STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION OF THE PACIFIC, Complainant, v. WASHINGTON STATE FERRIES, Respondent.	MEC CASE NO. 36-04 DECISION NO. 429 - MEC DECISION AND ORDER

APPEARANCES

Schwerin, Campbell and Barnard, by *Judith Krebs*, Attorney, appearing for the Inlandboatmen's Union of the Pacific (IBU).

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

NATURE OF THE PROCEEDING

The Inlandboatmen's Union of the Pacific brought this case before the Marine Employees Commission on the allegation that respondent Washington State Ferries violated the law by altering certain terms and conditions of employment without notice to and without prior bargaining with the union representing the affected employees. The allegation involves the employer's alleged actions with respect to extended leaves of absence and with respect to the terms and conditions under which benefit programs are available to employees on leave and to on-call and part-time employees when work is slow or non-existent.

SCOPE OF THE CASE

The union alleges that there were uniform terms and conditions of employment prior to the events at issue that the employer altered without notice or bargaining.

In this case, there is no issue about the "notice or bargaining" part – there wasn't any. Instead, the case focuses on whether or not there was a uniform practice (or practices) that was (were) altered by the employer. The employer argues, in essence, that it made no changes except in one area where the employer acknowledges having acted in error.

This case does not address the question of whether not the employer's treatment of specific employees violated the collective bargaining contract and/or violated controlling law. It is true that the contract contains clauses affecting leaves of absence and medical benefits and that state law (RCW 41.05) and regulations (WAC 182-12) address eligibility for medical benefits. A refusal-to-bargain charge, however, does not address the issue of whether or not the treatment of any specific individual complied with or violated those sources of rights and responsibilities. Such matters are beyond the scope of the unilateral change unfair labor practice change and are not decided herein. The focus is solely on the question of whether or not the employer unilaterally altered terms and conditions of employment concerning which it must bargain with the union.

RECORD BEFORE THE COMMISSION

Excluding scheduling orders and letters that address only procedural matters, the record before the Marine Employees Commission is as follows:

1. Complaint in Case 36-04 filed by the Inlandboatmen's Union of the Pacific and received by the Marine Employees Commission on February 17, 2004.

2. Amended Statement of Facts forwarded to the Marine Employees Commission along with a letter dated May 7, 2004 both of which were received by the Marine Employees Commission on May 10, 2004.

3. Answer filed by Washington State Ferries and received by the Marine Employees Commission on May 17, 2004.

4. Stipulated Protective Order regarding confidentiality of certain evidence.

5. Post-Hearing Brief of Complainant Inlandboatmen's Union of the Pacific.

6. Post-Hearing Brief of Respondent Washington State Ferries.

7. 386 page Transcript of the three days of hearing in this matter.

8. 30 exhibits accepted into evidence.

In addition, the Hearing Examiner located and printed out copies of RCW 41.05 and WAC 182-12 from the official Washington State website.

NOTE REGARDING THE DECISION

In accordance with the parties' confidentiality stipulation (Record Item 4), this decision does not identify any individual by name.

CONTENTIONS OF THE PARTIES

The Inlandboatmen's Union of the Pacific argues that Washington State Ferries illegally implemented changes in the following areas:

1. Restricting the use of extended (i.e. more than 30 days) medical leaves.

2. Altering access of those on extended medical leave to the employer's benefit programs.

3. Restricting the use of extended personal (i.e. non medical) leaves.

4. Altering access of those on extended personal leave to the employer's benefit programs.

5. Altering the manner in which on-call and/or part-time employees continue benefit coverage during periods of no or little work.

(The Union's brief identifies seven concerns rather than the five stated above. However, Union issues 3 and 7 are contained within issue 5 stated above while Union issues 5 and 6 are contained within the above-stated issue 3.)

With one major exception, Washington State Ferries argues that it has not violated the rights of any employees in the identified areas. It argues that there have not been unilateral changes at all. In addition, the employer argues that if there were specific instances of disputes about the eligibility for benefits or leaves, such matters would be outside the scope of this ULP proceeding and must be pursued elsewhere.

The exception to the broad denial is that the employer acknowledged that it has maintained a practice of allowing bargaining unit employees on extended medical leaves to maintain benefit coverage by using 8 paid hours per month from their accumulated vacation or sick leave or borrowed leave. In at least one instance, the employer acknowledged that it had deviated from that policy and that that deviation was an error.

That acknowledgement ultimately led to the stipulation stated at pages 280 – 281 of the transcript which states, in its material portion:

> . . . if a person in the IBU bargaining unit is on an approved personal medical leave, that is a medical leave for themselves, and the Washington State Ferries required them to use more hours per month than they wanted to maintain benefit eligibility, that individual will be allowed to recreate the leave that they were required to use by paying it back and putting it back in the bank in the same terms as were applied in the leave without pay decision by the Marine Employees' Commission.

CONTROLLING LAW

"Unilateral changes by an employer during the course of a collective bargaining relationship concerning matters that are mandatory subjects of bargaining are normally regarded as per se refusals to bargain." *The Developing Labor Law,* 4th Ed., p. 773. Neither party contests

the applicability of this rule. Neither party contends that matters of leave and/or medical benefits are not mandatory subjects of bargaining. (The Marine Employees Commission has twice ruled that leaves and the compensation associated with them as well as return-to-work issues are mandatory subjects of bargaining. (MEC Decisions 310 and 223 both of which are entitled *Inlandboatmen's Union of the Pacific v. Washington State Ferries*).)

The core question in this case is whether or not there have been any unilateral changes by the employer in the areas of contention.

The party contending that a change has been made has the burden to show the existence of a practice and then showing the alteration.

With respect to the existence of the practice, the charging party must show that the alleged practice was "unequivocal … clearly enunciated and acted upon … [and] readily ascertainable over a reasonable period of time as a fixed practice or policy accepted by both parties." *Inlandboatmen's Union of the Pacific v. Washington State Ferries*, MEC Dec. 183, page 9 (1997). Sporadic or occasional acts do not create past practices. See, by example, *Pennsylvania State Police v. PLRB*, 764 A2d 92, 95 (2000), *aff'd by* the Pa. Supreme Court in 810 A2d 1240 (2002).

FINDINGS OF FACT

On the basis of the record in this case, the Marine Employees Commission hereby makes the following Findings of Fact:

1. The two parties are parties to a collective bargaining agreement (Exhibit 1) that continues in full force and effect past its nominal termination date by operation of law.

2. In Rule 22, that collective bargaining agreement commits the parties to the benefit programs run by the Public Employees Benefit Board, an institution that is now called the State Health Care Authority.

3. Bargaining unit employees are entitled to benefit coverage after a certain period of employment not at issue in this case.

4. Otherwise eligible employees are entitled to continued coverage so long as they work a minimum of eight hours a month.

5. In various provisions, the collective bargaining agreement also specifies the terms and conditions for the granting of leaves of absence – periods of time when an employee is granted permission to be away from work.

6. Excluding issues such as lay-off, jury duty, approved schooling and/or vacation, Washington State Ferries categorizes all leaves as either medical or personal.

7. A medical leave is one where a medical condition triggers the request for time away from work. All other voluntary leaves are called personal leaves.

8. In addition, Washington State Ferries categorizes all medical and personal leaves as extended (lasting more than 30 days) or not extended.

9. With the one exception of the allegation regarding the right of on-call and part-time workers to benefits during periods of little or no work, this case involves extended medical and extended personal leaves. This case does not involve short term or non-extended leaves.

EXTENDED MEDICAL LEAVE ISSUES

10. With respect to extended medical leaves, the employer acknowledges that there has been a past practice of allowing persons on approved extended medical leaves to maintain

benefit coverage by using 8 hours of paid time off (e.g. sick leave or vacation or comp time or leave borrowed from a co-worker) during each month of the leave.

11. The employer has committed itself to correcting the acknowledged deviation from the acknowledged past practice regarding extended medical leaves.

12. The employer's acknowledgement and commitment to correct the apparent deviation is supported by the record in this case.

13. A sub-issue arose as to whether or not the employer can terminate the access to benefits by those on extended medical leaves after the period specified by the Federal Family Medical Leave Act (FMLA) expires.

14. In addition, another issue arose as to whether or not the employer can terminate access to benefits by those on extended medical leaves when the employer believes that the worker on leave is being uncooperative with respect to providing information to the employer or with respect to attendance at meetings scheduled by the employer or with respect to returning to work in an expeditious fashion. (The method the employer has used in such instances is to re-characterize the leave as personal and apply the policy discussed below of not allowing those on personal leaves to maintain benefit coverage by designating 8 hours of paid time per month.)

15. In addition, another issue arose as to whether or not the employer can determine that a condition that a medical professional identifies as medical is not, in fact, a medical condition.

16. The record establishes that the controlling past practice was to grant extended medical leave and to grant access to benefits with the use of 8 hours of paid status per month upon the receipt of a bona fide medical professional's information regarding the necessity of the leave and the medical basis of that necessity.

17. The practices identified in Findings 13, 14, 15 that result in terminating or recharacterizing medical leaves represent alterations to the clear, unequivocal, ascertainable and accepted practice regarding access to medical benefits by those on extended medical leaves of absence.

EXTENDED PERSONAL LEAVE ISSUES

18. The record shows that in the majority of cases, employees granted extended personal leaves were not allowed to use 8 hours of accumulated paid time per month to maintain benefit eligibility.

19. In some instances, employees on personal leave were allowed to designate 8 hours of paid time per month to maintain benefit coverage.

20. Those occasions were the exceptions and were not the rule. The exceptions did not ripen into a clear, unequivocal, ascertainable and accepted practice.

21. In most instances, deck employees were allowed to use accumulated vacation and comp time and the like to maintain benefit eligibility on the basis of 80 (rather than 8) hours per month.

22. In the terminal department, the past practice required full self-pay for the maintenance of benefits and barred the use of accumulated paid time off.

23. The charging party failed to establish facts to show an alteration of the prevailing practice in either instance with regard to those on extended personal leaves.

24. The separate allegation that Washington State Ferries is now requiring a commitment to self-pay as a pre-condition to a personal leave is disproved by the evidence upon which it was based – Exhibit 17, Request for Extended Leave dated 4/03/04. The writing on that document

reads, “Leave is approved contingent upon employee self-paying benefits if she wishes to continue benefits January and February 2005.”

25. The proper interpretation of that sentence is that the continuation of benefits during the requested leave (rather than the leave itself) is contingent upon choosing the self-pay option.

26. In addition, there is no evidence that the employer has altered the access to personal leave.

27. The Marine Employees’ Commission cannot draw any conclusion regarding overall policy from a single instance of an apparently tardy response to an employee’s request to alter the start and end dates (both in next year) of a personal leave that was, in fact, already approved. (Exhibit 17).

BENEFIT CONTINUATION DURING PERIODS OF LITTLE WORK

28. The employer acknowledged in its opening statement that employees are entitled to benefit coverage if they work as little as 8 hours per month (Transcript pages 28, 29 and 31).

29. There is no evidence that that practice has changed in any way.

30. The record did not establish how an employee ensures that his/her coverage continues when work is scarce. As a consequence, there is no evidence that the method for ensuring continued coverage in time of low employment has been altered in any way.

31. The evidence that one person was belatedly informed of lost coverage does not establish an alteration of a pre-existing practice because there was no way of determining whether coverage lapsed because of a bureaucratic error, an error on the part of the worker, a malevolent act of a poorly trained computer, or an alteration of a policy.

CONCLUSIONS OF LAW

1. The Marine Employees' Commission has jurisdiction over the parties to this case and over the issues presented in the case.

2. The charging party has not proven its claim that Washington State Ferries unilaterally altered the terms and conditions of the employment in the bargaining unit represented by the Inlandboatmen's Union of the Pacific with respect to extended personal leaves and with respect to the access of part-time and on-call employees to continued benefit coverage during period of low or no work.

3. No legal basis has been established for claims 3 through 7 as alleged in the Post-Hearing brief filed on behalf of the Inlandboatmen's Union of the Pacific.

4. Washington State Ferries acknowledged an error in the treatment of at least one person on medical leave with respect to access to benefits. Washington State Ferries reiterated its commitment to the practice of allowing those on medical leave to continued benefit coverage through the designation of 8 hours per month of paid time such as accumulated sick leave, vacation, or comp time. It also committed itself to correct the error and any similar errors.

5. The parties accepted that admission and commitment. The matter of benefits for persons on medical leave was thereby removed from this case.

6. Separately, Washington State Ferries violated its duty to bargain by unilaterally imposing a time limitation on access to benefits by those on medical leave to coincide with the time period specified by the FMLA. Washington State Ferries also violated its duty to bargain by terminating medical leaves or converting them to personal leaves for reasons other than the elimination or correction of the medical condition that caused the leave or the advice of the medical professional that the person could return to work. Washington State Ferries also

violated its duty to bargain by choosing to substitute a lay person's judgment as to what conditions are or are not medically based in place of the advice of a medical professional.

7. The ultimate consequence of the actions identified in the above paragraph was to deny certain individuals continued access to benefits unless they used far more than 8 hours of pay status per month.

8. The violations identified above comprise a small portion of the overall case.

9. There is no evidence for any claim that the violations were sufficiently egregious or willful so as to entitle the charging party to attorney fees and/or costs of this case.

On the basis of the above Findings of Fact and Conclusions of Law, the Marine Employees' Commission hereby enters the following ORDER:

ORDER

The allegations regarding personal leaves and regarding the access of on-call and part-time employees to medical benefits during period of little or no work are hereby dismissed.

The allegations regarding the right of employees on medical leave to continued benefit coverage through the designation of 8 hours of paid time per month were removed from this case upon the employer's acknowledgement of the controlling practice and commitment to correcting past deviations.

The allegations regarding the time limitations placed on medical leaves as well as the allegations regarding the improper termination of medical leaves (directly or by renaming such leaves as personal) were sustained by the Marine Employees Commission. The Marine Employees Commission hereby ORDERS that Washington State Ferries follow the pre-existing procedure of granting medical leaves on the advice of the appropriate medical professional and continuing such leaves until the person is cleared to return to work or reaches a point where it is

evident that the condition will prohibit the person from ever returning to work or reaches any time limit specified in the parties' collective bargaining agreement. In addition, Washington State Ferries is hereby ORDERED to make the buy-back provision applicable in the earlier MEC leave-of-absence case (MEC Dec.310) apply to all persons adversely affected by the action identified in this case as a violation of law.

It should be noted that this ORDER enforces the duty to bargain. It does not create any permanent rights. Both parties to this proceeding retain the right to seek alterations of the identified past practice through the collective bargaining process.

Each side shall bear its own costs and attorney fees. The request by the Union that the cost of its attorney fees and costs be imposed upon Washington State Ferries is DENIED.

RECONSIDERATION

Pursuant to the provisions of RCW 34.05.470, any party may file a petition for reconsideration of MEC's unfair labor practice ruling with the Commission within ten days from the date this final order is mailed. Any petition for reconsideration must state the specific grounds for the relief requested. Petitions that merely restate the party's previous arguments are discouraged. A petition for reconsideration does not stay the effectiveness of the Commission's order.

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If no petition for reconsideration is filed in a timely fashion, 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.

DATED this 22nd day of November 2004.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN BYRNE, Hearing Examiner

Approved by:

/s/ JOHN SWANSON, Chairman
/s/ JOHN SULLIVAN, Commissioner