

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

In re the Petition of OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 8 for Clarification of the WSF Bid Administrator Position.

MEC CASE NO. 5-08

DECISION NO. 540 - MEC

DECISION AND ORDER

Shannon Halme, Union Representative, appearing for the Office and Professional Employees International Union, Local 8.

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

THIS MATTER came before the Marine Employees' Commission on October 9, 2007 when the Office and Professional Employees Union, Local 8 filed a petition for unit clarification concerning the subject of the Bid Administrator position at Washington State Ferries.

NATURE OF THE PROCEEDINGS

On August 23, 2006 Washington State Ferries (WSF) responded to a letter written by Shannon Halme, Representative for Office and Professional Employees (OPEIU). The letter from WSF was intended to describe the duties of the Bid Administrator. The employer argues the assignment is not covered by the Agreement between OPEIU and WSF. The Bid Administrator is a position covered under the merit system and is not appropriate for the OPEIU bargaining unit. The union alleges the job is appropriate for the OPEIU unit and the work performed is specifically the work covered by the recognition clause in the WSF/OPEIU Collective Bargaining agreement.

RECORD BEFORE THE COMMISSION

1. Request by OPEIU for Clarification of Bargaining Unit Regarding Bid Administrator Classification.
2. Collective Bargaining Agreement (CBA) between Washington State Ferries and Office and Professional Employees International Union, Local 8, AFL-CIO, July 1, 2007 through June 30, 2009.
3. Copy of draft of above Agreement with WSF proposed changed language Re: Article 1 Recognition of the Union. Draft was supplied to MEC after negotiations with union and apparently prior to the CBA being proofed by the parties.
4. Transcript of hearing of January 10, 2008.
5. Exhibits 1-46 accepted into evidence from both the parties.
6. Post-hearing briefs from both parties.

RELEVANT CONTRACT LANGUAGE

ARTICLE 1

RECOGNITION OF THE UNION

- 1.1 The Employer recognizes the Union as the exclusive collective bargaining representative for all employees employed at the Department of Transportation's Washington State Ferries as identified I Appendix A and for **any additional job classifications, office and clerical in nature, created during the term of this Agreement as specified in the MEC unit clarification order, for the purpose of establishing wages, hours and working conditions.**

Emphasis added.

ARTICLE 4

MANAGEMENT RIGHTS

- 4.1 **Subject to the terms and conditions of this Agreement**, the Employer retains the right and duty to manage its business including, but not limited to, the right to determine the method and means by which its operations are to be carried on, to direct the work force, and to adopt such rules and regulations governing the appearance, dress, conduct and work procedures

of its employees, as are required to maintain safety, efficiency, quality of service, and the confidence of the traveling public.

ARTICLE 5 DEFINITIONS

5.1 Regular Employee

A regular employee is an employee who has been in the employ of the Employer for a period of over thirty (30) calendar days and shall be entitled to all benefits under the terms of this Agreement, except as otherwise specified in this Agreement.

5.2 Regular Full-Time Employee

A regular full-time employee is an employee who has been in the employ of the Employer full-time for a period of over thirty (30) calendar days and normally works a regular continuing schedule of eight (8) hours per day and forty (40) hours per week, and shall be entitled to full benefits under the terms of this Agreement.

ARTICLE 6 HIRING, ORGANIZATIONAL CHANGES, JOB POSTING PROCEDURE, PROBATION, DISCIPLINE, AND DISCHARGE

6.1 Hiring and Job Posting Procedure

A. Notice of all job vacancies, including temporary vacancies of an anticipated six-month or longer duration, shall be posted no later than thirty (30) days after the job becomes vacant for a duration of five (5) working days in all departments where employees of this Agreement are employed. If pressing business needs require a longer delay in posting, the Employer shall inform the Union and shall discuss all relevant facts with the Union. The posted notice will include the current Job Specification and Classification Questionnaire for the qualifications and responsibilities of the vacant position. The Employer shall not be obligated to post the positions of employees who are selected to fill temporary vacancies beyond electronic e-mail.

6.2 Organizational Changes

A. **In the event that new facilities are added and/or eliminated, departments are reorganized and a revision of current staffing and/or job specifications occur that effect WSF employees represented by OPEIU Local 8, the Employer shall notify the Union a minimum of thirty (30) days prior to the planned execution of the event.**

- B. **The Parties shall meet to discuss and/or negotiate where appropriate, wages, hours of work and conditions of employment for any employee(s) so affected within fifteen (15) days of the Union's receipt of notification. If the Union fails to respond during this period (15 days), the Union waives all rights pursuant to this section. Should the Parties fail to reach an agreement where negotiations are required within fifteen (15) working days or after a mutually agreed upon extension, the Union may pursue the matter through the grievance procedure as specified in Section 15 of the Collective Bargaining Agreement.**

Emphasis added.

ARTICLE 11
SENIORITY, LAYOFF AND RECALL

11.1 Seniority

A. Definition

Seniority is defined as an employee's continuous length of service with the bargaining unit from the most recent date of hire as a regular full-time or part-time employee or adjusted date of hire as a regular full-time or part-time employee and shall be accumulative on a bargaining unit-wide basis. For purpose of vacation and sick leave accrual, seniority is defined as an employee's continuous length of service with WSF. Seniority will begin to accrue for employees who have successfully completed their probationary period.

ARTICLE 15
GRIEVANCE PROCEDURE

- 15.1 The Union and the Employer agree that it is in the best interest of all parties to resolve disputes at the earliest opportunity and at the lowest level. The Union and the Employer encourage problem resolution between employees and management and are committed to assisting in resolution of disputes as soon as possible. In the event a dispute is not resolved in an informal manner, this Article provides a formal process for problem resolution.

ARTICLE 17
CLASSIFICATION AND WAGE RATES

- 17.3 Merit/Seniority Pay
Nothing in this Agreement shall preclude the Employer from paying an individual employee more than the rate fixed for his or her classification in recognition of merit.
- 17.5 Job Specification
The Employer shall provide the Union with the job specification and subsequent revisions for each covered bargaining unit position. Said revisions shall be transmitted to the Union at the time they are completed. The job descriptions shall accurately reflect the work performed and minimum qualifications for each job classification. The employer shall notify the Union, in writing, of any new classifications to be covered by the Agreement and shall meet with the Union for the purpose of negotiating the appropriate wage rate for any new job classification.

Emphasis added.

- 17.6 Job Classification Review
An employee may request that his or her position classification be reviewed to determine if the position is properly classified. The request shall be submitted in writing to the Human Resources Office and shall include a cover letter explaining the request and a completed classification form. The Human Resource Office response shall be communicated in writing within thirty (30) working days. If the employee is not satisfied, the employee and the Union may appeal the decision to the Human Resources Director. A meeting shall be held within fifteen (15) working days with the Director, the employee, the employee's supervisor and Union Representatives to review the request. The Employer shall submit a decision in writing, within twenty-five (25) working days of the meeting. If denied, the Employer's decision shall specifically outline the reason for denial. If the employee is not satisfied with the outcome, the Union may proceed to arbitration. Arbitration must be requested within thirty (30) days of receipt of the Employer's written decision. Any wage adjustment that may be appropriate as a result of the classification review will only be retroactive to the date the initial review request was properly submitted to the Employer.

Emphasis added.

ARTICLE 19
TRAINING PROGRAMS

- 19.1 The Washington State Ferries recognizes the mutual benefit to be attained by affording training opportunities to employees. All employees shall have equal access to training opportunities as sponsored by WSF, WSDOT and Washington State DOP that are relevant to their WSF position. Training can be scheduled through the employee's Department or the WSF Training Department. Employee's request for job related training must be pre-approved by the appropriate Department and/or Training Department authorities.
- 19.2 Regular full time employees with more than six (6) months of service with the Employer may receive tuition reimbursement for job related courses taking place during working hours or outside of working hours taught at a university, college, community college, or approved seminar; provided that (a) the courses and their details are approved by the Employer in advance, and (b) the employee furnishes proof of having satisfactorily passed the course upon its completion.

ARTICLE 22
TECHNOLOGICAL CHANGE AND TRAINING

- 22.2 New Jobs
In the event any new jobs are created as a result of technological change affecting the bargaining unit employees, the Employer agrees to give the existing employees first opportunity to qualify for such jobs. The Employer further agrees to provide suitable training for those employees who are selected for employment in resultant positions.
- 22.3 Training for Evolving Job Duties
In the event any new job duties are created within the bargaining unit, the Employer agrees to give bargaining unit employees with related duties within the unit of assignment first opportunity to train for these job duties.

Emphasis added.

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FINDINGS OF FACT

1. This issue was predicated as a result of an OPEIU represented employee requesting her job be reclassified in 1993 (Article 17-17.6).
2. The involved employee, Kathleen Flynn, asked for her job to be reclassified because she indicated she was assigned new and additional responsibilities.
3. In 1994, Ms. Flynn's and OPEIU's request for reclassification was denied by Mr. Tiberio. The union and Ms. Flynn then submitted the request for reclassification to Mr. Yearby, the Human Resource Director.
4. In 1995, Mr. Yearby denied the OPEIU and Ms. Flynn's request for reclassification following Mr. Tiberio's denial in 1994.
5. In November of 1996, after continuing refusals by WSF to reclassify Ms. Flynn's job, the OPEIU requested creating a new position "Personnel Coordinator/Human Resources Coordinator," a bargaining unit classification (Article 22-22.3).
6. In January 1997, the request by the union was again rejected by Ms. Johnson, the Personnel Manager.
7. Ms. Flynn and the OPEIU continued to pursue their contention that Ms Flynn was performing duties beyond the duties of her classification.
8. In April of 1997, the union requested a DOP desk audit.
9. In July of 1997, WSF, through the Attorney General, approved a desk audit and it was agreed it would result in a proposed settlement, and be completed by August 30, 1997. The desk audit agreed upon by Attorney General Johnson was never initiated or concluded. Again, nothing with respect to Ms. Flynn's situation and OPEIU's claim took place (Article 17).

10. In September 1997, the matter of the OPEIU request for Ms. Flynn's reclassification was again pursued by the union and Ms. Flynn.

11. On November 21, 1997, Philip Price of the Dept. of Personnel performed a job analysis.

12. As a result of the job analysis, it was confirmed that Ms. Flynn was performing work out of her classification (Article 22).

13. A request by OPEIU and Ms. Flynn that began in 1992 was settled in July of 1998 by a settlement proposal by WSF. This settlement removed Ms. Flynn's job from the bargaining unit. The agreement to resolve this continuing request by OPEIU and Ms. Flynn was signed by the union representative. This settlement violated specific articles of the CBA.

CONCLUSIONS OF LAW

On the basis of the record before him, the findings of fact and contractual and legal analysis, the Hearing Officer makes the following conclusions.

1. The parties' 2007-2009 Collective Bargaining Agreement is in force and full effect.
2. The Marine Employees' Commission has jurisdiction over the parties and the dispute (RCW 47.64.280). The matter is properly and procedurally before the Hearing Officer.
3. The record is absent any evidence that Ms. Flynn's job duties while she was represented by OPEIU during the protracted request for reclassification were any different in July 1998 than they were when the request for reclassification by the union was made.
4. There is no evidence in the record that WSF offered any evidence to justify a legal premise required to remove the job "Personnel Officer 2" from the bargaining unit. The record supports a conclusion that the duties of Personnel Officer 2 were the duties Ms. Flynn had been doing since 1995 and continued to perform after July 1998.

5. There is no evidence in the record that indicates that Personnel Officer 2 performs any duties or job requirements that would exclude the classification being included in Article 1 of the CBA.

6. There is no evidence in the record to support any authority of Mr. Yearby, Mr. Tiberio, Ms. Johnson or the union representative to modify or amend Article 1 – Recognition of the Union 1.1.

7. The ability of the Bid Administrator to approve or grant an employee an unscheduled day off under the circumstances described in the testimony and the record would not constitute the classification being no longer eligible to be included as represented and ordered by Article 1 of the CBA.

8. There are no CBA articles, NLRB, PERC or MEC provisions that provide legal or contractual provisions to authorize the alteration, modification or amendment to the articles of the OPEIU/WSF CBA. Such changes in the CBA can only be made through negotiations or interest arbitration.

9. The record is unrefuted that the issue before the parties starting in 1992/1993 was a grievance under specific articles of the OPEIU/WSF agreement. The grievance regarding the Flynn situation required a settlement consistent with the articles and terms of the CBA, not a settlement which violates the Agreement.

10. Statutory exclusions from bargaining units are clearly defined by both the NLRA and Washington State statutes. The Bid Administrator's job does not meet any criteria which would exclude this job classification from the definitions of Article 1 – 1.1 of the CBA.

11. It is unclear in the record why it took from 1992 or 1993 until July 9, 1998 to agree Ms. Flynn was performing outside her classification, or why a new classification was developed which constituted removing the job from Article 1.

12. It is also unclear as to whether Ms. Flynn was compensated for the period in 1992-1993 to July 9, 1998 for the additional duties she performed which were identified and confirmed by the job analysis.

13. The record is unrefuted that Ms. Flynn, during the period from 1992-1993 until 1998 when the new classification was created, performed the same job while a represented employee as she was performing at the time of the removal of the job from Article 1.

14. The Bid Administrator assignment which has been reassigned from Personnel/Human Resources to Operations performs substantially the same duties as performed prior to being assigned to Operations.

15. There is no evidence in the record that would support the Bid Administrator being considered managerial, confidential, professional, civil service, administrative and/or meeting any definition or criteria of the RCW's that would exclude the job classification from the OPEIU CBA and Article 1.

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DISCUSSION

There can be no reasoned justification for WSF's continued Violation of Article 17-17.6 during the extended period from 1992/1993 until 1998.

What is clear in the record and facts in the case is the employer dropped the ball and continually ignored requests of both the union and employee to evaluate the increased duties and responsibilities being performed by Ms. Flynn.

It then appears in an effort to mitigate the numerous OPEIU requests, WSF came up with another classification change, conceived not only as a method to eliminate retroactive compensation considerations, but as a guise to remove the newly introduced classification from Article 1 of the CBA. This new classification was created by WSF with no appreciable change in the job duties of the classification previously covered by the CBA.

It may have been out of frustration on the part of both the employee involved and the union, that after years of trying to resolve this issue, the union representative and a management representative made an agreement to modify Article 1 of the CBA.

Certainly, they had authority and the responsibility to evaluate Ms. Flynn's job duties even at this late date, but nothing in the CBA gives either of them the authority to remove classifications from Article 1 of the CBA and/or modify or alter the CBA to settle a long standing dispute that had been ignored by WSF by changing their classification title.

In this case, it appears WSF may be recognizing their past oversights by creating the Bid Administrator classification and assigning the position to Operations. At the same time the job duties are still substantially the same as previously performed, but with greater technical assistance making the complicated scheduling of employees during the Ferry seasonal changes

much easier. This reassignment provides the OPEIU the opportunity to reclaim job duties improperly removed from the CBA in the first place.

DECISION

1. The Bid Administrator classification is a classification covered by the Collective Bargaining Agreement of OPEIU and WSF.

2. This decision does not affect the incumbent's status or the classification until a vacancy occurs; however, the incumbent must comply with the contractual obligations of membership in the OPEIU.

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RECONSIDERATION

Pursuant to the provisions of RCW 34.05.470, any party may file a petition for reconsideration 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. If no action is taken by the Commission on the petition for reconsideration within twenty days from the date the petition is filed, the petition is deemed to be denied, without further notice by the Commission. A petition for reconsideration is not a prerequisite for seeking judicial review.

DATED this 27th day of March 2008.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN SWANSON, Hearing Officer

Approved By:

/s/ JOHN SULLIVAN, Commissioner

/s/ PATRICIA WARREN, Commissioner