

STATE OF WASHINGTON  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

DONALD DOWNING,	)	MEC CASE NO. 2-83
	)	
Grievant,	)	PERC CASE NO. 4548-A-83-382
	)	
vs.	)	
	)	
WASHINGTON STATE FERRIES,	)	DECISION NO. 4-B - MEC
	)	
Respondent.	)	SECOND MOTION FOR RECONSIDERATION
	)	
_____	)	

Mary Ruth Mann, Attorney at Law, appeared on behalf of the grievant.

Kenneth Eikenberry, Attorney General, by Robert M. McIntosh, appeared on behalf of Washington State Ferries.

FINDINGS OF FACT

1. In Decision No. 4-MEC, dated June 29, 1984, the Marine Employees' Commission dismissed the grievance of Grievant Donald Downing against Washington State Ferries, on the grounds that grievant failed to utilize the grievance procedures set out in Rule 15.02 of the agreement between the Inlandboatmen's Union of the Pacific and Washington State Ferries.
2. Grievant filed a Motion for Reconsideration of Decision No. 4-MEC on July 9, 1984, acknowledging that "...it is certainly true that I neglected to introduce evidence at the hearing that would demonstrate I had followed the correct grievance procedures...", but indicating that they may have been used.
3. The Marine Employees' Commission reviewed the hearing transcript and determined that the grievant may have misunderstood the examiner's ruling on certain WSF objections.

4. MEC accepted the Motion for Reconsideration, and scheduled an expedited procedural hearing on July 27, 1984, in order to re-assume jurisdiction, in case reconsideration should appear proper, before grievant's right of judicial review elapsed. The MEC sent notice of the July 27, 1984 hearing by first class mail in accordance with then existing WAC 316-02-130.

RCW 47.64.260 provides that service must be made by certified mail, return receipt requested.

5. Grievant failed to appear and/or show cause for his failure to appear. Therefore MEC denied grievant's Motion for Reconsideration under WAC 316-65-535.
6. On or about November 9, 1984, grievant filed another Motion for Reconsideration and an Affidavit, swearing that he had not received notice of the July 27, 1984 hearing.
7. MEC took jurisdiction of the Second Motion for Reconsideration since the notice of the hearing scheduled for July 27, 1984 did not comply with the statute.
8. In notifying Grievant, WSF and IBU (by certified mail) that a hearing was scheduled, MEC stated, in part:

...That hearing will not be to consider the merits of whether you complied with Rule 15 of the IBU/WSF Agreement. Rather, the purpose of the hearing is to provide you with an opportunity to present any grounds which you feel merit reconsideration of the Commission's order in this Case.

In light of the purpose of this hearing, we would direct your attention to Hall v. Seattle, 24 Wn.App. 357, 602 P.2d 366 (1977), which holds that an administrative agency may reconsider a previous action where the order was entered through fraud, mistake, or misconception of fact. Please be prepared to present any evidence which you feel demonstrates that the order was entered through fraud, mistake or misconception of fact... .

9. The grievant appeared personally at the hearing and through his attorney, Mary Ruth Mann. Grievant argued that reconsideration was justified because he had actually followed the grievance procedure, and therefore Findings of Fact Nos. 4 and 5 entered by MEC in its original order were misconception of fact.
10. Findings of Fact Nos. 4 and 5 were stated as follows:
  4. No evidence was presented to show that the grievant notified IBU and WSF of his claim prior to filing it with PERC as required by Rules 15.02 of the WSF/IBU agreement.
  5. No grievance conference was ever held nor was there any attempt by representatives of the union and the employer to settle the matter before the grievant filed with the Marine Employees' Commission.
11. In order to determine whether aforesaid Findings of Fact Nos. 4 and 5 were correct, it became necessary to examine the Transcript and Exhibits of the original hearing, March 12, 1984. (NOTE: A copy of an IBU grievance in the name of Don W. Downing, dated 3-16-83, was submitted with the Second Motion for Reconsideration, but was not considered, on the grounds that it was neither timely nor admissible, without opportunity for cross-examination.)
12. Rule 15.02 of the 1980-1983 Agreement between WSF and IBU (Exhibit 2) states:
  - 15.02. In the event of a controversy or dispute arising either out of the interpretation of this Agreement or because an employee considers himself or herself unjustly treated, the aggrieved party shall, within thirty (30) calendar days after the facts and circumstances actually become known, mail or personally present his claim concerning the matter in writing to the Union and the Employer, together with such pertinent facts as will substantiate his claim.

Grievances shall be pursued according to the following steps:

- (1) The Union Delegate will attempt to resolve the issue immediately. If the Issue is not resolved within three (3) days, it will be referred to the Union for step 2. processing.
- (2) A conference shall be arranged as soon as reasonably possible between the Union and the Employer. Each may appoint one (1) representative, with full authority to settle such controversy or dispute. The aggrieved party may attend all hearings.
- (3) In the event the representatives fail to agree within thirty (30) days, it shall be their duty to refer such controversy or dispute to the Public Employment Relations Commission, established under RCW chapter 47.64. The orders and awards of the Public Employment Relations Commission shall be binding upon any employee, or employees, or their representative, and upon the Employer.

13. Although no direct evidence was presented to show that grievant had mailed or personally presented his claim to IBU and WSF together with pertinent facts, an inference may be drawn from the record that Grievant had filed a grievance with IBU, and that Step 1 of Rule 15.02 of the WSF/IBU Agreement had been initiated. During cross-examination of David Rice, WSF Personnel Officer, the following colloquy took place:

#### CROSS EXAMINATION

BY MR. DOWNING

Q. MR. RICE, DO YOU RECALL ANY CONVERSATIONS WITH MEMBERS— ADMINISTRATORS OF THE INLANDBOATMEN'S UNION ON THIS MATTER BEFORE THIS TIME?

A. BEFORE NOW?

Q. YES.

A. YES.

Q. DO YOU RECALL ANY CONVERSATIONS WITH THEM ABOUT THE TIME I FILED THE ORIGINAL GRIEVANCE WHICH WOULD BE 10/25/82?

A. I DON'T RECALL ANY SPECIFIC CONVERSATION BACK THEN. I AM SURE WE DID HAVE THOUGH.

Q. DO YOU RECALL THE SUBSTANCE OF THAT CONVERSATION?

A. NOT THAT ONE, NO. I DID HAVE A CONVERSATION WITH MR. HOOD FAIRLY RECENTLY, SINCE THIS WAS SCHEDULED, AS TO HIS RECOLLECTION OF IT AND HE—THIS WAS ON THE TELEPHONE—AND HE SAID HIS NOTES SHOW THAT WE REJECTED THE GRIEVANCE, AND HAD RETURNED IT TO THE INLANDBOATMEN'S UNION. IN OTHER WORDS, THE FERRY SYSTEM SAID WE DON'T FEEL THIS IS A GRIEVANCE UNDER THE TERMS OF THE CONTRACT. THE NEXT STEP WOULD BE THE CALL FOR A CONFERENCE. (Transcript, pp. 79-80)

14. No evidence was presented to show that a call for a grievance conference was ever made by grievant or by IBU or WSF under Step 2 of the IBU/WSF Agreement, nor that such a conference was ever held.

15. In determining whether or not the Order entered in Decision No. 4 – MEC was based upon misconception of fact, Finding of Fact No. 4, if correct, would have been supportive of the Order, but not determinative.

16. Finding of Fact No. 5 is supported by the evidence in the record which exhibits that Grievant did not demonstrate that he had exhausted the remedies available to him in Rule 15.02 of the IBU/WSF Agreement. There was no misconception of the fact by the MEC.

Based upon the foregoing Findings of Fact, the Marine Employees' Commission adopted the following Conclusions of Law.

#### CONCLUSIONS OF LAW

1. The Marine Employees' Commission has been assigned jurisdiction in this matter under the provisions of RCW 47.64.150 and 47.64.280 and of Rule 15.02(3) of the IBU/WSF Agreement.

2. The words Public Employment Relations Commission in Rule 15.02(3) of the IBU/WSF Agreement (Exhibit 2) should be read Marine Employees' Commission in accordance with Chapter 47.64 RCW.
3. The Marine Employees' Commission may reconsider Decision No. 4 – MEC only if it were based upon fraud, mistake, or misconception of fact, in accordance with Hall v. Seattle, 24 Wn.App. 357, 602 P.2d 366 (1977).
4. The rule stated in Hall v. Seattle, contemplates that the misconception of facts or mistake must be that of the Commission in reviewing the evidence. The fact that a party makes a mistake in failing to raise an issue, or present sufficient evidence on a question, does not justify reconsideration under Hall v. Seattle.
5. Grievant has not established that Finding of Fact No. 5 and the Order in Decision No. 4 - MEC were entered because of the Commission's misconception of a fact or facts that appear in the record. Rather, grievant failed to present evidence that would establish that he exhausted the grievance procedure (specifically Steps 2 and 3) in accordance with the terms of the IBU/WSF Collective Bargaining Agreement.
6. The Marine Employees' Commission did commit a mistake in adopting WAC 316-02-130, and should rescind Decision No. 4-A- MEC on its own motion, because notices of hearing were not in compliance with RCW 47.64.260.
7. The Marine Employees' Commission should rescind Finding of Fact No. 4 in Decision No. 4 - MEC, on its own motion, under Hall v. Seattle, ibid.
8. No fraud, mistake, or determinative misconception of fact was found under Hall v. Seattle, ibid, therefore Finding of Fact No. 5 in Decision No. 4 – MEC should be sustained based on the evidence in the record.
9. The grievant's Second Motion for Reconsideration should be denied.

Based on the foregoing findings of fact and conclusions of law, the Marine Employees' Commission enters the following order.

ORDER

1. Decision No. 4-A – MEC, dated August 10, 1984, is hereby rescinded.
2. Decision No. 4 – MEC, dated June 29, 1984, is hereby amended by deleting Finding of Fact No. 4.
3. Donald Downing's Second Motion for Reconsideration is hereby dismissed.

DATED at Seattle, Washington, this 6<sup>th</sup> day of June, 1985.

MARINE EMPLOYEES' COMMISSION

/s/ DAVID P. HAWORTH, Chairman

/s/ LOUIS O. STEWART, Commissioner

/s/ DONALD E. KOKJER, Commissioner