

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

In Arbitration
Before John Swanson

MARINE ENGINEERS' BENEFICIAL
ASSOCIATION on behalf of KEN DAFT,

Grievant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC CASE NO. 30-04

DECISION NO. 415 – MEC

DECISION AND AWARD

APPEARANCES

Davies, Roberts & Reid, L.L.P., by *Thomas A. Leahy*, Attorney, appearing for the Marine Engineers' Beneficial Association (MEBA) and Ken Daft.

Christine Gregoire, Attorney General, by *David Slown*, Assistant Attorney General, appearing for the Washington State Ferries (WSF).

ISSUE

Was Ken Daft terminated for just cause and in accordance with the Labor Agreement?

If not, what is the appropriate remedy?

NATURE OF THE PROCEEDING

The Marine Engineers' Beneficial Association (MEBA) comes before the Marine Employees Commission (MEC) with a grievance regarding the November 13, 2003 termination of Mr. Ken Daft. The Union alleges Mr. Daft was unjustly terminated in violation of the Labor Agreement, just cause, due process and without regard to progressive discipline. The Washington State Ferries (WSF) argues that this is a case where the Employer went the extra

mile for a poorly performing employee to no avail. Mr. Daft deliberately failed to perform his assigned duties. Mr. Daft, after being assigned duties on the ferry Yakima, failed to complete the familiarization report required by WSF and the United States Coast Guard.

RECORD BEFORE THE ARBITRATOR

The Arbitrator has the following record before it:

1. The Request for Grievance Arbitration.
2. The Notice of Settlement Conference and Notice of Hearing.
3. The MEBA and WSF Collective Bargaining Agreement for the period 1999-2001.
4. Transcript of Hearing (121 pages).
5. Twenty-three exhibits accepted into evidence during the course of the hearing.
6. WSF and MEBA's Post-Hearing Briefs received by the Arbitrator on May 27, 2004.

APPLICABLE STANDARD

The parties to this dispute have agreed the principles of "just cause" should control the decision in the matter before the Arbitrator. The contract does not contain a definition of "just cause;" however, a review of published arbitration awards reveal a "common law" set of guidelines that may be applied to the facts peculiar to this case. The most often quoted statement of criteria used in these guidelines is in the form of a series of questions provided by Arbitrator Carroll Daugherty. (*Enterprise Wire Co.*, 46 LA 359)

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the company's investigation conducted fairly and objectively?

5. At the investigation did the “judge” obtain substantial evidence of proof that the employee was guilty as charged?
6. Has the company applied its rules, orders and penalties even-handedly and without discrimination to all employees?
7. Was the degree of discipline in a particular case reasonably related to (a) the seriousness of the employee’s proven offence and (b) the record of the employee in his service with the company?

Arbitrator Daugherty and many other Arbitrators state that a “no” answer to any one or more of the above questions normally signifies that just and proper cause for termination did not exist.

REVIEW OF THE RECORD

On the basis of the evidence and record of the proceedings, the Arbitrator makes the following Findings of Fact:

1. Mr. Daft was employed by the WSF as an Assistant Engineer in June of 1998.
2. Mr. Daft had an unblemished work record when he was assigned to the MV Yakima on August 6, 2003.
3. Mr. Daft, during the period June 22, 1998 to February 28, 2002, had previously worked on the MV Yakima a total of 317 days. (This total is derived from recomputing Daft’s time on an 8-hour per day basis.) Ex. 11. His employment was as an Assistant Engineer. The record does not indicate who the Chief Engineer was on the vessel at that time or whether Mr. Daft completed the familiarization program on the MV Yakima prior to February 28, 2002. If, as Mr. Zecha testified that the familiarization program had been in effect 5 or 6 years, (Tr. 16) Mr. Daft may have already completed the familiarization program for the MV Yakima during his prior assignment.
4. Mr. Daft was again assigned to the MV Yakima on August 6, 2003. Mr. Alex Zecha, the Port Engineer, (at the request of Ken Marable) met with Mr. Daft on August 8, 2003 at 8:00 a.m. in Anacortes. Mr. Marable was concerned about Mr. Daft’s “lack of progress” according to

Mr. Zecha. This was after Mr. Daft had only been on the MV Yakima for less than two shifts. There is no evidence as to the time of day on August 7 when Mr. Marable contacted Mr. Zecha by telephone. It appears it must have been before the completion of Mr. Daft's shift on August 7, 2003 that ended at 8:00 p.m.

5. Mr. Zecha, during his discussion with Mr. Daft on August 8, 2003, did not put Mr. Daft on notice that his performance or lack thereof was, or could be, cause for disciplinary action.

6. Mr. Zecha didn't appear to know or acknowledge that Mr. Daft had previously worked on MV Yakima 317 days x 8 hours a day – the equivalent of 2,536 hours. This is in excess of the yearly hours of the schedule Mr. Daft was working in August 2003.

7. Mr. Zecha's meeting with Mr. Daft on August 8 is the only meeting between the two prior to the Loudermill hearing. He never counseled Mr. Daft on the consequences of Mr. Daft's failure to complete the familiarization document. He never inquired if Mr. Daft had, on his previous assignment to the Yakima, completed the familiarization papers.

8. On August 8, 2003 Mr. Zecha had a general conversation first with Mr. Daft and Mr. Marable, then with Mr. Daft alone. The conversation was not specific as to what was expected of Mr. Daft other than concerns about "slow or lack of progress". At no time did Mr. Zecha indicate to Mr. Daft that his performance could or would in any way lead to disciplinary action on the part of WSF.

9. Mr. Marable, Mr. Daft's immediate Chief Engineer and the person who reported Mr. Daft's performance or lack thereof, never notified Mr. Daft that his performance could result in any consequences or disciplinary action.

10. Mr. Marable's absence in both the Loudermill and the arbitration hearings in this case is troubling. Nothing attributed to Mr. Marable in this case has any probative value and has to be considered hearsay evidence and in general, discounted because Mr. Marable was available and could have been called by WSF to testify.

11. Mr. Snipes had a meeting with Mr. Daft and Mr. Marable on the 18th or 19th – he is not sure as to the date. At that meeting Mr. Snipes presented Mr. Daft with functions he needed to perform (Tr. 69-70).

Q What were those functions you discussed?

A Two of them come to mind as being able to maneuver the vessel, being able to take fuel and I think there were two, maybe a third, but I don't specifically remember them. They were a far serious reduction in what's available in the familiarization book, a very small percentage of that.

Q I'd invite your attention to Exhibit 4. Do you recognize that?

A Yes. This looks like a letter that I sent to Alex and it includes some abilities that I was hoping Mr. Daft would be able to achieve.

Mr. Snipes discussion as it relates to Exhibit 4 is contrary to his conversation with Mr. Daft on the 18th or 19th.

12. Exhibit 4 contains prejudicial statements and conflicts with Mr. Snipes' testimony of the 18th or 19th of August. Mr. Snipes' testimony does not indicate he ever gave Mr. Daft any written instructions during that meeting. On the contrary, he wasn't sure what the instructions were.

13. There is no evidence Mr. Daft ever received the correspondence identified in Exhibit 4. Mr. Snipes instructs Mr. Marable to show Mr. Daft the letter and give him a copy as needed. Exhibit 4 was prepared by Mr. Snipes on August 27, 2003 at 12:05 p.m. after Mr. Daft had reported off sick suffering from stress. When the letter to "Ken" signed by "Beech" was written, nobody but Mr. Snipes knows. It appears this letter could have been prepared at the same time as Exhibit 4, which would be consistent with Mr. Snipes' other actions in this case. There is also

no evidence to support Mr. Snipes' prejudicial comments that Mr. Daft had cleaned out his locker and called in sick to avoid Mr. Snipes or that Mr. Daft was intending to sue the State the second day of the first week of break-in.

14. Exhibit 5 also contains a prejudicial conclusion not supported by the record. "There is a trail of sub-standard performance for the past 6 years on various vessels." This statement of Mr. Snipes is contrary to any testimony or evidence in the record.

15. Exhibit 9 again attempted to build a negative case against Mr. Daft and was not sent to chief engineers with whom Mr. Daft had recently worked such as Mr. Knowlton or Mr. Twitty.

16. Mr. Snipes' cross-examination by Mr. Leahy also points out a serious contradiction in Mr. Snipes' testimony (Tr. 71) by MR. LEAHY:

Q Did you oversee Mr. Daft's work on the Yakima?

A No.

Q So you never observed him working?

A Not specifically, no.

Q Then how are you able to draw the conclusion that he's not competent to familiarize on the Yakima if you never saw him work?

A The chief engineer that oversaw his break-in informed me and I fully trust his opinion.

Q So you're drawing your conclusion solely on what Mr. Marable told you?

A That and the fact that he wasn't able to demonstrate the five standards that I've presented to him personally.

Q And how do you know he wasn't able to demonstrate those five standards?

A I was told by Mr. Marable that he didn't complete his work week and when an additional effort to allow him to come back and show somebody, Alex Zecha set up some times, I was informed by Alex that he didn't show up for those either.

Q But you never personally observed him?

A I came down to the boat and he was not on watch the last day.

Q But the five...

A I couldn't observe him because he refused to come to work.

MR. LEAHY: Move to strike that from the record. The questions was never asked.

ARBITRATOR SWANSON: Yep, do that, strike that last sentence that he refused to come to work.

Q (BY MR. LEAHY) So the five points, tasks or goals for Mr. Daft, you never observed, personally observed him attempt to complete these?

A No.

There is nothing in the record supporting that Mr. Snipes outlined five standards to Mr. Daft personally. Mr. Snipes' recollection of the meeting on the 18th or 19th indicates vague and inconclusive instructions. There is no conclusive or factual evidence that Mr. Daft ever got what appears to be after-the-fact instructions outlined in Exhibit 4.

17. Mr. Snipes never observed Mr. Daft's performance and never indicated to Mr. Daft any disciplinary consequences as a result of any performance issues.

18. Mr. Snipes' conduct was not motivated to help Mr. Daft or consider other alternatives that may have been available. Shortly after Mr. Daft was assigned to the Yakima, Mr. Snipes began a constructive effort to have Mr. Daft replaced.

19. Mr. Mark Nitchman, the person responsible for terminating Mr. Daft, appears to be a knowledgeable and conscientious supervisor; however, he made no independent investigation of the facts or circumstances in Mr. Daft's case.

20. If he had, he would have known that neither Mr. Zecha nor Mr. Snipes had informed Mr. Daft that his work performance could lead to disciplinary action.

21. If Mr. Nitchman had investigated, he would have known that neither Mr. Zecha nor Mr. Snipes had followed the WSF Code of Conduct (Ex. 13) or Section 19 of the Human Resource Handbook (Ex. 23) regarding the treatment of employees and required progressive discipline.

22. If Mr. Nitchman had investigated, he would also have been concerned and would have inquired into the inaccurate, prejudicial and unsupported comments of Mr. Snipes. He

would not have relied exclusively on questionable written statements and/or documents without some investigation and he would have had an investigative meeting with Mr. Marable.

23. The absence of direct involvement of Mr. Marable also supports the lack of any meaningful investigation of the facts involved in this case.

24. The lack of notice, no evidence of insubordination, no meaningful investigation and the deliberate attempt to constructively discharge Mr. Daft are contrary to WSF Code of Conduct and Human Resource Handbook as well as any consideration of due process.

25. Mr. Nitchman's letter of October 2, 2003 instructing Mr. Daft to attend the October 13, 2003 meeting again does not indicate any real interest in hearing Mr. Daft's explanation. The first paragraph concludes that Mr. Nitchman, without any explanation or any investigation, has arrived at his decision. "It is my intent that you will be disciplined up to, and including, termination." (Emphasis added.) This letter was sent prior to any discussion with Mr. Daft or his representative and without any attempt by Mr. Nitchman to get Mr. Daft's side of the story.

26. The record does not indicate whether Mr. Daft was having a specific medical problem at the time of his assignment to the MV Yakima in August of 2003. However, Exhibit 13 does indicate that Mr. Daft was increasingly under stress. He did call in sick prior to the end of his second week of assignment on the Yakima. It is not clear whether the stress was induced by the work environment or from other medically or physically related problems. In any event, after his assignment to MV Yakima in August, Mr. Daft was for sometime under the care of a physician.

CONCLUSIONS OF LAW

On the basis of the Record before him, the Findings of Fact and the contractual and legal analysis, the Arbitrator makes the following Conclusions of Law:

1. The parties' 1999-2001 contract remains in full force and effect past its stated expiration date by operation of law (RCW 47.64.170).

2. The Arbitrator has jurisdiction over the parties and the dispute (RCW 47.64.280).

This case is properly before the Arbitrator for decision.

3. WSF did not give Mr. Daft forewarning or foreknowledge of the possible or probable consequences of his performance.

4. WSF did not, before administering discipline, make any effort to discover whether the employee did, in fact, violate a rule or order of management.

5. WSF's investigation was not conducted fairly and objectively. Much of the evidence Mr. Zecha and Mr. Nitchman received was prejudicial, uncorroborated and not supported by the record.

6. WSF, in this case, has not followed Exhibit 13 Washington Ferries Code of Conduct. "WSF respects the civil rights, constitutional rights and collective bargaining agreement rights of employees and will not violate their rights in the exercise of its disciplinary processes/procedures." Progressive discipline is part of the WSF's Code of Conduct (Ex. 13) as well as Section 19 of WSF's Human Resource Handbook (Ex. 23).

7. The degree of discipline in this case is unreasonable based on the record. The evidence in the record indicates Mr. Daft is extremely well trained and qualified. The employer's presentation does not support insubordination or any criteria that could or should result in Mr. Daft's termination as outlined in either Exhibit 13 or Exhibit 23. There were other alternatives available that were never given meaningful consideration.

8. As a result of the record, Mr. Daft's suffering stress and the letter from Mr. Daft's representative in Exhibit 15, Mr. Daft should be determined to be medically fit before being

assigned back to work as an Assistant Engineer where public safety is a major factor in the performance of the work.

DECISION AND REMEDIAL ORDER

The Arbitrator hereby determines that the Washington State Ferries violated the Labor Agreement, WSF Code of Conduct, WSF Human Resource Handbook as well as accepted guidelines for due process.

1. Mr. Daft is to be reinstated with full back pay minus interim earnings, if any, and made whole except for the time he was off under the care of a physician. The make whole remedy includes pay as well as other contractual benefits.

2. Prior to Mr. Daft returning to active duty the following will occur:

- (a) Mr. Daft will be examined by competent medical authority as outlined below to determine if he is fit for duty.
- (b) The parties (MEBA and WSF) will, as soon as possible, jointly agree to a clinic, doctor or hospital, i.e. Swedish Hospital, University Hospital, to examine Mr. Daft. Mr. Daft's doctor and WSF doctors are excluded; however, the EAS may be used to make a recommendation to the parties as to procedure. Mr. Daft's doctor may submit a statement and copies of his medical records or findings to the doctor, clinic or hospital selected by the parties.
- (c) A jointly agreed upon description of the responsibilities and work being performed shall be submitted to the medical authority selected and it shall be the basis for a determination as to whether or not Mr. Daft is fit for duty as an Assistant Engineer.

3. The costs of such examination and reports necessary to provide the information required will be borne by Washington State Ferries.

4. The findings and determination from the examination will be binding on Washington State Ferries, MEBA and Mr. Daft.

5. Mr. Daft will be considered an employee on administrative paid leave pending the outcome of the medical evaluation.

6. If Mr. Daft does not wish to or refuses to participate in the medical examination required by this decision, it will be deemed that he has resigned his employment as an employee of WSF on the day of such refusal by Mr. Daft.

DATED this 23rd day of June 2004.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN SWANSON, Arbitrator

Approved By:

/s/ JOHN SULLIVAN, Commissioner

/s/ JOHN BYRNE, Commissioner