STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

NORBERT MUELLER, Complainant, v. DISTRICT NO. 1, MARINE ENGINEERS BENEFICIAL ASSOCIATION, Respondent.	MEC Case No. 1-02 DECISION NO. 290 - MEC ORDER OF DISMISSAL REJECTING ULP COMPLAINT

NATURE OF THE PROCEEDING

This matter is before the Marine Employees' Commission (MEC) for a determination pursuant to WAC 316-45-110 and WAC 316-02-620 of whether or not the complaint in this case alleges facts which may constitute an unfair labor practice so as to require further proceedings.

PREVIOUS COMMISSION ACTION

The original complaint was received by the Marine Employees' Commission on August 23, 2001. On August 30, 2001, the Commission issued an Order requiring that the complaint be amended to include a proper statement of alleged facts. That amendment was filed by the complainant on September 28, 2001.

RECORD BEFORE THE COMMISSION

The Commission's determination is based upon the following record:

1. The complaint form filed August 23, 2001

2. The Commission's Order August 30, 2001

3. The amendment of the complaint entitled "Statement of Clarification" filed by the complainant on September 28, 2001.

4. The official record in MEC Case No. 12-00 which led to Decision No. 263-MEC.

FACTS

On the basis of that record, the Commission hereby makes the following factual determinations:

1. As amended, the complaint alleges that the complaining party was adversely affected "[d]ue to incompetent representation [by the charging party's union, District No. 1, MEBA] and false information" at an earlier grievance arbitration conducted by the Marine Employees Commission. The complaining party alleges that, as a consequence of the alleged incompetent representation, the arbitrator in MEC Case No. 12-00 applied a standard different from that applied to other employees.

2. District No. 1, MEBA initiated MEC Case 12-00 through a request for arbitration that the union filed with the Marine Employees' Commission on June 28, 2000.

3. The appointed arbitrator held a hearing in MEC Case 12-00 on February 12, 2001.

4. That hearing generated a transcript of 92 pages. During the course of the hearing, seven exhibits were offered into evidence and five were accepted by the arbitrator.

5. The complaining party in the present case actively participated in the arbitration hearing and he testified at length.

6. At the conclusion of the hearing in MEC Case 12-00, the arbitrator stated that he did not believe there was any need for post-hearing written argument. The representatives of both parties to the case agreed to submit the matter on the record as it then stood.

7. The arbitrator issued his decision in the matter on March 8, 2001. The other two Marine Employees Commission commissioners approved the decision.

8. The present complaint was filed with the Marine Employees Commission on August 23, 2001.

9. All but one of the specific events to which the complaining party takes exception in the amended complaint occurred more than 180 days prior to the initial filing of the complaint at issue here. The single exception is a letter dated March 23, 2001 in which the union representative stated, among other things, that "The MEC decision is final."

10. The complaint in this matter does not allege that the manner in which the arbitration at issue was presented by the union was in any way different from the way in which the union presented arbitrations or complaints that had been initiated by other persons in the bargaining unit.

LEGAL PRINCIPLES

The recognized exclusive bargaining representative of a bargaining unit of ferry employees is bound by the legal doctrine known as the duty of fair representation. The Marine Employees Commission has frequently affirmed that legal principle. See, by example, *Myers v. International Association of Machinists, District Lodge 160 etc*., Decision No. 169 - MEC. The duty of fair representation does not, however, mean that the union must agree with or please each and every member of the bargaining unit. See, by example, *Allen v. Seattle Police Officers' Guild*, 100 Wn. 2d 361 (1983). In addition, complaints regarding the alleged breach of the duty of fair representation are subject to the 180-day time limitation imposed by the MEC on all complaints alleging unfair labor practices (WAC 316-45-020).

The scope of the duty was defined decades ago by the United States Supreme Court in cases such as *Vaca v. Sipes*, 386 US 171 (1966). In that case, the Court held (386 US at page 190) that "a breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Later in *Air Line Pilots v. O'Neill*, 499 US 65 (1990), the U. S. Supreme Court stated at page 67 and again at page 78 that the union's action must be "so far outside a 'wide range of reasonableness'. . . as to be irrational." to violate the standard.

The Washington Supreme Court has uniformly adopted and followed the Federal court decisions regarding the scope of the duty of fair representation. See, by example, *Lindsey v. Metropolitan Seattle*, 49 Wn. App. 145, 148 - 149 (1987), *sustained* 109 Wn. 2d 1016.

The reported Washington Court and MEC cases have most frequently arisen from complaints over decisions not to proceed with a case on behalf of a member of the bargaining unit or disputes over broader policy or negotiations matters. There are no reported Washington Court or MEC decisions involving allegations that the union mishandled the presentation of the matter at the arbitration hearing itself. For such cases, it is necessary to turn again to the Federal Courts.

The standard applied by the Federal Courts in such cases is that "courts will interfere with union decisions about employee grievance proceedings only if a union shows reckless disregard for the rights of an employee. [citations deleted] Mere negligence on the part of the union does not constitute a breach of the union's duty." *Castelli v. Douglas Aircraft Company*, 752 F2d 1480, 1482 (9th Cir., 1985). (The *Castelli* case itself was cited with approval by the Washington Court of Appeals in *Lindsey v. Metropolitan Seattle*, 49 Wn. App. 145, 149 (1987).)

Applying the general rule to the facts of that case, the 9th Circuit Court of Appeals determined in *Castelli* (752 F2d 1480 (1985)) that:

- decisions regarding the selection or presentation of witnesses or evidence that may later appear to be tactical errors do not establish a breach of the duty of fair representation (page 1483)

- the duty of fair representation does not require a union to use an attorney in a hearing, absent a showing that the union usually uses attorneys in such matters and had no reason for denying the use of an attorney to the complaining party (page 1483)

- the duty of fair representation does not require a union to permit the participation of a grievant's own attorney in a hearing (page 1484).

The Federal Courts uniformly refuse to second guess the manner in which a case is presented by the union. As the Federal District Court stated in unusually colorful language in *Legg v. Chauffers, Teamsters & Helpers Local 364,* 714 F. Supp. 385 (N. D., Ind. 1988), "A union is not liable for 'careless or boneheaded conduct.'" The Federal Courts uniformly reject cases based on allegations of union mistakes such as failure to review available evidence (*Garcia v. Zenith Electronics Corp*., 58 F. 3rd 1171, 1178 (7th Cir., 1995)), incorrect advice as to how to initiate a grievance (*Legg v. Chauffeurs, Teamsters & Helpers Local 364,* 714 F. Supp. 385, 388 - 389 (N. D., Ind., 1988)), failure to ask the grievant himself to attend the hearing and present evidence (*Kaiser v. U. S. Postal Service*, 785 F. Supp. 648, 663 (E. D., Mich., 1992)), and telling the grievant to limit what he said when he was on the witness stand (*Byrd v. Local 317T,* 166 LRRM 2317, 2318 - 2319 (M.D., N. C., 2000)). The Courts have also rejected the argument that the duty of fair representation is breached by the assignment of a new and inexperienced agent to represent the grievant at a hearing (*Allen v. Allied Plant Maintenance Company of Tennessee*, 636 F. Supp. 1090, 1098 - 1099 (1986)).

Ultimately, the critical issue is not what the Union did at the hearing but what its motivation was for what it did (*Camacho v. Ritz-Carlton Water Tower,* 786 F. 2d 242, 244 (7th Cir., 1986)). The complaining party must show that the union was motivated by a desire to invidiously discriminate against the individual by deliberately sabotaging his or her case.

CONCLUSIONS OF LAW

On the basis of the facts in this matter and the legal principles controlling the doctrine of the duty of fair representation, the Commission makes the following Conclusions of Law:

1. All but one portion of the complaint in this case is untimely because the facts at issue occurred more than 180 calendar days prior to the filing of the complaint (WAC 316-45-020).

2. The arguably timely portion of the complaint, that portion dealing with the alleged advice about appealing, as well as all of the untimely portions of the complaint, taken separately or together, fail to allege facts upon which an unfair labor practice could be established. Both the complainant's allegations and the official record of the arbitrator establish that the grievance was not treated in a perfunctory or bad faith manner. At most, the complainant's factual allegations allege negligence or tactical errors in the presentation of the case. Such allegations do not state a claim upon which an unfair labor practice determination may be based.

3. In addition, the complete absence of any allegation or suggestion that the union's manner of presenting the grievance to the arbitrator was in any way different from its manner of presenting arbitration cases initiated by other members of the bargaining unit precludes a finding that the alleged union action in this case breached the duty of fair representation.

4. The only discrimination alleged is that the arbitrator applied a standard different from that applied to other employees in reaching his decision. The allegation

that the arbitrator erred or even that the arbitrator's alleged error was based on union negligence in the manner in which the case was presented, does not supply the absent element of alleged invidious discrimination by the union.

ORDER OF DISMISSAL

On the basis of the record in this matter and pursuant to the controlling legal principles, the Marine Employees' Commission hereby ORDERS that the complaint in this matter be dismissed.

NOTICE REGARDING REQUEST FOR REVIEW

Pursuant to WAC 316-02-620, this order is a denial of adjudicative proceeding. The complainant (Mueller) may file a Request for Review with the Marine Employees Commission within 30 days of his receipt of this Order. If no Request for Review is filed within that time period, this Order shall become final and binding in accordance with RCW 47.64.280.

If no Request for Review is filed, the Marine Employees' Commission will issue a second Order, which will state that this Order has become final and binding in accordance with RCW 47.64.280. That second Order will start the period running for any appeal to the Washington State Superior Court pursuant to RCW 34.05.542 and 34.05.514. Under those statutes, the complainant (Mueller) has thirty days from the date of the second Order to pursue an appeal in Thurston County Superior Court or the Court of his residence. (Respondent union should note that RCW 47.64.250 may be applied to limit its appeal rights to a period of no more than ten days from the second order and to limit the venue of any such union appeal to Thurston County Superior Court.)

If a Request for Review is filed, the appeal period would run from the date of the issuance of a specific response to such Request.

DATED this _____ day of _____ 2001.

MARINE EMPLOYEES' COMMISSION

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JOHN NELSON, Chairman

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JOHN SULLIVAN, Commissioner

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JOHN BYRNE, Commissioner