

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

In Arbitration
Before John Swanson

INLANDBOATMEN'S UNION OF
THE PACIFIC on behalf of
BURTON DEZIHAN,

Grievant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC CASE NO. 22-05

DECISION NO. 450 - MEC

DECISION AND AWARD

APPEARANCES

Schwerin, Campbell and Barnard, by *Judith Krebs*, Attorney, and *Jay Ubelhart*, Business Agent, appearing for the Inland Boatmen's Union of the Pacific (IBU) and Burton Dezihan.

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

ISSUE

Was Burton Dezihan terminated for just cause and in accordance with the Collective Bargaining Agreement (CBA)?

If not, what is the appropriate remedy?

NATURE OF THE PROCEEDING

The Inlandboatmen's Union (IBU) comes before the Marine Employees Commission (MEC) with a grievance regarding the October 18, 2004 termination of Mr. Burton Dezihan, (grievant). The Union alleges grievant was unjustly and improperly terminated in violation of

the CBA provisions without just cause, without an independent investigation of the facts and while performing his duties as instructed.

The Employer would contend this is a case where the grievant's prior record and unacceptable job performance left the Washington State Ferries (WSF), the Employer, no other choice but to terminate grievant. This is a case where an employee with a history of poor performance acted with complete disregard for his job and the interests of WSF, failed in the performance of his duties and allowed a situation to occur where passengers were encouraged and instructed by grievant to board the ferry without payment of fares.

RECORD BEFORE THE COMMISSION

The MEC has the following record before it:

1. Request for grievance arbitration assigned Case No. 22-05.
2. The Notice of Settlement Conference and the Notice of Hearing.
3. The IBU and WSF Collective Bargaining Agreement for the period 1999-2001.
4. Transcript of the hearing of 22-05 of May 9, 2005 (228 pages).
5. Transcript of the Continuation of Hearing of 22-05 on May 10, 2005 (pages 229-344).
6. Transcript of the Continuation of Hearing of 22-05 on May 12, 2005 (pages 345-394).
7. Transcript of Grievant's and Respondent's closing presentations submitted to the Court Reporter on May 18, 2005 (pages 395-427).
8. Exhibits 1 through 29 including Exhibit #24, the CBA 1999-2001.

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FINDINGS OF FACT

On the basis of the evidence, testimony and record of the proceedings, the arbitrator makes the following findings of fact:

1. A careful review of the evidence, testimony, closing arguments and the record shows the critical and significant importance of the testimony of Ms. Hewitt, Mr. Dezihan, Ms. Lowry and Ms. Buswell.

2. Ms. Lee Hewitt, a 13 year employee who has worked as a traffic attendant, passenger seller, auto seller at various docks and a Union steward witnessed the conduct and activities of Mr. Dezihan prior to the 7:20 p.m. ferry sailing to Bainbridge Island on July 30, 2004. Ms. Hewitt was a ticket seller in booth three and had a clear view of Mr. Dezihan's booth and, in general, the surrounding area involved in the case. Ms. Hewitt observed Mr. Dezihan on his return to the booth following his change order duties. The 7:20 p.m. sailing to Bainbridge Island is generally a busy boat. Ms. Hewitt observed Mr. Dezihan getting "a little excited" – "his voice was raising" – "when Burt was standing in the aisle-way outside his booth". Ms. Hewitt perceived this as "problematic, that Burt was yelling – yelling at customers." Ms. Hewitt notified supervision that "Burt is yelling at customers, you've got to stop him." Ms. Hewitt made a second call to the supervisors within "two minutes or so" because she was fearful – "I was fearful for the whole situation." She told supervisor Lowry in the second call "you've got to get over here now." "Burt had continued to yell and now his whole line was going past his booth without paying." This was causing a "major problem" for Ms. Hewitt because the passengers in her line "were wanting to go on also and I was having a hard time controlling my line." Ms. Hewitt observed Mr. Dezihan yelling to passengers "get out of here, just go on, get out of here, toward the boat in the paid lines." Sue Lowry, a supervisor and Jennie Buswell, a part-time

supervisor arrived at the scene in response to Ms. Hewitt's call and "took control of the situation."

Ms. Hewitt's background, observations and experience with Mr. Dezihan provides the record with relevant testimony. Her testimony is credible and was the only testimony resulting from the personal observation of the entire situation from the time of Mr. Dezihan's return to booth four to the departure of the 7:20 p.m. ferry on July 30, 2004. Ms. Lowry's and Ms. Buswell's testimony also appears (in spite of the length of time since the incident) to be consistent with the entries in the Performance Log of July 30, 2004 (Union Exhibit #14) regarding the incident in dispute. Ms. Hewitt's testimony is also consistent with her signed, dated statement of August 4, 2004 (Union Exhibit #14). Ms. Hewitt contacted the Union prior to her August 4, 2004 written statement because she was concerned about potential discipline if she refused to write a statement about her observations of July 30, 2004. The Union representative advised her to make a statement as requested and tell the truth as to what happened. There is no evidence that contradicts Ms. Hewitt's statement and the record confirms the substantive incidents as described by Ms. Hewitt.

While learned counsel for the Union challenged certain inconsistencies in testimony and raised several procedural issues, there was nothing materially contradictory in Ms. Hewitt's testimony or the testimony of Ms. Lowry or Ms. Buswell. There was nothing in the record to indicate Mr. Schlieff's investigative report was flawed or inaccurate. While it is true that Mr. Schlieff had a previous incident with Mr. Dezihan, for the purposes of this incident, he was clearly an independent investigator regarding the circumstances of July 30, 2004. There is no evidence that his investigation was in anyway prejudiced or affected by any previous history with Mr. Dezihan. TR71-TR149.

3. Mr. Burton Dezihan was employed by WSF in May of 1997.
4. Mr. Dezihan's prior work history consisted of "military criminal investigator, federal protective service, Immigration and Naturalization Service and U.S. Customs. The general duties he performed consisted of "criminal investigations, law enforcement and the general duties of a law enforcement officer". He also studied criminology in college.
5. Mr. Dezihan's service at WSF was interrupted when he was terminated in November, 2002 and reinstated in May, 2003 as a result of a "last chance agreement."
6. On July 29, 2004 as a result of a situation with a customer, Mr. Dezihan was notified by his superior that (a) as a ticket seller, he was responsible "for the line of people, the collection of fares and, was fully responsible and accountable for all transactions that occur." Mr. Dezihan was also requested to "tone down how I get a person's attention to bring him back to the booth." Mr. Dezihan concluded based on instructions that he was being advised "not to yell probably as loud as I can."
7. On July 30, 2004 Mr. Dezihan was working as a ticket seller in booth four. The sailing in the dispute was the 7:20 p.m. sailing for Bainbridge Island.
8. Following the 6:45 p.m. sailing for Bremerton, Mr. Dezihan notified the other ticket sellers, Ms. Butler and Ms. Hewitt, he was closing his booth to make a change order.
9. After visiting the restroom, Mr. Dezihan proceeded to the agent's office for the change order. He had a brief conversation with agents Sue Lowry and Jennie Buswell in the agent's office prior to returning to booth four.
10. Mr. Dezihan returned to booth four and entered 40 pre-paid fares in groups of 10 fares into his system. It is not credible that these pre-paid fares came from passengers between 1856 and 1858.

11. Mr. Dezihan collected his first cash fare, a one-passenger full fare, at 1900. At 1917, while serving a credit card customer, Mr. Dezihan observed “approximately three individuals push through the line of waiting people and enter the paid lobby area”. Mr. Dezihan did not observe any method of payment from the three individuals. He “called to them to return to the seller’s booth. At that time, they were just starting to get to the wall – the last individual gave me the bird”.

12. At 1917 when Mr. Dezihan completed the credit card transaction, he shut down his booth. There was a line of passengers waiting to be served to board the 1920 ferry. With 3 minutes before the scheduled sailing and with a long line of waiting customers, Mr. Dezihan closed his booth to pursue the approximately three individuals who appeared not to have paid a fare.

13. Mr. Dezihan testified that during the time he shut down his booth to pursue the three individuals and left a line of passengers at his booth “at least that approximate same point in time, the vessel blew its horn saying it was ready for departure. Somebody yelled those guys are riding for free. I’m catching the boat, and they started pushing through”. Mr. Dezihan testified that he “attempted to step back across the aisle to get to my booth and I was informed at that time, if I brush or touch an individual or gentleman I would be sued.” His reaction to that was to not confront anyone “based on my previous last-chance settlement, I did not want a reoccurrence”.

14. When Mr. Vogt arrived on the scene, the area was clear of passengers except there were two people running by him when he entered the area (TR 335). Mr. Vogt didn’t see Ms. Butler, Ms. Buswell or Ms. Lowry and during a brief conversation with Mr. Dezihan, he observed “Burt standing outside his booth saying ‘we’re all cleared, the boat can go.’ It looked

handled, so I left”. Mr. Vogt then left the area. His testimony did not confirm or refute any substantive testimony except that he indicated when he arrived shortly before departure there were no passengers in line at Mr. Dezihan’s booth and Mr. Dezihan was outside his booth. He was not asked, nor did he volunteer, that the boat had sounded the departure signal as indicated by Mr. Dezihan. Mr. Dezihan did not inform Mr. Vogt that a number of passengers had boarded the boat without paying or request the vessel be delayed by Mr. Vogt to correct the situation. Mr. Dezihan testified he told Mr. Vogt to “let the boat go”.

CONCLUSIONS

On the basis of the transcripts before him, the findings of fact and the overall complete record presented by learned counsel, the arbitrator makes the following conclusions:

1. The 1999-2001 contract of the parties remains in full force and effect past its stated expiration date by operation of the 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. Mr. Dezihan, by his own admission, has been trained in criminal investigation, law enforcement, federal protective service, Immigration and Naturalization Service, U. S. customs and general duties of a law enforcement officer. Certainly this training teaches crowd control, observation and the necessity for securing assistance and backup in situations such as existed on July 30, 2004 none of which were instituted or practiced by Mr. Dezihan.

4. The situation on July 30, 2004 was aggravated by only one booth being open (while Mr. Dezihan was involved in a change order) prior to the 7:20 p.m. sailing of the Bainbridge Island ferry, and the fact that Mr. Dezihan took the time to enter in bundles of 10, 40 pre-paid

passenger tickets between 1856 and 1858 with a long line of passengers waiting to be processed and concerned they would miss the ferry.

5. It is not credible, reasonable or supported by the record to assume Mr. Dezihan processed 40 actual pre-paid passengers between 1856 and 1858. Mr. Dezihan further created an anxious, concerned passenger line when he organized a cash pick-up at 1914 and then, at 1917 when he shut down his booth with 3 minutes until departure time. These actions indicated complete disregard for the passengers in line and for his responsibilities as a ticket seller.

6. The failure of Mr. Dezihan to seek help from supervision or police in pursuing the three individuals who pushed through the line without proof of payment and the closing of his booth at 1917 (3 minutes prior to a 1920 departure), created an untenable situation for the long line of anxious, waiting passengers who were concerned about missing the ferry.

7. Mr. Dezihan's statement that he could not access his booth to get help because "I was informed at that time that if I brush or touch an individual or gentleman, I would be sued" is not credible or reasonable. He certainly could have excused himself and stepped between boarding passengers if they hadn't already been waved on board. He could have requested the boat be delayed, called supervision and police and rectified the situation he had created.

8. Mr. Dezihan had not notified the ferry to delay departure. In a self-induced chaotic situation, being frustrated Mr. Dezihan allowed and encouraged passengers to board the ferry without paying their fares.

9. Mr. Dezihan's actions on July 30, 2004 created the circumstances that resulted in his neglect of duty and violations of procedures and policy. His conduct was without regard for the passengers and his co-workers.

10. Mr. Dezihan's testimony and conduct related to the circumstances of the 7:20 p.m. ferry departure for Bainbridge Island is not credible or reasonable.

11. Learned Union counsel has done an outstanding job of raising issues of circumstance and procedure reflecting inconsistencies in certain aspects of the incident. However, none of counsel's facts or exhibits change the fundamental fact that Mr. Dezihan's conduct and failure to collect fares created a chaotic and out-of-control situation made worse by his failure to secure assistance from supervision or police under the circumstances involved.

12. Learned counsel for the Union, who is extremely competent, in her zeal to defend Mr. Dezihan's conduct, raises procedural, technical and testimony conflicts that needed to be raised and disposed of. In this case, they are issues that do not provide the necessary mitigation of Mr. Dezihan's unacceptable performance and unusual misconduct to excuse his action on July 30, 2004.

13. Union counsel's skill in raising issues of circumstance and procedure reflected many inconsistencies in certain testimony or aspects of the incident, while not changing the fundamental fact that Mr. Dezihan's conduct in failing to collect fares created a chaotic situation involving self-help contrary to his education and WSF policies, rules and procedures.

14. Mr. Dezihan, by his conduct and performance on July 30, 2004 with regard to the 7:20 p.m. Bainbridge Island ferry sailing, created a confusing and chaotic situation contrary to any reasonable concern for customers, WSF or his co-workers. Mr. Dezihan did allow numerous passengers to board the 7:20 p.m. ferry without payment of fares.

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AWARD

Mr. Dezihan was terminated for just cause and consistent with the Collective Bargaining Agreement and WSF Policies and Procedures.

The Union's grievance is denied.

DATED this 22nd day of June 2005.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN SWANSON, Arbitrator

Approved by:

/s/ JOHN SULLIVAN, Commissioner

/s/ELIZABETH FORD, Commissioner