

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

DAN GAGE,

Grievant,

and

TEAMSTERS UNION, LOCAL 174,

Intervenor,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC Case No. 30-02

DECISION NO. 362 - MEC

DECISION AND ORDER
REGARDING JURISDICTION

APPEARANCES

Carla Kiiskila, Attorney, appearing for Dan Gage.

Davies, Roberts and Reid, attorneys, by *Thomas Leahy*, appearing for Teamsters Union, Local 174.

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

NATURE OF THE PROCEEDING

This matter is before the Marine Employees' Commission for a decision on the issue of whether or not the Commission has jurisdiction over a Request for Grievance Arbitration filed by Dan Gage on February 5, 2002.

PROCEDURAL BACKGROUND

Dan Gage filed the Request for Grievance Arbitration with the Marine Employees' Commission to protest his separation from employment with the Washington State Ferries. He

had been employed as a driver/warehouseman in a bargaining unit represented by a group of unions that includes Teamsters Union Local 174. He filed the Request for Grievance Arbitration after being informed that his earlier grievance protesting the employment decision could not be pursued under the contract grievance procedure.

On February 19, 2002, the Marine Employees Commission issued an Order to Show Cause asking that interested parties argue the issue of the Commission's jurisdiction over Mr. Gage's Request for Grievance Arbitration and another Request for Grievance Arbitration filed at about the same time by a different individual in a different union-represented bargaining unit.

The responses to the Order to Show Cause showed that the two matters were sufficiently different to require separate proceedings on the jurisdictional issue.

The Marine Employees' Commission scheduled the Gage matter for hearing on the jurisdictional issue for July 12, 2002.

Mr. Gage's attorney then requested a continuance of that hearing date. The Marine Employees' Commission rescheduled this case for October 4, 2002. In the meantime, Mr. Gage filed a Complaint alleging Unfair Labor Practice against both the Washington State Ferries and Teamsters Union Local 174. The Marine Employees' Commission docketed that matter as Case number 6-03.

The Marine Employees' Commission then dismissed the portion of Mr. Gage's ULP complaint (Case Number 6-03) that alleged a violation of law by the Washington State Ferries. That portion of the complaint that alleged a violation by the union was found to state a potential claim and was placed in the normal scheduling process.

Teamsters Union Local 174 then asked that the grievance matter and the unfair labor practice matter be consolidated into a single hearing. The Marine Employees' Commission granted the request and scheduled the combined cases for hearing on January 23, 2003.

Mr. Gage and Teamsters Local 174 settled the ULP complaint (Case 6-03) prior to the January 23, 2003 hearing. Mr. Gage withdrew the complaint prior to the commencement of the hearing and confirmed his withdrawal of the ULP complaint at the hearing itself.

Teamsters Union Local 174 appeared at the January 23, 2003 hearing in case 30-02, the Request for Grievance Arbitration. The union intervened in the grievance matter for the purpose of assisting, but not representing, Mr. Gage. Mr. Gage is being represented by his own attorney, Carla Kiiskila.

SCOPE OF THE HEARING

The three entities present at the January 23, 2003 hearing all agreed that the hearing would be focused solely on the issue of whether or not the Marine Employees' Commission has jurisdiction of the Request for Grievance Arbitration filed by Mr. Gage. All three entities had the opportunity to put in whatever evidence they felt was necessary to support their respective arguments on the jurisdictional matter. All three subsequently filed written arguments.

During the hearing, the Hearing Examiner warned all three entities that any and all testimony and other evidence placed in the record during the January 23, 2003 hearing would also be considered as part of the record of any subsequent hearing on the merits should the Marine Employees' Commission order that such a hearing be held.

HEARING RECORD BEFORE THE COMMISSION

In addition to its official file regarding the scheduling of this case, the Marine Employees' Commission has before it the following record which was developed during and after the January 23, 2003 hearing:

1. The 54 page transcript which includes a stipulation sought by the Washington State Ferries to the effect that the grievance filed by Mr. Gage with the Union was not brought forth to arbitration by the Union (pages 14 – 15, 19). (The restatement of the stipulation at page 19 reads: "Teamsters 174 did not support or bring forward to arbitration the grievance of Dan Gage regarding his alleged termination on July 11, 2001.")
2. Exhibits 1 through 11.
3. The written argument filed by the Attorney General on behalf of Washington State Ferries, by the Grievant, Mr. Gage, and by the Intervenor, Teamsters Union Local 174.

FINDINGS OF FACT

On the basis of this record the Marine Employees' Commission makes the following Findings of Fact:

1. Teamsters Union Local 174 dispatched Dan Gage to a job with the Washington State Ferries from the union's hiring hall.
2. A contract between the Washington State Ferries and a group of unions including Teamsters Union Local 174 sets certain terms and conditions of employment for the work to which Mr. Gage was dispatched. That contract remains in full force and effect by operation of law pending the negotiation of a replacement agreement.
3. Mr. Gage began working for the Washington State Ferries on or about August 13, 2000.

4. He worked as a driver about 80 or 85 percent of the time and as a warehouseman the rest of the time.

5. Mr. Gage worked for the Washington State Ferries during the course of eleven months.

6. From time to time, Mr. Gage would not work because there was no work for him. Those gaps occurred mostly at the beginning portion of his time with the Washington State Ferries.

7. During the entire period of Mr. Gage's employment, Washington State Ferries believed him to be in the category of a "temporary employee." Mr. Gage believes that he became a regular or non-temporary employee at some point during his employment.

8. The Washington State Ferries ended Mr. Gage's work on or about July 11, 2001.

9. Mr. Gage testified that he was told he was being let go on account of a safety concern.

10. Washington State Ferries originally characterized the separation from employment as a termination as opposed to a lay-off.

11. Mr. Gage filed a grievance under the contract to protest the termination of his employment. He filed the grievance with Teamsters Union Local 174 the same day as his last day of employment.

12. That grievance protested the employer's action on both procedural and substantive grounds.

13. Timothy Sullivan, the union representative, pursued the grievance on behalf of Mr. Gage.

14. In August, Mr. Sullivan reported to Mr. Gage that he had discussed Mr. Gage's grievance with Washington State Ferries Labor Relations Manager Mike Manning. He reported that both parties were seeking further information regarding the matter and regarding Mr. Gage's status at Washington State Ferries.

15. The parties had at least one other meeting regarding the grievance and they also communicated by telephone and e-mail.

16. In a letter dated September 28, 2001, Mr. Manning informed Mr. Sullivan that Washington State Ferries believed that Mr. Gage had no right to appeal via the contractual grievance procedure because he was a temporary employee whom Washington State Ferries had laid off.

17. Mr. Manning cited to Article IV, Section 8 of the contract which reads:

Temporary employees who have served six (6) cumulative months shall have all benefits afforded a permanent employee. Such temporary employees will not have access to the grievance procedure for lay-off.

Mr. Manning asserted that that language precluded Mr. Gage from using the contract grievance procedure.

18. Teamsters Union Local 174 reviewed the matter and ultimately determined that the employer was correct on the procedural issue and that Mr. Gage's grievance was outside the scope of the grievance and arbitration language of the contract. The Union informed Mr. Gage of the parties' procedural determination in a letter dated January 9, 2002.

19. Washington State Ferries and Teamsters Union Local 174 did not reach any agreement on the merits of Mr. Gage's grievance.

20. Mr. Gage believes and currently argues that both the employer and the union were incorrect in their analysis of the procedural matter, that he was not a temporary employee, and

that the termination was not a lay-off but was a termination for alleged cause. However, Mr. Gage's beliefs did not entitle him to further access to the grievance procedure contained in the contract once both parties to that contract concur that his grievance cannot be processed through the contractual grievance procedure.

21. On February 5, 2002, Mr. Gage filed the Request for Grievance Arbitration with the Marine Employees' Commission.

22. Mr. Gage filed the Request for Grievance Arbitration within 90 days of when he learned that he did not have access to the grievance procedure to present his grievance.

23. Washington State Ferries believes that the Marine Employees' Commission does not have jurisdiction of this matter. Mr. Gage and Teamsters Union Local 174 argue that the Marine Employees Commission does have jurisdiction of Mr. Gage's Request for Grievance Arbitration.

CONTROLLING STATUTES, REGULATIONS AND PRECEDENT

RCW 47.64.280 (2) directs the Marine Employees' Commission to "Adjust all complaints, grievances, and disputes between labor and management arising out of the operation of the ferry system ..." Insofar as grievances are concerned, RCW 47.64.150 cuts into this otherwise broad grant of jurisdiction by directing parties to collective bargaining agreements which contain grievance/arbitration procedures to "provide for the invoking of arbitration only with the approval of the employee organization." This latter statute goes on to state that "Ferry system employees shall follow either the grievance procedures provided in a collective bargaining agreement, or if no such procedures are so provided, shall submit the grievances to the marine employees' commission" In other words, the controlling statute requires the adjustment of every labor relations grievance by the Marine Employees' Commission unless there is a contractual procedure available to the employee through his or her union to adjust the

dispute. The legislature clearly intended that there would be a forum for the resolution of “all complaints, grievances, and disputes . . .” (RCW 47.64.280 (2)).

The Marine Employees’ Commission has regulations implementing the language of these statutes (WAC 316-65). The material portion of those regulations states the following with respect to arbitration by the Commission (WAC 316-65-020):

The commission shall consider such a request for arbitration valid only after any applicable dispute remedies in the pertinent collective bargaining agreement have been exhausted, and within the time limits specified in such agreements. If the collective bargaining agreement does not contain a remedial procedure for disputes, or upon showing good cause for not exhausting prearbitration remedies, a party may file the original request for arbitration directly with the commission. Unless otherwise specified in the agreement, a request for grievance arbitration must be filed not more than ninety days after the party filing such grievance knew or should have known of the alleged injury, injustice, or violation.

The prior cases which have involved an issue of the Marine Employees’ Commission’s jurisdiction over Request for Grievance Arbitration can be divided into two broad categories:

1. Those instances where the contract provides for a complete remedy for the particular dispute that an individual is trying to bring before the Commission. Where a complete remedy is provided by the contractual procedure, an individual employee can move a matter to arbitration only where the union approves of that request. The availability of a complete remedy does not stop the union from deciding the grievance lacks merits and deciding not to use the available remedy. If the union and employer agree on the merits of a matter that could have been arbitrated under the contract, the employee cannot move it to arbitration or involve MEC jurisdiction absent union approval. It is the availability that counts, not the opinion of the individual. This analysis applies whether the contractually-set arbitrator is the Marine Employees’ Commission or an outside arbitrator. See, by example, *Irish v. Washington State Ferries*, MEC 10-93, Dec.

No. 112-MEC; *Twitty v. Washington State Ferries*, MEC 1-00, Dec. No. 232-MEC, and *Caspers v. Washington State Ferries*, MEC 24-02, Dec. No. 316-MEC.

2. Those instances where there is no collective bargaining agreement with a grievance procedure or there is a collective bargaining agreement but the grievance/arbitration procedure of the contract does not cover the dispute at issue, such as the termination of employees while they are in their probationary period. See, by example, *Marine Engineers Beneficial Association v. Washington State Ferries*, MEC 6-86, Dec. No. 26-MEC; *Arroyo v. Washington State Ferries*, MEC 9-96, Dec. No. 172-MEC and 161-MEC; and *Olwell v. Washington State Ferries*, MEC 5-89, Dec. No. 50-MEC. In those cases, the Marine Employees Commission has interpreted RCW 47.64.150 and RCW 47.64.280 to mean that it has jurisdiction of the disputes. (The first of the cited cases was actually pursued by a union outside the scope of its own contract. The others were brought by the affected individuals.) The issue of union approval is not relevant to these cases where the grievance procedure does not provide a complete remedy. The Marine Employees' Commission jurisdiction is based on the statute and the regulation cited above that require the adjustment of all disputes by the Marine Employees' Commission where no contractual procedure is available as a procedural matter.

(There is also an earlier case, *Washington State Ferries*, Decision 1228 (PECB, 1981), which holds that the Marine Employees' Commission has jurisdiction of any and all disputes irrespective of what a contract states but the reasoning of that decision does not appear to have survived subsequent alterations to the controlling statute. *Washington State Ferries*, Decision 1228 has not been cited as controlling in any subsequent case.)

In its brief, the Washington State Ferries argues that the Marine Employees' Commission should depart from the second set of cited precedents to eliminate the employees' right to invoke

Marine Employees' Commission jurisdiction in those cases where there is no contract remedy available. However, the Marine Employees' Commission has no authority to ignore or re-write the controlling statutes. The statute requires the adjustment of all disputes either by the contractual process or, where that is not available, by the Marine Employees' Commission. The earlier Marine Employees' Commission decisions correctly applied the broad language of the statute to allow employees to raise grievances before the Marine Employees' Commission when those grievances were procedurally barred from the contract's grievance procedure. The legislature intended that employees could have their work-related disputes decided on the merits. That point was emphasized by the Marine Employees' Commission in the first case on point, *Marine Engineers Beneficial Association v. Washington State Ferries*, MEC 6-86, No. 26-MEC. There is no basis for departing from the controlling precedents in this case.

CONTRACT LANGUAGE

Washington State Ferries asserts that Mr. Gage was hired and terminated as a "temporary employee."

The contract does not define the term "temporary employee". The contract contains only one reference to that term, the following language found in Article IV, Section 8:

Temporary employees who have served six (6) cumulative months shall have all benefits afforded a permanent employee. Such temporary employees will not have access to the grievance procedure for lay-off.

The term "such temporary employee" as used in the second sentence of the subsection refers back to the first sentence which, in turn, applies by its own terms only to those temporary workers who have worked six months or more. As a consequence, the contract's limitation on access to the grievance procedure remains in place so long as the person is in the status of

“temporary employee”. If Mr. Gage is, as the employer argues, a temporary employee with tenure greater than six months, this language applies to him.

The contract’s grievance procedure is available to “an employee” (Article XII), a phrase that is broad enough to cover every person, including temporary employees, doing work under the terms of the contract. The broad scope of that word means that both temporary and non-temporary employees can use the grievance procedure for all contract disputes except that certain temporary employees are prohibited from invoking that procedure to dispute a lay-off. The procedural determination made by the employer and the union that this language applied to Mr. Gage, eliminated his access to the contract’s grievance procedure.

CONCLUSIONS OF LAW

1. Although its stated term has expired, the contract between Washington State Ferries and various unions, including the Teamster Union Local 174, remains in full force and effect by operation of law.

2. That contract precludes certain temporary employees, including those who have worked six months or more, from bringing grievances to protest lay-offs through the contract grievance procedure. This prohibition lasts as long as the person is in the status of “temporary worker.”

3. Although there was initial uncertainty as to the proper characterization of the end of Mr. Gage’s employment, Mr. Gage was ultimately denied access to the contract’s arbitration procedure when the employer and the union concurred that the cited language applied to Mr. Gage.

4. Mr. Gage's argument that the other two parties were wrong in their analysis is not relevant to the procedural issue because the concurrence of the other two parties closed the gate to the contract grievance and arbitration procedure that they, by law, control.

5. Whether the decision was correct or not, the joint decision to deny Mr. Gage access to the grievance arbitration procedure triggered the general jurisdiction of Marine Employees' Commission over all disputes (RCW 47.64.280 (2)) as well as that portion of RCW 47.64.150 which enables employees to bring cases directly to the Marine Employees Commission where no contract grievance and arbitration process is available to them for the particular dispute.

6. An employee filing a case directly with the Marine Employees' Commission does not need union agreement to file a case where there is no contract procedure available to that employee.

7. Mr. Gage filed his original grievance with the Union in a timely manner.

8. The parties originally dealt with the Gage grievance under the terms of the contract's grievance procedure, as if it was probably brought pursuant to that procedure.

9. In such a case, the time for measuring the timeliness of a filing with the Marine Employees' Commission runs from the point at which both parties to the contract concurred in the procedural determination that the matter could not be pursued through the contract's grievance procedure. Until that point in time, Mr. Gage had no basis for invoking the jurisdiction of the Marine Employees' Commission because he was pursuing what he believed to be his proper procedural process under the contract.

10. Mr. Gage filed the Request for Grievance Arbitration in a timely manner from the point in time at which he was informed that the parties controlling access to the contract

grievance and arbitration procedure concurred in the procedural determination that his grievance could not be brought through the contract's procedure.

11. Under the terms of RCW 47.64.150, Washington State Ferries and Teamsters Union Local 174 could and can deprive the Marine Employees' Commission of jurisdiction of this matter by jointly agreeing, prior to any MEC hearing on the merits of this case, to submit Mr. Gage's original grievance, in a timely fashion and without any jurisdictional or procedural arguments whatsoever, to an arbitrator selected from a Federal Mediation and Conciliation Service list as provided in contract Article XII.

12. Absent such an agreement by the employer and the union that the merits of the matter can and will be pursued to arbitration under the terms of the contract's grievance procedure, the Marine Employees' Commission has jurisdiction of the issues raised by Mr. Gage's grievance and Request for Arbitration. This matter will proceed to a hearing on the merits at 9:30 a.m., Thursday, May 15, 2003 in Room 264 of the Coleman Building.

13. This decision does not decide any of the substantive issues raised by Mr. Gage's Request for Grievance Arbitration in any way. This decision does not decide that Mr. Gage was or was not a temporary employee, nor that the separation was or was not a lay-off. In addition, this decision does not decide which party has the burden of proof, nor does it decide the standard to be applied to the issue of Mr. Gage's separation from employment. Those matters are to be addressed by the parties at the subsequent hearing.

ORDER

On the basis of the Findings of Fact and Conclusions of Law, the Marine Employees' Commission hereby ORDERS that the parties present their facts and arguments regarding the substantive issues in this case at the hearing previously scheduled for May 15. The Marine

Employees' Commission hereby directs that Washington State Ferries be prepared to proceed first at the hearing, followed by Mr. Gage and then by intervenor Teamsters Union, Local 174.

This order is not intended to indicate anything with respect to burden of proof, nor with respect to the standard to be applied to the issues or any one of them. The order is set solely as a matter of administrative convenience in the interest of developing a complete and coherent record.

Should any party desire that a mediation be scheduled in this matter, that party should contact the offices of the Marine Employees' Commission immediately and ask that an attempt be made to schedule a mediation with Commissioner Sullivan.

DATED this ____ day of March 2003.

MARINE EMPLOYEES' COMMISSION

JOHN BYRNE, Arbitrator

Approved by:

JOHN NELSON, Chairman

JOHN SULLIVAN, Commissioner