

NO. 41225-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,

Appellant,

v.

MARINE EMPLOYEES' COMMISSION, and
MARINE ENGINEERS' BENEFICIAL ASSOCIATION,

Respondents.

**BRIEF OF RESPONDENT
MARINE EMPLOYEES' COMMISSION**

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COURT OF APPEALS
DIVISION II

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I. INTRODUCTION

This is a challenge by Washington State Ferries to a portion of a grievance arbitration award issued by the Marine Employees' Commission (Commission). Specifically, Washington State Ferries challenges the Commission's authority to award attorneys' fees to the union that prevailed in the arbitration proceeding.

The dispute between Washington State Ferries and the union concerned payment for the time that employees on a specific watch (shift) on a ferry vessel spent advising employees in the succeeding watch about problems or issues the employees being relieved encountered on their watch. In a published opinion issued by this Court in 2007, this Court stated that the ferry employees were entitled to pay under their collective bargaining agreement for this watch changeover time. However, the Court ruled that the employees needed to seek such pay through the procedures in their collective bargaining agreement, including pursuing their claims to the Commission if necessary, rather than filing suit directly in court as the employees had done.

When the employees, through their union, requested back pay from Washington State Ferries pursuant to the Court's decision, the ferry system refused to give them any pay for watch changeover, resulting in

the union having to file a grievance, which the ferry system denied. The union then had to pursue the matter to arbitration before the Commission.

In the arbitration proceeding, Washington State Ferries asserted as its only defense, that this Court's statement that watch changeover time was work for which the employees are entitled to be paid was not binding on it or on the Commission because the language was mere dicta. However, Washington State Ferries did not dispute in any way the amount of back pay the union was seeking on behalf of the employees. The Commission determined that the ferry system's defense was totally without merit in light of this Court's opinion and took the extraordinary action of awarding attorneys' fees to the union for having to pursue its pay claim to arbitration.

Washington State Ferries challenges the Commission's authority to make such an attorneys' fee award. The Commission submits this brief in support of its authority to award attorneys' fees in a grievance arbitration when appropriate.¹

¹ An administrative agency should not participate in a judicial review proceeding to defend the merits of its decision. *Kaiser Aluminum & Chem. Co. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 781, 854 P.2d 611 (1993). However, an agency may participate in judicial review to protect the integrity of its internal decision-making processes or to respond to challenges to its jurisdiction. *See id.* at 782; *Local 2916, IAFF v. Pub. Emp. Relations Comm'n*, 128 Wn.2d 375, 907 P.2d 1204 (1996); *Meštrovac v. Dep't of Labor & Indus.*, 142 Wn. App. 693, 704, 176 P.3d 536 (2008), *aff'd sub nom Kustura v. Dep't of Labor & Indus.*, 169 Wn.2d 81, 233 P.3d 853 (2010); *Ferenčák v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 721-22, 175 P.3d 1109 (2008), *aff'd sub nom Kustura v. Dep't of Labor & Indus.*, 169 Wn.2d 81, 233 P.3d 853 (2010).

II. STATEMENT OF ISSUE

Does the Marine Employees' Commission have the authority under equitable principles to award attorneys' fees to the prevailing party in a grievance arbitration proceeding, where the Commission determines that the claim or defense raised by the losing party is so devoid of merit that an award of such fees is appropriate?

III. COUNTERSTATEMENT OF THE CASE

A. Ferry System Labor-Management Relations and the Marine Employees' Commission

Washington State Ferries is part of the Washington State Department of Transportation. RCW 47.56.032; *see generally* RCW 47.56, RCW 47.60. The ferry system is constitutionally recognized as part of the state highway system. Const. art. II, § 40(b)(5) (Amendment 18). The State has operated Washington State Ferries since 1951, having acquired the ferry system from a private firm that had been operating the system.² Washington State Ferries is the largest ferry system in the United States and the third largest in the world.³ Washington State

² History of Washington State Ferry System (http://www.wsdot.wa.gov/ferries/your_wsf/our_fleet/), wsdot.com. *See* Laws of 1949, ch. 148; Laws of 1949, ch. 179; Laws of 1951, ch. 259. *See also* Grahame F. Shrader, *The Black Ball Line, 1929-1951* (1980).

³ An Introduction to the Largest Ferry System in the Nation (<http://www.wsdot.wa.gov/ferries/pdf/WSFLargest.pdf>), Washington State Ferries, Customer and Community Relations, May 2006.

Ferries directly serves eight counties⁴ and is the primary transportation link between many island communities and the rest of the state. Washington State Ferries carries nearly 23 million riders a year.⁵ The Washington State Legislature has declared it to be a public policy of the state to “[p]rovide continuous operation of the Washington state ferry system” and to “protect the citizens of this state by assuring effective and orderly operation of the ferry system.” RCW 47.64.006(1), (4).

Employees in the maritime industry have long been represented by labor unions,⁶ and the Legislature has always recognized that the maintenance of good labor-management relations between Washington State Ferries and its employees represented by unions is critical to effective, continuous ferry service. In the 1949 session authorizing the State to acquire the ferry system, the Legislature declared:

The State of Washington, as a public policy, declares that sound labor relations are essential to the development of a ferry and bridge system which will best serve the interests of the people of the State.

Laws of 1949, ch. 148, § 1 (codified as RCW 47.64.005). *See also* RCW 47.64.006(3) (declaring it a public policy of the state to “promote

⁴ *Id.*

⁵ History of Washington State Ferry System (http://www.wsdot.wa.gov/ferries/your_wsf/our_fleet/), wsdot.com.

⁶ Employees of the private ferry operation that Washington State Ferries took over were organized for collective bargaining purposes in the 1930s. Grahame F. Shrader, *The Black Ball Line, 1929-1951*, at 5-6 (1980).

harmonious and cooperative relationships between the ferry system and its employees by permitting ferry employees to organize and bargain collectively”).

Employees of Washington State Ferries are currently represented by seven separate labor unions.⁷ To assist in promoting harmonious labor relations between Washington State Ferries and the unions representing ferry system employees, the Legislature established the Marine Employees’ Commission when it first took over the ferry system.⁸ After a brief period in which the Commission’s functions were transferred to other agencies, the Legislature reestablished the Marine Employees’ Commission in 1983. Laws of 1983, ch. 15. *See generally* RCW 47.64.

The Commission is a three-member body that by statute includes a representative from industry, a representative from labor, and a member from the public “who has significant knowledge of maritime affairs.” RCW 47.64.280. The Legislature has assigned the Commission several responsibilities in facilitating harmonious relations between Washington State Ferries and its employees. These include: (1) conducting proceedings to determine the collective bargaining representative,⁹ to

⁷ Marine Employees’ Commission website, www.marineempcom.org.

⁸ Laws of 1949, ch. 148.

⁹ WAC 316-25 (representation cases).

determine the composition of bargaining units,¹⁰ and to resolve disputes regarding union security requirements;¹¹ (2) appointing a mediator when an impasse has been declared in contract negotiations¹² and certifying issues to be sent to interest arbitration;¹³ and (3) conducting proceedings to determine if the employer or union has committed an unfair labor practice,¹⁴ issuing declaratory rulings,¹⁵ and acting as grievance arbitrator if the collective bargaining agreement does not provide otherwise (or if the parties agree to have the Commission be the arbitrator).¹⁶ At any particular time, the Commission may be involved in processing numerous proceedings of varying kinds. For example, in January 2011, the Commission had pending 18 active matters—eight unfair labor practice complaints, one unit clarification petition, and nine grievance arbitrations.¹⁷

B. Prior Lawsuit Over Pay for Watch Changeover (*Davis Case*)

In the mid-2000s, certain employees of Washington State Ferries filed a class action lawsuit that eventually led to a published appellate

¹⁰ WAC 316-35 (unit clarification cases).

¹¹ WAC 316-75 (union security dispute cases).

¹² RCW 47.64.280(2)(b), RCW 47.64.210.

¹³ RCW 47.64.300(2), WAC 316-55 (impasse rules).

¹⁴ RCW 47.64.130, WAC 316-45.

¹⁵ RCW 34.05.240, WAC 316-02-500 to -520.

¹⁶ RCW 47.64.150, RCW 47.64.280(2)(a), WAC 316-65 (grievance arbitration rules).

¹⁷ List of active Marine Employees' Commission cases updated Jan. 21, 2001, from MEC website, checked on Jan. 28, 2011, www.marineempcom.org.

decision by this Court. *Davis v. State Dep't of Transp.*, 138 Wn. App. 811, 159 P.3d 427 (2007), *review denied*, 163 Wn.2d 1019 (2008) (copy attached as Appendix A to this Brief). The plaintiffs in *Davis* were two groups of ferry employees, licensed engineers and unlicensed engineers. The *Davis* plaintiffs sought back pay for the time spent on watch changeover, i.e., the time after their watch (shift) when they would debrief their replacements on any problems or issues about which the incoming watch should know. The plaintiffs in *Davis*, as well as all other licensed and unlicensed engineers, are represented for collective bargaining by the Marine Engineers' Beneficial Association (hereafter, Union). However, the plaintiffs in *Davis* brought suit on their own, not with the assistance of the Union.

Reversing the trial court, this Court held that the employees in *Davis* should have pursued their remedies through their collective bargaining agreement and, if necessary, through the Marine Employees' Commission, rather than having filed directly into court. But this Court also stated that the employees were entitled to back pay for watch changeover time, as the employees had sought. This Court stated:

We *hold* that, under the collective bargaining agreement (CBA), watch changes are a work activity for which the State must compensate employees. And we *hold* that the employees failed to exhaust either their contractual

remedies under the CBA or their administrative remedies under the Marine Employees' Commission (MEC).

Davis, 138 Wn. App. at 814 (emphasis added). This Court concluded its opinion by stating:

And we hold that the trial court erred in granting summary judgment to the employees. Nevertheless, we emphasize that watch changes are a regular, essential, and required work activity for which the State must compensate under the CBA. *And whether watch changes are work or whether watch changes must be compensated is not an issue for further grievance or arbitration.*

Davis, 138 Wn. App. at 825-26 (emphasis added).

C. Grievance Arbitration Proceeding Before the Marine Employees' Commission

Following this Court's opinion in *Davis*, the Union sought back pay from Washington State Ferries for watch changeover time, which the ferry system refused to provide. The Union then filed grievances with the ferry system on behalf of the two groups of engineers (licensed and unlicensed). Marine Employees' Commission Certified Administrative Record (AR) 338-340, AR 341-343. When Washington State Ferries denied the grievances, the Union moved the grievances to arbitration before the Commission. AR 5-8.

The Commission assigned one of its Commissioners to conduct a hearing. AR 114-247. In the hearing, Washington State Ferries took the position that neither it nor the Commission was bound by any statements

in the *Davis* opinion, that the Commission had the authority to decide whether or not the employees were entitled to watch changeover pay, and that the Commission should conclude that the employees were not entitled to any such pay. AR 51-52.

Washington State Ferries presented no evidence regarding the amount of back pay it might owe to the employees for watch changeover. Nor does it appear that the ferry system ever began to keep records of the amount of time spent by employees on watch changeover in order to verify or respond to claims by the employees or their Union. In short, Washington State Ferries did not deny the Union's grievance or require the Union to pursue the matter to arbitration by the Commission because of any disagreement with the Union over the precise time spent by the employees on watch changeover or the exact amount of back pay owing for such time.¹⁸ The ferry system simply continued to take the position that the employees were not entitled to watch changeover pay at all.

Following the hearing, the full Commission issued a decision and award. AR 80-89 (copy attached as Appendix B to this Brief). In the decision, the Commission quoted (twice) this Court's passage in the *Davis* opinion: "And whether watch changes are work or whether watch changes must be compensated is not an issue for future grievance

¹⁸ See summary of record before the Commission items 9 and 10 of Arbitrator's Decision and Award. AR 84.

arbitration.” AR 81, AR 84. While the Commission stated that it believed the Court should not “have given advance instructions to the Commission on the interpretation of the collective bargaining agreement,” AR 86, nevertheless:

[T]he matter is before us as an agency of the State of Washington and we are governed by the courts of this State. We therefore concede to the directive of the Court and find that the matter of whether or not watch changeover is “work” within the meaning of the statutes of the State of Washington has already been determined, and our challenge is to determine the proper remedy.

....

Decisions of the MEC [Commission] are subject to appeal and modification by the Courts. It is well understood that the MEC has no authority to hear an appeal or overrule decisions of the Courts. While the MEC shares the concerns of the WSF [ferry system] about the intervention of the Court into the collective-bargaining process, the WSF ignored the directive of the Court at its peril.

AR 86.¹⁹ The Commission directed Washington State Ferries to review the employees’ timesheets to see if the parties could agree on the amount to be paid to the employees and, failing this, the ferry system was to pay the back pay amount set forth by the Union in its evidence at the hearing, plus interest. AR 87.

¹⁹ The Commission also stated that it was “unreasonable to believe” that, if the grievance had been submitted to the Commission first before the courts, the Commission would not have reached the same result as the Court of Appeals. AR 86.

In addition to back pay, the Union requested that the Commission award the Union attorneys' fees as a remedy. AR 76-77, AR 137-138. With regard to remedies that the Commission may include in its arbitration award, the Commission's rules provide that the person named in the grievance complaint may be required "to take such affirmative and corrective action as necessary to restore grievant's rights and to effectuate the policies of RCW 47.64.005 and 47.64.006." WAC 316-65-560. RCW 47.64.150 provides, in part: "An arbitrator's decision on a grievance shall not change or amend the terms, conditions, or applications of the collective bargaining agreement." The statute also provides, in part: "The costs of arbitrators shall be shared equally by the parties." WAC 316-65-150 provides, in part: "Each party shall pay the expenses of presenting its own case"

In its decision and award, the Commission granted the Union's request for attorneys' fees, stating: "Upon presentation of affidavits, WSF [ferry system] will reimburse the MEBA [Union] for attorney fees incurred in bringing this grievance before the MEC [Commission]." AR 87.²⁰

Washington State Ferries moved for reconsideration of the portion of the decision that awarded attorneys' fees. AR 90-93. The ferry system

²⁰ The Commission denied attorneys' fees for the firm that prosecuted the *Davis* class action. The Commission also denied double damages to the Union. AR 88.

did not seek reconsideration of any other portions of the award, including any portion dealing with the merits or the amount of back pay owed. Washington State Ferries pointed to the Commission's rule stating that each party shall bear its own expenses, WAC 316-65-150. AR 91. Washington State Ferries also noted that the parties' collective bargaining agreements provided: "All other costs [besides the cost of the arbitrator, which is to be divided equally] incurred by a Party resulting from an arbitration hearing will be paid by the party incurring them." AR 91. *See* AR 275 (collective bargaining agreement for licensed engineer officers), AR 295 (collective bargaining agreement for unlicensed engine room employees).

The Commission denied the petition for reconsideration. AR 102-105, AR 111-113 (copy attached as Appendix C to this Brief). Again referencing this Court's language from the *Davis* decision, the Commission stated:

The Arbitrator acted appropriately and within his contractual authority and obligations. The Employer was on notice from the Court of Appeals that payment for watch changeover was a contractual obligation of WSF. . . .

Upon receipt of the Court of Appeals' findings, WSF had every opportunity to work with the Union to pursue an appropriate remedy short of requiring the MEBA [Union] to present their members' case to an arbitrator and require additional attorney's fees, in spite of the direction of the Courts.

AR 102-103.

The Commission stressed that, in awarding attorneys' fees in this case, it was acting within what it considered to be its equitable powers and was carrying out its statutory charge of promoting harmonious labor-management relations at the ferry system:

After careful review of all relevant facts, the Commission is certain the decision in this case is within its legal and contractual authorities. It also should be noted that a great deal of consideration regarding the parties' operating history, their long, professional enlightened relationship and the Union's desire to settle the issue by offering reasoned alternative proposals influenced the Commission's equitable approach in resolution of the controversy.

AR 103. With this denial of reconsideration, the Commission's decision became final.²¹

D. Trial Court Proceedings

Washington State Ferries timely filed a Petition for Common Law Writ of Certiorari and Review of Arbitration Decision Awarding Attorney's Fees in Thurston County Superior Court. CP 3-10. The trial court entered an Order Affirming Arbitration Decision and Award and Dismissing Petition. CP 242-243.

Washington State Ferries then timely filed an appeal to this Court. CP 244-247.

²¹ Counsel for the Union later submitted a declaration asking for just over \$18,000 in attorneys' fees. CP 28-30.

IV. STANDARD OF REVIEW

Washington State Ferries sought review of the Commission's decision and award under the constitutional writ of certiorari (inherent power review). *See* Const. art. IV, § 6. This is the appropriate—indeed, generally the only—basis for judicial review of a labor arbitration award involving a public agency.²²

The standard of review is whether the arbitrator, here the Commission, exceeded its authority. As stated by the Supreme Court in *Clark County PUD No. 1 v. International Brotherhood of Electrical Workers*, 150 Wn.2d 237, 76 P.3d 248 (2003), at 245:

Review of an arbitration decision under a constitutional writ of certiorari is limited to whether the arbitrator acted illegally by exceeding his or her authority under the contract.

Accord, Kitsap Cnty. Deputy Sheriff's Guild v. Kitsap Cnty., 167 Wn.2d 428, 434, 219 P.3d 675 (2009); *City of Yakima v. Yakima Police Patrolman's Ass'n*, 148 Wn. App. 186, 192, 199 P.3d 484 (2009); *Yakima Cnty. v. Yakima Cnty. Law Enforcement Officers Guild*, 157 Wn. App. 304, 318, 237 P.3d 316 (2010).

²² *See Clark Cnty. PUD No. 1 v. Wilkinson*, 139 Wn.2d 840, 991 P.2d 1161 (2000) (discussing why other means of review are unavailable). In addition, grievance arbitration awards by the Marine Employees' Commission are not subject to judicial review under the Administrative Procedure Act, RCW 34.05. *See* RCW 34.05.510 (judicial review under the APA is of "agency action"), RCW 34.05.010(3)(b) ("agency action" does not include arbitration of labor disputes).

The appellate court reviews whether the arbitrator has exceeded his authority de novo as a matter of law. *Yakima Cnty.*, 157 Wn. App at 318; *Klickitat Cnty. v. Beck*, 104 Wn. App. 453, 460-61, 16 P.3d 692 (2001).

While the court reviews whether the arbitrator has exceeded his authority, “the appellate court does not reach the merits of the case.” *Clark Cnty.*, 150 Wn.2d at 245. *Accord*, *Yakima Cnty.*, 157 Wn. App. at 318. That is, the court does not review whether the arbitrator correctly interpreted the law or the facts of the case. *Clark Cnty.*, 150 Wn.2d at 245; *Yakima Cnty.*, 157 Wn. App. at 318. This is in recognition of the extreme deference given to the arbitrator, whose opinion the parties bargained to receive. *Clark Cnty.*, 150 Wn.2d at 246-47. Accordingly, the appellate court does not review the arbitration decision under the arbitrary and capricious standard. *Clark Cnty.*, 150 Wn.2d at 246-47; *Yakima Cnty.*, 157 Wn. App. at 318.

V. ARGUMENT

A. **A Tribunal May Award Attorneys’ Fees Against a Party That Asserts a Claim or Defense That Is So Lacking in Merit as to Make Such an Award Equitable**

Under the “American rule,” a tribunal can award attorneys’ fees only when such an award is authorized by statute, contract, or a recognized ground in equity. *Forbes v. Am. Bldg. Maint. Co. W.*, 170 Wn.2d 157, 168-69, 240 P.3d 790 (2010). Under the exception for a

recognized ground in equity, a tribunal may award attorneys' fees against a party that asserts a claim or defense that is so lacking in merit as to justify such an award on equitable principles. *See Forbes*, 170 Wn.2d at 168-69; *Snyder v. Tomkins*, 20 Wn. App. 167, 174-75, 579 P.2d 994, *review denied*, 91 Wn.2d 1001 (1978) ("In appropriate circumstances, however, equity may allow reimbursement of attorney's fees whenever overriding considerations, such as oppressive behavior on the part of a party, indicate the need for such a recovery."); *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120, *review denied*, 120 Wn.2d 1002 (1992) ("the court's award of attorney fees was justified on equitable ground based on the appellant's intransigence which forced the respondent to go to court to obtain the relief granted below"); *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 982 P.2d 131 (1999) ("bad faith litigation can warrant the award of attorney fees") (quoting *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 267 & n.6, 961 P.2d 343 (1998)).

Washington case law in this regard is consistent with that of other jurisdictions, including cases involving labor-management disputes. *See Daniel P. Jones, Annotation, Attorneys' fees: obduracy as basis for state-court award*, 49 A.L.R. 4th 825 (1986); William A. Harrison, *Annotation, Award of counsel fees to prevailing party based on adversary's bad faith*,

obduracy, or other misconduct, 31 A.L.R. Fed. 833 (1977); John B. Spitzer, Annotation, *Labor Arbitration: Recoverability of Attorneys' Fees in Action to Compel Arbitration or to Enforce or Vacate Award*, 80 A.L.R. Fed. 302 (1986).

In these cases, the courts have articulated a variety of standards for the conduct that can give rise to an award of attorneys' fees on equitable grounds: bad faith, frivolous claim or defense, obduracy, intransigence, without justification, and others. In the present case, Washington State Ferries has challenged the authority of the Marine Employees' Commission to award attorneys' fees as part of a grievance arbitration award under *any* circumstances, and the parties have not briefed the precise standard under which the Commission has authority to award attorneys' fees.²³ Accordingly, this Court does not need to address under what standard the Commission exercises its authority to award attorneys' fees, only whether the Commission has such authority in the first place. *See, e.g., State v. Puapuaga*, 164 Wn.2d 515, 521 n.6, 192 P.3d 360 (2008) (appellate court will not consider issues that have not been

²³ The *standard*, i.e., bad faith, frivolous, obduracy, etc., is different from whether the Commission made the correct decision in this case. As discussed earlier, the court does not review the *merits* of the Commission's award of attorneys' fees.

adequately developed in the briefing); *Westar Funding, Inc. v. Sorrels*, 157 Wn. App. 777, 787, 239 P.3d 1109 (2010) (same).²⁴

However, as Washington State Ferries itself has noted in its brief, the present case appears to be the first occasion in which the Commission has awarded attorneys' fees in a grievance arbitration proceeding. Brief of Appellant at 8-9. This belies Washington State Ferries' suggestion that the Commission will grant attorneys' fees on a routine basis or merely because the Commission "is displeased with the legal position argued by a party." *Id.* at 2. Moreover, the mere absence of a precedent is no reason to deny equitable relief. *Rummens v. Guar. Trust Co.*, 199 Wash. 377, 92 P.2d 228 (1939).

B. An Arbitrator May Award Attorneys' Fees in a Grievance Arbitration Proceeding on Equitable Grounds

As the authorities cited by Washington State Ferries itself recognize, an arbitrator has wide latitude in fashioning an appropriate remedy. *See Endicott Educ. Ass'n v. Endicott Sch. Dist. No. 308*, 43 Wn. App. 392, 394, 717 P.2d 763 (1986) ("Inherent in the authority to adjudicate the breach is the power to remedy it."); *N. Beach Educ. Ass'n v. N. Beach Sch. Dist. No. 64*, 31 Wn. App. 77, 639 P.2d 821 (1982). *See*

²⁴ While in this case the Commission expressly stated that it was awarding attorneys' fees on "equitable" grounds, AR 112, there is no requirement that an arbitrator set out his reasoning or make findings of fact to support his award. *See Westmark Props. v. McGuire*, 53 Wn. App. 400, 403, 766 P.2d 1146 (1989); *Dep't of Agric. v. State Pers. Bd.*, 65 Wn. App. 508, 515, 828 P.2d 1145, *review denied*, 120 Wn.2d 1003 (1992).

Brief of Appellant at 11. The Marine Employees' Commission's rule on grievance arbitration remedies provides that the Commission may issue an order "requiring . . . such affirmative and corrective action as necessary to restore grievant's rights and to effectuate the policies of RCW 47.64.005 and 47.64.006" WAC 316-65-560.

The issue here is whether the Marine Employees' Commission has the authority to award attorneys' fees on equitable grounds as part of a grievance arbitration award.²⁵ Both arbitrators and courts have held that an award of attorneys' fees may be made as part of an arbitration award when justified on equitable grounds. These cases have recognized that an exception to the American Rule on attorneys' fees can apply when the action of a party has resulted in unnecessary grievance arbitration proceedings. *See Synergy Gas Co. v. Sasso*, 853 F.2d 59, 64-65 (2d Cir.), *cert. denied*, 488 U.S. 994 (1988), *enforcing Synergy Gas Co.*, 91 Lab. Arb. (BNA) 77, 92 (1987) (Simons) ("although attorney's fees are not routinely awarded in labor disputes, it has been held that they may be awarded in certain circumstances[,] [f]or example, . . . where the

²⁵ It is well established that a labor relations board such as the Marine Employees' Commission has the authority to award attorneys' fees under equitable principles in *unfair labor practice* proceedings. *See State ex rel. Wash. Fed'n of State Emps. v. Bd. of Trs.*, 93 Wn.2d 60, 665 P.2d 1252 (1980); *Green River Cmty. Coll. Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 442, 730 P.2d 653 (1986); *Lewis Cnty. v. Pub. Emp't Relations Comm'n*, 31 Wn. App. 853, 865-66, 644 P.2d 1231, *review denied*, 97 Wn.2d 1034 (1982). The issue in this case is whether that authority also extends to *grievance arbitration* proceedings.

employer's defenses are frivolous"); *Langemeier v. Kuehl*, 307 Mont. 499, 40 P.3d 343, 347 (2001) ("an arbitrator may, under limited circumstances, award attorney's fees through his equity powers where bad faith or malicious behavior is involved"); *Fortex Mfg. Co.*, 67 Lab. Arb. (BNA) 934, 939-40 (1976) (Bryan), *enf'd sub nom. Fortex Mfg. Co. v Local 1065, Amalgamated Clothing Workers of Am.*, 99 L.R.R.M. (BNA) 2302, 2305 (M.D. Ala. 1978) (attorneys' fees awarded against union for bad faith in not acting to stop strike sooner); *Litton Unit Handling Sys. v. Shopmen's Local Union No. 522*, 90 L.R.R.M. (BNA) 3176, 3179-80 (S.D. Ohio 1975) (attorneys' fees awarded by arbitrator against union for asserting "patently spurious defense"); *Rust Eng'g Co.*, 77 Lab. Arb. (BNA) 488, 490-91 (1981) (Williams) (attorneys' fees awarded against union where shop steward's "actions can hardly be viewed as a good faith interpretation [of the contract]"); *Sunshine Convalescent Hosp.*, 62 Lab. Arb. (BNA) 276, 279 (1974) (Lennard) (attorneys' fees awarded against employer where employer kept changing position as to whether it would participate in arbitration voluntarily).²⁶

²⁶ Washington State Ferries relies on language in *Int'l Firefighters Local 46 v. City of Everett*, 146 Wn.2d 29, 48, 42 P.3d 1265 (2002), which in turn cites *Fairweather's Practice & Procedure in Labor Arbitration* 497 (Ray J. Schoonhoven ed., 4th ed. 1999), for the general rule that in a labor arbitration each side pays its own attorneys' fees. Brief of Appellant at 17. However, the treatise cited continues on to recognize that courts and arbitrators have awarded attorneys' fees under the equitable grounds above. *Fairweather's Practice & Procedure in Labor Arbitration* 498.

As a general proposition, then, a grievance arbitrator, such as the Marine Employees' Commission here, has the authority to award attorneys' fees as part of its award when such an award is justified on equitable grounds.

C. Provisions Providing That Each Party Shall Bear Their Own Costs in an Arbitration Do Not Preclude an Arbitrator From Awarding Attorneys' Fees on an Equitable Ground for Having to Participate Unnecessarily in the Arbitration

Washington State Ferries argues that the Commission did not have authority to award attorneys' fees because the collective bargaining agreements between the ferry system and the Union provided that each party was to bear its own costs of arbitration and because the statutes and rules governing the Commission provided that the Commission could not, in a grievance arbitration, change or add to the terms of the parties' agreement. Brief of Appellant at 15-20.

However, it is well established that a tribunal may decline to enforce the terms of an agreement or other legal right where doing so would be inequitable. As our Supreme Court stated in the leading case of *Thisius v. Sealander*, 26 Wn.2d 810, 175 P.2d 619 (1946), at 818:

There is no question but that equity has a right to step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable.

Accord, Proctor v. Huntington, 169 Wn.2d 491, 500, 238 P.3d 1117 (2010); *In re Estates of Palmer*, 146 Wn. App. 132, 137 n.7, 189 P.3d 230 (2008); *Hornback v. Wentworth*, 132 Wn. App. 504, 513, 132 P.3d 778 (2006).

This principle has been applied in the context of arbitration agreements. See *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 45 P.3d 594 (2002) (court declined to enforce arbitration provision in mobile home sales agreement where representation to buyer that arbitration would be relatively inexpensive was untrue).

More specifically, courts and arbitrators have ruled that attorneys' fees may be awarded, on equitable grounds, even where the arbitration agreement contains a provision to the effect that each party is to bear its own costs. As one arbitrator expressed it:

Article 13, section 13-1 provides that, "The Employer and the Union involved in the arbitration shall each pay its own expenses incidental to the preparation of its case" The attorney fees claimed by the Employer, however, are not "incidental to the preparation and presentation of its case." The Local Union had to be dragged into arbitration pursuant to a court order compelling arbitration.

Rust Eng'g Co., 77 Lab. Arb. at 490. As stated by the arbitrator in *Litton Unit Handling Sys.*, 90 L.R.R.M. at 3180: "This unparalleled abuse of arbitral process hardly could have been conceived of by the parties when they negotiated the language of the arbitration provisions." See also

Synergy Gas Co., 853 F.2d at 65-66 (award of attorneys' fees by arbitrator was compensatory, not punitive, because employer "had acted in bad faith").

The provisions in the collective bargaining agreements between Washington State Ferries and the Union here are premised on there being a bona fide dispute between the parties. Under such circumstances, having each party pay its own attorneys' fees is reasonable and logical, on the premise that the parties' advancement of good faith claims and defenses, even if ultimately unsuccessful in particular cases, will even out in the end. However, where a party has asserted a claim or defense that is so without merit that it causes the other party to expend resources unnecessarily, this is inconsistent with the assumptions underlying the contractual language about each party bearing its own costs, and the Commission acting as arbitrator can award attorneys' fees to address this. Put another way, the contractual provisions, statutes, and rules on which Washington State Ferries rely deal with the parties' cost of *participating* in an arbitration. The equitable authority to award attorneys' fees deals with a party's *having to participate* in an arbitration (unnecessarily).

This distinction explains why cases relied upon by Washington State Ferries to the effect that employees, through the collective bargaining agreement negotiated by their union, may contract away their

right to attorneys' fees are not controlling here. *See* Brief of Appellant at 17-19; *Hitter v. Bellevue Sch. Dist. No. 405*, 66 Wn. App. 391, 832 P.2d 130, *review denied*, 120 Wn.2d 1013 (1992); *Int'l Firefighters Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002). Those authorities deal with the employer's ability to avoid, through contract, an award of statutory attorneys' fees when employees prevail on the merits in a proceeding for wages. The attorneys' fees award by the Commission here was not because the Union prevailed on the merits, but rather because the Union should not have had to expend resources to go through the arbitration proceeding at all.

In support of its position, Washington State Ferries also relies on a recent decision by Division III of this Court. *Yakima Cnty. v. Yakima Cnty. Law Enforcement Officers Guild*, 157 Wn. App. 304, 237 P.3d 316 (2010). Brief of Appellant at 13-15. Contrary to the ferry system's suggestion, the *Yakima County* decision supports the Commission here.

In the first *Yakima County* case, *Yakima County v. Yakima County Law Enforcement Officers Guild*, 133 Wn. App. 281, 135 P.3d 558 (2006), the Court of Appeals affirmed a trial court order that granted the union's request for arbitration of a disciplinary action under the parties' collective bargaining agreement. With respect to the union's cross-claim for attorneys' fees in having to file the court action to obtain an order granting

arbitration, the Court of Appeals referred that claim to the arbitrator, stating:

[W]e leave the remaining procedural questions to the arbitrator, including the Guild’s entitlement to attorney fees, if any, under its cross-appeal theory. We note the Guild fails to persuade us the County has acted in bad faith or vexatiously in this appeal. The delays here are supported by declarations and appear routine.

Yakima Cnty., 133 Wn. App. at 288-89.

In the arbitration, the arbitrator “agreed with the Guild’s claim that the County acted ‘without justification’ . . . by refusing to arbitrate the grievance” and “ordered the County to reimburse the Guild for attorney fees incurred to judicially enforce the arbitration award.” *Yakima Cnty.*, 157 Wn. App. at 316. *See also id* at 337. The Court of Appeals upheld the arbitrator’s award of attorneys’ fees. The Court stated:

Federal courts authorize an award of fees in equity when an employer, in bad faith or without justification, refuses to proceed to arbitration.

157 Wn.2d at 338 (citations omitted). The Court noted that the union had asserted this equitable basis in support of its request for attorneys’ fees and that the arbitrator granted fees on the basis of refusing to arbitrate “without justification.” *Id.* The Court continued:

The arbitrator did not exceed his authority under the CBA [collective bargaining agreement] because he did not award fees pursuant to the CBA but only on the equitable ground authorized in our first opinion. We will not review

further the arbitrator's decision to award fees for legal or factual error.

Id. at 339 (citation omitted).

In its brief, Washington State Ferries points to the passage in the *Yakima County* opinion to the effect that the collective bargaining agreement requires each party to pay its own expenses in arbitration and that "it is not surprising that the Guild did not request attorney fees in its grievance." *Id.* at 338. Brief of Appellants at 14. From this, the ferry system appears to argue that the only situation in which a union could be awarded attorneys' fees is for having to go to court to force the employer to go to arbitration. But the case law is not limited to situations in which the union had to go to court to force arbitration; it also includes situations where the union had to proceed to arbitration to vindicate a claim to which the employer had no valid defense. See *Synergy Gas Co.*, 91 Lab. Arb. at 92; *Langemeier*, 307 Mont. 499, 40 P.3d 343.

Moreover, the ferry system's approach would lead to an artificial dichotomy between those situations in which the union had to invoke the power of the court to get into arbitration to vindicate its claim and those in which the employer voluntarily went to arbitration, albeit with no valid defense to the union's claim. Nothing in the *Yakima County* opinion or

any other authority supports such a distinction.²⁷ In addition, the *Yakima County* opinion makes it clear that the arbitrator has the authority to determine whether attorneys' fees should be awarded where a party's claims or defenses are not justified.

D. The Public Policy of Promoting Harmonious Labor-Management Relations Between Washington State Ferries and Its Employees Supports the Commission's Authority to Award Attorneys' Fees in Grievance Arbitrations in Extraordinary Situations

Washington State Ferries argues that recognizing the authority of the Marine Employees' Commission to award attorneys' fees in grievance arbitrations is contrary to the public policy favoring arbitration. Brief of Appellant at 20. The ferry system contends that recognizing such authority would undermine the security of parties in their ability to rely on the terms of the collective bargaining agreement they have negotiated. However, as discussed above, the terms of the parties' agreement are premised on the assumption that each party will act in good faith. The sanctity of the collective bargaining agreement is not undermined by granting equitable relief when this is not the situation.

²⁷ In its brief, Washington State Ferries maintains it was the ferry system "that was in the position of having to endure a judicial proceeding to enforce the grievance requirements of the CBAs [collective bargaining agreements] and the statute, and, thus, equity should be on the side of WSF," referring to this Court's decision in *Davis*. Brief of Appellant at 15, n.8. Among other problems with the ferry system's position, this argument ignores the fact that the *Davis* case was not brought by the Union but rather by individual employees.

Moreover, the Legislature has long expressed a public policy of promoting harmonious relations between the Washington State Ferries and its employees, to ensure efficient, continuous ferry service to the many citizens and communities that are dependent on the ferry system. The Legislature has given authority to the Marine Employees' Commission to promote such relations in its decisions. Employees of Washington State Ferries are represented by seven separate labor unions. At any particular time the ferry system and its unions are involved in numerous disputes, many of which must be resolved by the Commission. In light of the many valid disputes on which Washington State Ferries and its unions, as well as the Commission, must expend their limited resources, recognizing the authority of the Commission to grant attorneys' fees in extraordinary situations where there is no valid dispute promotes the public policy enunciated by the Legislature.²⁸

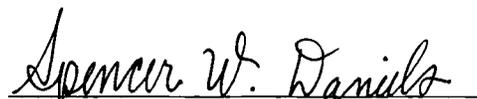
²⁸ The Union here points out in its brief that the employer has greater resources and could wear down unions with frivolous defenses. Brief of Respondent Marine Engineers' Beneficial Association at 2-3, 26. The Commission notes that the resources of Washington State Ferries, as well as all other public entities, are also limited and are becoming even more so in the current economic crisis. See *State ex rel. Pac. Tel. & Tel. Co. v. Dep't of Pub. Serv.*, 19 Wn.2d 200, 265, 142 P.2d 498 (1943) (court can take judicial notice of economic circumstances); *State ex rel. Hamilton v. Martin*, 173 Wash. 249, 256, 23 P.2d 1 (1933) (same). In the Commission's view, neither the union's nor the employer's resources should be spent responding to claims or defenses with no conceivable merit.

VI. CONCLUSION

For the reasons set forth above, the Marine Employees' Commission respectfully asks this Court to affirm the decision and award of the Commission in this case.

RESPECTFULLY SUBMITTED this 23rd day of February, 2011.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in cursive script that reads "Spencer W. Daniels". The signature is written in black ink and is positioned above a horizontal line.

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Court of Appeals of Washington,
 Division 2.
 Ben DAVIS, Floyd Fulmer, Roy Hyett, Dick Olson,
 individually and on behalf of all persons similarly
 situated, Respondents,

v.
 STATE of Washington, DEPARTMENT OF
 TRANSPORTATION, Appellant.

No. 34352-5-II.
 May 30, 2007.

Background: Licensed engineer officers and unlicensed engine room employees for Washington State Ferry (WSF) system brought class action lawsuit against Department of Transportation (DOT), alleging that named plaintiffs and class members were entitled to compensation for watch changes that extended beyond regular assigned work day. The Superior Court, Pierce County, Rosanne Nowak Buckner, J., granted summary judgment to plaintiffs. State appealed.

Holdings: The Court of Appeals, Bridgewater, P.J., held that:

- (1) under collective bargaining agreement, class members were entitled to compensation for watch changes, but
- (2) class members' remedy was under grievance procedures of collective bargaining agreement or under grievance procedures established by Maritime Employees' Commission.

Reversed and remanded.

West Headnotes

[1] **Contracts 95**  147(1)

95 Contracts
 95II Construction and Operation
 95II(A) General Rules of Construction
 95k147 Intention of Parties

95k147(1) k. In general. Most Cited Cases

In construing a written contract, the intent of the parties controls.

[2] **Contracts 95**  147(3)

95 Contracts
 95II Construction and Operation
 95II(A) General Rules of Construction
 95k147 Intention of Parties
 95k147(3) k. Construing whole contract together. Most Cited Cases

The court ascertains the intent of the parties to a contract from reading the contract as a whole.

[3] **Contracts 95**  143(2)

95 Contracts
 95II Construction and Operation
 95II(A) General Rules of Construction
 95k143 Application to Contracts in General

95k143(2) k. Existence of ambiguity. Most Cited Cases

The court does not read ambiguity into a contract.

[4] **Contracts 95**  152

95 Contracts
 95II Construction and Operation
 95II(A) General Rules of Construction
 95k151 Language of Instrument
 95k152 k. In general. Most Cited Cases
 The court gives words and provisions in a contract their ordinary meaning.

[5] **Contracts 95**  143(2)

95 Contracts
 95II Construction and Operation
 95II(A) General Rules of Construction
 95k143 Application to Contracts in Gen-

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eral

95k143(2) k. Existence of ambiguity.
 Most Cited Cases

If the meaning of words in a contract is uncertain or if they are capable of more than one meaning, the court considers them ambiguous.

[6] **Contracts 95** ⚡️ **143(2)**

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k143 Application to Contracts in General

95k143(2) k. Existence of ambiguity.
 Most Cited Cases

Words and provisions in a contract are not ambiguous simply because a party suggests an opposing meaning.

[7] **Labor and Employment 231H** ⚡️ **1279**

231H Labor and Employment

231HXII Labor Relations

231HXII(E) Labor Contracts

231Hk1268 Construction

231Hk1279 k. Wages and hours. Most Cited Cases

Under collective bargaining agreement (CBA) between Department of Transportation (DOT) and union representing licensed engineer officers and unlicensed engine room employees for Washington State Ferry (WSF) system, watch changes during which off-going employees exchange any pertinent information about operation of vessels before being relieved by on-coming employees, which watch changes extended beyond regular assigned work day of such employees, were a work activity for which State must compensate such employees.

[8] **Contracts 95** ⚡️ **143(4)**

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k143 Application to Contracts in Gen-

eral

95k143(4) k. Subject, object, or purpose as affecting construction. Most Cited Cases

Contracts 95 ⚡️ **147(3)**

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k147 Intention of Parties

95k147(3) k. Construing whole contract together. Most Cited Cases

Contracts 95 ⚡️ **169**

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k169 k. Extrinsic circumstances. Most Cited Cases

The language of the contractual provisions at issue is only one factor in the equation of the parties' intent, and the court also looks to the contract as a whole, its subject matter and objective, the circumstances of its making, subsequent acts and conduct of the parties, and the reasonableness of the parties' interpretations.

[9] **Contracts 95** ⚡️ **176(3)**

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k176 Questions for Jury

95k176(3) k. Extrinsic facts. Most Cited Cases

Interpretation of a contract provision is a question of law if: (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence.

[10] **Contracts 95** ⚡️ **147(1)**

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

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95k147 Intention of Parties

95k147(1) k. In general. Most Cited Cases

Unilateral and subjective beliefs about the impact of a written contract do not represent the intent of the parties.

[11] **Contracts 95** ↪ 170(1)

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k170 Construction by Parties

95k170(1) k. In general. Most Cited Cases

The subsequent conduct of the parties to a contract is only one factor that may aid in elucidating the parties' intent.

[12] **Evidence 157** ↪ 397(1)

157 Evidence

157XI Parol or Extrinsic Evidence Affecting Writings

157XI(A) Contradicting, Varying, or Adding to Terms of Written Instrument

157k397 Contracts in General

157k397(1) k. In general. Most Cited Cases

Extrinsic evidence may not be used to add to, modify, or contradict the unambiguous terms of a contract provision, absent evidence of fraud, accident, or mistake.

[13] **Labor and Employment 231H** ↪ 1279

231H Labor and Employment

231HXII Labor Relations

231HXII(E) Labor Contracts

231Hk1268 Construction

231Hk1279 k. Wages and hours. Most Cited Cases

Absent evidence of fraud, accident, or mistake, unambiguous provisions of collective bargaining agreement (CBA) between Department of Transportation (DOT) and union representing licensed

engineer officers and unlicensed engine room employees for Washington State Ferry (WSF) system, under which provisions the union members were entitled to compensation for watch changes that extended beyond regular assigned work day, could not be contradicted by extrinsic evidence that custom and practice in maritime industry was that watch turnover was not separately compensable.

[14] **Labor and Employment 231H** ↪ 1560

231H Labor and Employment

231HXII Labor Relations

231HXII(H) Alternative Dispute Resolution

231HXII(H)4 Proceedings

231Hk1559 Grievance Proceedings

231Hk1560 k. In general. Most Cited Cases

Remedy for licensed engineer officers and unlicensed engine room employees for Washington State Ferry (WSF) system, regarding their claim of entitlement to compensation for watch changes that extended beyond regular assigned work day, was under grievance procedures of collective bargaining agreement (CBA) between union and Department of Transportation (DOT), or under grievance procedures established by Maritime Employees' Commission (MEC), rather than by civil action under wage payment statutes. West's RCWA 47.64.150, 47.64.280(2)(a), 49.52.050, 49.52.070.

[15] **Ferries 172** ↪ 27

172 Ferries

172II Regulation and Operation

172k27 k. Power to control and regulate. Most Cited Cases

The Maritime Employees' Commission (MEC) is an administrative agency created by the Washington State legislature, which Commission has only such power as the legislature chooses to grant. West's RCWA 47.64.280.

[16] **Administrative Law and Procedure 15A** ↪ 5

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15A Administrative Law and Procedure
 15AI In General
 15Ak4 Constitutional and Statutory Provisions in General
 15Ak5 k. Agencies and proceedings affected. Most Cited Cases

Ferries 172 ↪27

172 Ferries
 172II Regulation and Operation
 172k27 k. Power to control and regulate. Most Cited Cases
 The Administrative Procedure Act (APA) applies to decisions of the Maritime Employees' Commission (MEC) as a state agency authorized to adjudicate disputes. West's RCWA 34.05.001 et seq.

[17] Statutes 361 ↪223.1

361 Statutes
 361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k223 Construction with Reference to Other Statutes
 361k223.1 k. In general. Most Cited Cases

Statutes 361 ↪223.4

361 Statutes
 361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k223 Construction with Reference to Other Statutes
 361k223.4 k. General and special statutes. Most Cited Cases

In construing conflicting statutes, the primary objective of the court is to ascertain and carry out the intent and purpose of the legislature, and thus, the court gives effect to each of the statutes, while generally giving preference to the more specific and more recently enacted statute.

**429 Stewart Arthur Johnston, Atty. General Office L & p Div., Kara Anne Larsen, Office of The Atty. General, Olympia, WA, for Appellant.

Lewis Lynn Ellsworth, Gordon Thomas Honeywell, Warren Evans Martin, Tacoma, WA, for Respondents.

BRIDGEWATER, P.J.

*814 ¶ 1 The State appeals from a summary judgment order in favor of Washington State Ferry employees, in which the trial court agreed that the State willfully deprived the employees of compensation for watch changes that extended beyond their regular assigned work day. Washington State Ferry policies require these watch changes, during which the off-going employees exchange any pertinent information about the operation of the vessels before being relieved by on-coming employees.

¶ 2 We hold that, under the collective bargaining agreement (CBA), watch changes are a work activity for which the State must compensate employees. And we hold that the employees failed to exhaust either their contractual remedies under the CBA or their administrative remedies under the Maritime Employees' Commission (MEC). Because the employees' lawsuit was inappropriate, the trial court should have granted summary judgment in favor of the State. Therefore, the employees must seek a remedy either through the procedures established by the CBA or through the procedures established by the MEC. Accordingly, we reverse and remand for entry of a summary judgment in favor of the State.

*815 FACTS

¶ 3 The respondents in this case are licensed engineer officers and unlicensed engine room employees for the Washington State Ferry (WSF) system. Under a CBA between the Marine Engineers Beneficial Association and the Washington State Department of Transportation (DOT), these employees have negotiated various provisions for overtime compensation.

¶ 4 For instance, licensed engineer officers and unlicensed engine room employees generally are entitled to overtime compensation at a rate of two

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times the base rate in their classification.^{FN1} When work is extended 15 minutes or less beyond a regular assigned work day,^{FN2} the CBA requires the State to compensate the employee for one-quarter hour at the overtime rate. When work is extended 15 minutes or more beyond a regular assigned work day, the CBA requires the State to compensate the employee in increments of one hour at the overtime rate. Nevertheless, “[s]uch extended work shifts shall not be scheduled on a daily or regular basis.” CP at 72, 107.

FN1. The employees are not always entitled to overtime compensation, though. “Time on duty due to emergency service or delay on account of collision, breakdown, terminal damage, stranding, rendering aid to another vessel, rendering aid to a person, or persons in distress, or life-saving shall not result in overtime pay.” CP at 72, 113.

FN2. Depending on a vessel's schedule, a regular assigned work day could be 8 hours or 12 1/2 hours.

¶ 5 Each regular assigned work shift aboard a ferry is called a watch. These watches do not overlap. When one watch ends, another watch immediately begins. Washington State Ferry policies require that the off-going employees exchange any pertinent information about the operation of the vessels before being relieved. The respondents' **430 expert concluded that on average these watch changes lasted about 11 minutes; the State's expert concluded that on average these watch changes lasted about 5 minutes.

¶ 6 Even though watch changes extend the employees' work beyond a regular assigned work shift, the State does *816 not compensate employees for watch changes. In defense of its position, the State notes that: (1) the maritime industry does not consider watch changes compensable work; (2) the CBA is silent about compensation for watch changes; (3) no employee has ever sought overtime

compensation for watch changes; and (4) compensation for watch changes has never been the subject of collective bargaining.

¶ 7 Because of the State's position, the respondents brought a class action lawsuit on behalf of themselves and all other similarly situated employees of the marine transportation division of the DOT. They alleged that the State unlawfully withheld their wages under chapter 49.48 RCW and chapter 49.52 RCW.

¶ 8 The State moved for summary judgment, arguing that there was no legal basis for the claim and that the employees failed to exhaust their administrative remedies before the MEC. But the trial court denied the State's motion.

¶ 9 The employees then moved for partial summary judgment, arguing that watch changes are compensable work under chapter 49.48 RCW and/or chapter 49.52 RCW. The trial court agreed with the employees and granted their motion.

¶ 10 Thereafter, both the State and the employees moved for summary judgment. Again, the State argued in part that: (1) the employees are not entitled to any compensation for watch changes under the CBA; (2) the employees failed to exhaust their administrative remedies before the MEC; and (3) in any case, the State did not willfully deprive the employees of compensation for watch changes. The State also argued that watch changes should not be considered work because they are a de minimis activity. The employees argued that the State willfully deprived them of compensation for watch changes and that they were entitled to twice the amount of wages unlawfully withheld under RCW 49.52.070.

¶ 11 The trial court denied the State's motion for summary judgment, but granted the employees' motion for *817 summary judgment. The trial court then entered judgment for the employees.

ANALYSIS

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I. STANDARD OF REVIEW

¶ 12 On review of an order for summary judgment, we perform the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash.2d 853, 93 P.3d 108 (2004). Thus, the standard of review is de novo. *Morton v. McFall*, 128 Wash.App. 245, 252, 115 P.3d 1023 (2005). Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). We consider the facts and all reasonable inferences in the light most favorable to the non-moving party. *Scott v. Pac. W. Mountain Resort*, 119 Wash.2d 484, 502-03, 834 P.2d 6 (1992). Summary judgment is granted only if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wash.2d 16, 26, 109 P.3d 805 (2005). “All questions of law are reviewed de novo.” *Berger v. Sonneland*, 144 Wash.2d 91, 103, 26 P.3d 257 (2001).

II. THE RIGHT TO COMPENSATION FOR WATCH CHANGES IS DERIVED FROM THE CBA

¶ 13 The State claims that “[t]he collective bargaining agreements contain all the terms and conditions of employment and are the exclusive source for wages.” Br. of Appellant at 15. And because the CBA is allegedly silent about compensation for watch changes and because the employees did not seek a remedy under the CBA, the State contends that their lawsuit must fail. But we disagree with the State that the CBA is silent about compensation for watch changes.

**431 [1][2][3] ¶ 14 In construing a written contract, such as the CBA here, we have consistently applied the following rules: *818 (1) the intent of the parties controls; (2) we ascertain that intent from reading the contract as a whole; and (3) we do not read ambiguity into the contract. *Dice v. City of Montesano*, 131 Wash.App. 675, 683-84,

128 P.3d 1253, *review denied*, 158 Wash.2d 1017, 149 P.3d 377 (2006); *Mayer v. Pierce County Med. Bureau*, 80 Wash.App. 416, 420, 909 P.2d 1323 (1995).

[4][5][6] ¶ 15 Furthermore, we give words and provisions in a contract their ordinary meaning. *Corbray v. Stevenson*, 98 Wash.2d 410, 415, 656 P.2d 473 (1982). If their meaning is uncertain or if they are capable of more than one meaning, we consider them ambiguous. *Shafer v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc.*, 76 Wash.App. 267, 275, 883 P.2d 1387 (1994), *review denied*, 127 Wash.2d 1003, 898 P.2d 308 (1995). But words and provisions in a contract are not ambiguous simply because a party suggests an opposing meaning. *Mayer*, 80 Wash.App. at 421, 909 P.2d 1323.

[7] ¶ 16 Here, we hold that the CBA unambiguously addresses compensation for watch changes in its definition of wages and its treatment of overtime. As we have noted, the CBA requires: (1) the State to compensate the employees for one-quarter hour at the overtime rate when work is extended 15 minutes or less beyond a regular assigned work day; and (2) the State to compensate the employees in increments of one hour at the overtime rate when work is extended 15 minutes or more beyond a regular assigned work day. The ordinary meaning of these provisions leaves no room for alternative interpretations. Consequently, the language itself is not ambiguous.

[8][9] ¶ 17 But the language of these provisions is only one factor in the equation of the parties' intent. *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.*, 120 Wash.2d 573, 580, 844 P.2d 428 (1993). In determining the parties' intent, we also look to the contract as a whole, its subject matter and objective, the circumstances of its making, the subsequent acts and conduct of the parties, and the reasonableness of *819 the parties' interpretations. *Berg v. Hudesman*, 115 Wash.2d 657, 667, 801 P.2d 222 (1990).^{FN3}

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FN3. Under *Berg*, interpretation of a contract provision is a question of law: (1) when the interpretation does not depend on the use of extrinsic evidence or (2) when only one reasonable inference can be drawn from the extrinsic evidence. *Berg*, 115 Wash.2d at 668, 801 P.2d 222.

[10][11] ¶ 18 The State contends that no employee has ever sought overtime compensation for watch changes and that the union has never made compensation for watch changes the subject of collective bargaining.^{FN4} Yet, during oral argument, the State candidly acknowledged that even a “layman” certainly would understand that watch changes are a work activity. And regardless of the State’s inconsistent positions, the CBA clearly provides compensation for work that is extended beyond a regular assigned work day.

FN4. We note that our role is to ascertain the mutual intent of the contracting parties. *Dwellely v. Chesterfield*, 88 Wash.2d 331, 335, 560 P.2d 353 (1977). “Unilateral and subjective beliefs about the impact of a written contract do not represent the intent of the parties.” *Olympia Police Guild v. City of Olympia*, 60 Wash.App. 556, 559, 805 P.2d 245 (1991). Moreover, the subsequent conduct of the parties is only one factor that may aid in elucidating the parties’ intent. *Berg*, 115 Wash.2d at 668, 801 P.2d 222.

[12][13] ¶ 19 The State also contends, “It is undisputed that it is the custom and practice in the maritime industry that watch turnover is not separately compensable.” Br. of Appellant at 27. But extrinsic evidence may not be used to add to, modify, or contradict the terms of a contract provision absent evidence of fraud, accident, or mistake. *In re Marriage of Schweitzer*, 132 Wash.2d 318, 327, 937 P.2d 1062 (1997); *Berg*, 115 Wash.2d at 669, 801 P.2d 222. Here, in the absence of fraud, accident, or mistake, the State asks us to view the custom and practice of not providing compensation for

watch changes as “an expression of the common law of the maritime industry that has become an implied term of the collective bargaining agreements.” Br. of Appellant at 27. But, consistent with *Berg*, we refuse to **432 add to, modify, or contradict the unambiguous provisions of the CBA.^{FN5}

FN5. We note that the principles of *Berg* readily apply to collective bargaining agreements. *Olympia Police Guild*, 60 Wash.App. at 559-60, 805 P.2d 245.

*820 ¶ 20 The State finally contends that watch changes are a *de minimis* activity, for which the employees should receive no compensation. But we hold that the State’s argument is unreasonable and ill-founded. First, the State requires this regular and essential activity. Second, in collectively bargaining with the employees, the State agreed to this compensation practice. Third, we are aware of no state authority that applies a *de minimis* rule, and the State has shown no compelling reason for us to apply such a rule in light of their compensation practice. In fact, the State’s reliance on *Lindow v. United States*, 738 F.2d 1057 (9th Cir.1984), is misplaced. In *Lindow*, the Ninth Circuit Court of Appeals applied a federal *de minimis* rule and found that the plaintiffs’ claims were *de minimis* when the activity was: (1) irregular; and (2) difficult or impractical for the administration to record. *Lindow*, 738 F.2d at 1063-64. In contrast, given the testimony of the State and the employees, watch changes here are: (1) regular; and (2) not difficult or impractical for the State to monitor and record.

¶ 21 Here, the only reasonable interpretation of the CBA provision addressing the definition of wages is unambiguous and clear: the State must compensate the employees for watch changes.

III. RCW 47.64.150 IS CONTROLLING

¶ 22 Nevertheless, the employees argue that they could not seek a remedy under the CBA in this case because “it would not involve the application or interpretation of any provision of the agreement.” Br. of Resp’t at 35-36. Consequently, they

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argue that they were entitled to a statutory remedy under RCW 49.52.050 and RCW 49.52.070.

¶ 23 First, we disagree with the employees that they could not seek a remedy under the CBA. As explained above, the CBA unambiguously addresses compensation for watch changes in its definition of “wages.” Naturally, any effort by the employees to enforce these provisions *would* involve applying the CBA, its grievance procedures, and its remedies.

[14] *821 ¶ 24 Second, we disagree with the employees that they were entitled to a statutory remedy under RCW 49.52.050 and RCW 49.52.070. In part, RCW 49.52.050 states:

Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who

...

(2) Wilfully and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract ...

...

Shall be guilty of a misdemeanor.

And RCW 49.52.070 provides:

Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of subdivisions (1) and (2) of RCW 49.52.050 shall be liable in a civil action by the aggrieved employee or his assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: PROVIDED, HOWEVER, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations.

[15][16] ¶ 25 But when the relevant statutory provisions are read together and as a whole, it is clear that the statutory remedy under RCW 49.52.070 does not apply to ferry employees. Instead, we hold that the employees were obligated to pursue their statutory remedies under RCW 47.64.150, which provides:

An agreement with a ferry employee organization that is the exclusive representative of ferry employees in an appropriate unit may provide procedures for the consideration of ferry employee grievances **433 and of disputes over the interpretation and application of agreements. Negotiated procedures may provide for binding arbitration of ferry employee grievances and of disputes over the interpretation and application of existing agreements. An arbitrator's decision on a grievance *822 shall not change or amend the terms, conditions, or applications of the collective bargaining agreement. The procedures shall provide for the invoking of arbitration only with the approval of the employee organization. The costs of arbitrators shall be shared equally by the parties.

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 as provided in RCW 47.64.280.

(Emphasis added). And RCW 47.64.280(2)(a) provides that the MEC ^{FN6} shall “[a]djust all complaints, grievances, and disputes between labor and management arising out of the operation of the ferry system as provided in RCW 47.64.150.” ^{FN7}

FN6. The MEC is an administrative agency created by the Washington legislature and has only such power as the legislature chooses to grant. *Dep't of Transp. v. Inlandboatmen's Union*, 130 Wash.App. 472, 475, 123 P.3d 137 (2005), *review denied*, 157 Wash.2d 1020, 142 P.3d 607 (2006).

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Chapter 47.64 RCW clearly shows that “the Washington Legislature has authorized the MEC to intercede in labor negotiations between WSF on the one hand, and, on the other hand, ferry employees and a ferry employee organization.” *Inlandboatmen's Union*, 130 Wash.App. at 479, 123 P.3d 137. In addition, the Administrative Procedure Act, chapter 34.05 RCW, applies to decisions of the MEC as a state agency authorized to adjudicate disputes. *Dep't of Transp. v. Inlandboatmen's Union*, 103 Wash.App. 573, 579, 13 P.3d 663 (2000).

FN7. Chapter 47.64 RCW does not define complaint, grievance, or dispute. See RCW 47.64.011.

¶ 26 By their plain terms, RCW 49.52.070 and RCW 47.64.150 appear to be in conflict. RCW 49.52.070 allows aggrieved employees to seek a remedy through a civil action. But RCW 47.64.150 requires aggrieved ferry employees to seek a remedy either through procedures established by the CBA or through procedures established by the MEC.

[17] ¶ 27 “In construing conflicting statutory language, ‘the primary objective of the court is to ascertain and carry out the intent and purpose of the legislature in creating it.’ ” *Gorman v. Garlock, Inc.*, 155 Wash.2d 198, 210, 118 P.3d 311 (2005) (quoting *823 *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wash.2d 224, 239, 59 P.3d 655 (2002), cert. denied, 538 U.S. 1057, 123 S.Ct. 2221, 155 L.Ed.2d 1107 (2003)). Thus, we give effect to each of the statutes, while generally giving preference to the more specific and more recently enacted statute. *Tunstall v. Bergeson*, 141 Wash.2d 201, 211, 5 P.3d 691 (2000), cert. denied, 532 U.S. 920, 121 S.Ct. 1356, 149 L.Ed.2d 286 (2001).

¶ 28 Here, we give preference to the more recent and far more specific language of RCW

47.64.150. After all, the policy of the legislature in originally enacting RCW 49.52.050 and RCW 49.52.070 in 1939 was to prevent employers from coercing employees into making secret rebates from their wages. *McDonald v. Wockner*, 44 Wash.2d 261, 269-71, 267 P.2d 97 (1954); see Laws of 1939, ch. 195, § 1-5.^{FN8} But the policy of the legislature in enacting RCW 47.64.150 in 1983 included the desire to:

FN8. We note, however, that the application of RCW 49.52.050 and RCW 49.52.070 has changed over the years to include claims against employers for unlawfully held wages, regardless of whether the claim involved secret rebates of wages or false records. See *Wingert v. Yellow Freight Sys., Inc.*, 146 Wash.2d 841, 50 P.3d 256 (2002); *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wash.2d 824, 991 P.2d 1126, 1 P.3d 578 (2000).

promote harmonious and cooperative relationships between the ferry system and its employees by permitting ferry employees to organize and bargain collectively; ... prohibit and prevent all strikes or work stoppages by ferry employees; ... protect the rights of ferry employees with respect to employee organizations; and ... promote just and fair compensation, benefits, and working conditions for ferry system employees.

RCW 47.64.006; see Laws of 1983, ch. 15, § 1-33. And the legislature created the **434 MEC to achieve these ends. RCW 47.64.280(1); *Dep't of Transp. v. Inlandboatmen's Union*, 103 Wash.App. 573, 578, 13 P.3d 663 (2000). Moreover, if we were to allow the employees to seek a remedy under RCW 49.52.070, we would render RCW 47.64.150 and the rest of chapter 47.64 RCW “meaningless or superfluous.” *Whatcom County v. City of Bellingham*, 128 Wash.2d 537, 546, 909 P.2d 1303 (1996). We cannot condone such a result. *824 See *Gorman*, 155 Wash.2d at 211, 118 P.3d 311. Instead, consistent with the aforementioned principles of statutory

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construction, we hold that the employees were obligated to pursue their statutory remedies under RCW 47.64.150.

IV. EXHAUSTION OF GRIEVANCE & ARBITRATION PROCEDURES

¶ 29 According to the plain language of RCW 47.64.150, ferry employees must pursue a grievance through the procedures established by the CBA unless “no such procedures are so provided.” RCW 47.64.150; *Hill v. Dep't of Transp.*, 76 Wash.App. 631, 645, 887 P.2d 476, review denied, 126 Wash.2d 1023, 896 P.2d 63 (1995).

¶ 30 Here, the CBA provided grievance procedures to the employees. In the event of a controversy or dispute arising from applying or interpreting the CBA, licensed engineer officers are to “present the grievance or dispute in writing to the other party as soon as possible” for resolution of the matter. CP at 91. In the event the parties fail to agree on a resolution, either party can submit the matter to arbitration before the MEC or an independent third party for a final resolution. In any case, the arbitrator's decision is final and binding.

¶ 31 And in the event of a dispute involving the interpretation, application, or alleged violation of the CBA, unlicensed engineer officers are to use the exclusive CBA grievance procedures. In fact, no other remedies may be utilized by any person ... until the grievance procedures herein have been exhausted. The initial grievance procedures include informal resolution and formal resolution of the grievance. But if the matter has not been satisfactorily resolved, the Union may submit the matter to arbitration before the MEC or an independent third party for a final resolution. In any case, the arbitrator's decision is final and binding.

¶ 32 Even assuming, arguendo, that the employees' claim was not a grievance for purposes of the CBA, and that the employees therefore had no grievance procedures available through the CBA, the employees nevertheless were obligated*825 to pursue a remedy from the MEC according to RCW

47.64.150 before seeking a remedy at law. See *Hill*, 76 Wash.App. at 645, 887 P.2d 476. Here, without question, the employees had a complaint, grievance, or dispute that arose “out of the operation of the ferry system.” RCW 47.64.280(2). And the MEC would have the authority to address the employees' dissatisfaction with watch changes and overtime pay.^{FN9}

FN9. And before seeking a remedy through the court system, the employees would have to exhaust all rights of administrative appeal. See *S. Hollywood Hills Citizens Ass'n v. King County*, 101 Wash.2d 68, 73, 677 P.2d 114 (1984). After all, claims under RCW 47.64.150 and RCW 47.64.280(2) are originally cognizable by the MEC, which has established mechanisms for resolving complaints by aggrieved parties and administrative remedies to provide the relief sought. See Title 316 WAC.

V. CONCLUSION

¶ 33 It is undisputed that the employees in this case failed to seek a remedy either through the procedures established by the CBA or through the procedures established by the MEC. By resorting to the court system, we agree with the State that the employees have “short-circuit[ed]” RCW 47.64.150. Br. of Appellant at 29. Having failed to exhaust either their contractual remedies or their administrative remedies, we hold that the employees are precluded from bringing this action. See *S. Hollywood Hills Citizens Ass'n v. King County*, 101 Wash.2d 68, 73, 677 P.2d 114 (1984); *Smith v. Gen. Elec. Co.*, 63 Wash.2d 624, 625-27, 388 P.2d 550 (1964); *Moran v. Stowell*, 45 Wash.App. 70, 75, 724 P.2d 396, review denied, 107 Wash.2d 1014 (1986); *Garton v. N. Pac. Ry. Co.*, 11 Wash.App. 486, 489, 523 P.2d 964 (1974).

**435 ¶ 34 And we hold that the trial court erred in granting summary judgment to the employees. Nevertheless, we emphasize that watch changes are a regular, essential, and required work

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activity for which the State must compensate under the CBA. And whether watch changes are work or whether watch changes must be compensated is not an *826 issue for future grievance or arbitration. We also emphasize that our holding in this case is limited to ferry employees as defined in RCW 47.64.011(5).^{FN10} And because of this holding, we do not address any other statutory remedies apart from RCW 47.64.150.^{FN11}

FN10. Because our decision rests exclusively on RCW 47.64.150, and the State is not an employer under the Labor-Management Relations Act, 29 U.S.C. § 185, we do not reach the issue of whether the employees' claims are subject to federal preemption under section 301 of the Labor-Management Relations Act. See 29 U.S.C. § 152(2); *Livadas v. Bradshaw*, 512 U.S. 107, 121-22, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985); see also *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wash.2d 120, 129, 839 P.2d 314 (1992); *United Food & Commercial Workers Union Local 1001 v. Mut. Benefit Life Ins. Co.*, 84 Wash.App. 47, 51, 925 P.2d 212, review denied, 133 Wash.2d 1021, 950 P.2d 478 (1997); *Ervin v. Columbia Distrib., Inc.*, 84 Wash.App. 882, 888-89, 930 P.2d 947 (1997).

FN11. But we note that chapter 49.46 RCW, the Minimum Wage Act, does not apply to the employees. The MWA specifically exempts vessel operating crews of the ferry system. RCW 49.46.010(5)(m). And we disagree with the State's contention that chapter 47.64 RCW conflicts with chapter 49.12 RCW, the Industrial Welfare Act (IWA). Except for its conclusory statements, the State has not explained how

chapter 47.64 RCW conflicts with chapter 49.12 RCW, chapter 43.22 RCW, or chapter 296-126 WAC. In fact, we note that the IWA operates as a floor for labor standards, above which parties may contract through collective bargaining agreements for terms that enhance or exceed those minimum standards. *Wingert*, 146 Wash.2d at 852; 50 P.3d 256 (quoting *Wingert v. Yellow Freight Sys., Inc.*, 104 Wash.App. 583, 596, 13 P.3d 677 (2000)).

VI. ATTORNEY FEES

¶ 35 Because the employees at this time have not recovered any wages owed, we do not award attorney fees under either RCW 49.48.030 or RAP 18.1.

¶ 36 Reversed and remanded to enter judgment on behalf of the State of Washington, Department of Transportation.

We concur: QUINN-BRINTNALL and PENOYAR, JJ.

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STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

DISTRICT NO. 1, MARINE ENGINEERS'
BENEFICIAL ASSOCIATION,

Grievant,

v.

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION, FERRIES
DIVISION,

Respondent.

MEC CASE NO. 16-08

DECISION NO. 563 - MEC

DECISION AND AWARD

APPEARANCES

Reid, Pederson, McCarthy and Ballew by *Michael McCarthy*, Attorney, appearing for the District No. 1, Marine Engineers' Beneficial Association (MEBA).

Robert McKenna, Attorney General, by *David Slown* and *Kara Larsen*, Assistant Attorneys General, appearing for the Washington State Department of Transportation, Ferries Division (WSF).

NATURE OF PROCEEDING

WSF's engine room employees are all required to do a watch turnover or changeover at the beginning and end of every shift, whereby the off-going crew relays to the oncoming crew the status of the engine room and ongoing issues that may have arisen during that shift. The WSF has never paid engine room employees for the time involved in doing the turnover.

On August 11, 2004, several MEBA members filed a class action lawsuit in Pierce County Superior Court seeking wages for the time spent performing turnover functions. MEBA members prevailed. The Court ordered WSF to pay engine room employees wages for turnover, plus interest, attorneys' fees and double damages under RCW 49.52.050 and RCW 49.52.070. WSF appealed, arguing that the employees' claims should have been brought under the Collective Bargaining Agreement (CBA).

The Washington Court of Appeals reversed the Superior Court's ruling, dismissing the class action lawsuit because the employees' claims should have been brought pursuant to RCW

47.64.150, which required them to seek a remedy through procedures in the CBA or procedures established by the MEC. However, the Court of Appeals' decision emphasized that "watch changes are a regular, essential, and required work activity for which the State must compensate under the CBA. And whether watch changes are work or whether watch changes must be compensated is not an issue for future grievance or arbitration."

On March 14, 2008, District No. 1 MEBA filed the instant grievance with the MEC (docketed as MEC Case 16-08) seeking wages for engine room employees for time spent on watch turnover.

ISSUES PROPOSED BY THE UNION

1. How much money should the Employer be required to pay under the decision of the Washington Court of Appeals in Davis, et al v. Washington Department of Transportation, No. 04-2-010585-0?
2. Should the Employer also be required to pay double damages, interest, and attorney's fees and costs?

ISSUE PROPOSED BY THE EMPLOYER

Did Washington State Ferries violate the Collective Bargaining Agreement (CBA) between WSF and MEBA by not paying overtime compensation for routine watch turnover performed by engine room employees?

RECORD BEFORE THE MARINE EMPLOYEES' COMMISSION

1. Request for Grievance Arbitration, filed March 14, 2008.
2. Notice of Scheduled Hearing, dated August 1, 2008.
3. The official transcript of the hearing conducted on April 3, 2009.
4. Exhibits 1—18, accepted into evidence from the parties during the April 3, 2009 hearing (including the 1999-2001 MEBA/WSF Licensed and Unlicensed Collective Bargaining Agreements).
5. Post-hearing brief of MEBA, submitted June 5, 2009.
6. Post-hearing brief of WSF, submitted June 5, 2009.

RELEVANT CONTRACT PROVISIONS

1999-2001 MEBA/WSF Collective Bargaining Agreement—Licensed

SECTION 6 – WAGES AND OVERTIME

.....
(b) Overtime compensation shall be at the rate of two times the base rate in each classification. All overtime requests must be approved and authorized by the Port Engineer, except that in emergency cases overtime pay may be approved by the Staff Chief Engineer or Chief Engineer on watch. The Staff Chief or Chief Engineer shall forward an accurate record of all authorized Engine Department overtime to the Operations Department in a timely manner.

(c) Minimum payment for any overtime work performed shall be in increments of one (1) hour, except as follows: the employee will be paid one-quarter (1/4) hour at the overtime rate when work is extended one (1) fifteen (15) minutes or less beyond the regular assigned work day, or two (2) fifteen (15) minutes or less beyond twelve and one-half (12½) hours within a scheduled shift. Such extended work shifts shall not be scheduled on a daily or regular basis. Work performed during the third eight (9) hour shift shall be paid at triple-time, unless a six (6) hour break has been granted. Exceptions to this subsection are specified in SECTION 9.

1999-2001 MEBA/WSF Collective Bargaining Agreement—Unlicensed

RULE 11 – MINIMUM MONTHLY PAY AND OVERTIME

11.01 The overtime rate of pay for employees shall be at the rate of two (2) times the straight time rate in each classification.

11.02 When work is extended fifteen (15) minutes or less beyond the regular assigned work day, or beyond twelve and one-half (12½) hours of a regular assigned work day, such time shall be paid at the overtime rate for one quarter (¼) of an hour. Should work be extended by more that fifteen (15) minutes, the time worked beyond the regular assigned work day or beyond 12½ hours of a regular assigned work day, shall be paid at the overtime rate in increments of one (1) hour. Such extended work shifts shall not be scheduled on a daily or regular basis. Crew members required to work more that one (1) shift without a break shall be paid as follows:

The first scheduled shift shall be paid at the straight time rate; the second shift shall be at the overtime rate; the third shift shall be at triple the straight time rate, unless the employee has had a minimum of a six (6) hour break preceding the third shift excluding travel time.

POSITIONS OF THE PARTIES

Union's Position (MEBA)

The MEBA/WSF Licensed and Unlicensed Collective Bargaining Agreements, (Wages and Overtime sections) require engine room employees to be paid for watch turnover time. The Washington Court of Appeals held that "watch changes are a work activity for which the State must compensate employees." Union Ex. 4, p. 2 of 10. Turnover clearly represents an extension of work beyond the regularly assigned work day. There is a 15-minute minimum payment due at the overtime rate, once per shift per person.

As far as determining how far back the payments to engine room employees need to go, the Union offers three options: April 9, 2007, which is 60 days prior to the filing of the grievances; August 11, 2004, which is when the class action lawsuit was filed in Superior Court; or August 11, 2001, which is three years prior to the filing of the lawsuit.

Employer's Position (WSF)

Historically, no one has ever been paid for watch turnover beyond the professional wages that they are granted under the contract. Turnover is part of the routine duties of engineer officers and unlicensed engineers. The parties agreed on compensation levels understanding that that was part of the job.

Custom and practice in the maritime industry has never included additional compensation for watch turnover. The Commission should look at this grievance as though it had been filed before the class action suit.

FINDINGS OF FACT

1. WSF's engine room employees are all required to do a watch turnover or changeover at the beginning and end of every shift. WSF policies require off-going employees to exchange pertinent information about operation of the vessel before being relieved by the on-coming crew.
2. During the April 3, 2009 MEC hearing, the parties stipulated that the WSF has never paid engine room employees for the time involved in performing the watch turnover, even though watch turnover extends the employee's work beyond the regular assigned work shift.
3. There is no substantive evidence in the record to confirm whether any individual claims for watch turnover may have been made in the past.
4. On August 11, 2004, several MEBA members filed a class action lawsuit in Pierce County Superior Court seeking wages for the time spent performing turnover functions. MEBA

members prevailed. The Court ordered WSF to pay engine room employees wages for turnover, plus interest, attorneys' fees and double damages under RCW 49.52.050 and RCW 49.52.070. WSF appealed, arguing that the employees' claims should have been brought under the grievance procedures of the Collective Bargaining Agreement (CBA).

5. The Washington Court of Appeals reversed the Superior Court's ruling, dismissing the class action lawsuit because the employees' claims should have been brought pursuant to RCW 47.64.150, which required them to seek a remedy through procedures in the CBA or procedures established by the MEC. However, the Court of Appeals also held that "watch changes are a regular, essential, and required work activity for which the State must compensate under the CBA. **And whether watch changes are work or whether watch changes must be compensated is not an issue for future grievance or arbitration.**" (Emphasis added.)

6. On March 14, 2008, District No. 1 MEBA filed the instant request for grievance arbitration.

7. The parties agree that each watch turnover takes less than fifteen (15) minutes.

8. Both the Licensed and Unlicensed Collective Bargaining Agreements provide that, when work is extended less than 15 minutes beyond the regularly assigned workday, the minimum payment is 15 minutes at the overtime rate. Jt. Ex. 2, § 6(c); Jt. Ex. 3, Rule 11.01.

9. There was no evidence that WSF made any attempt to calculate backpay for watch turnover to determine liability, even after the Court of Appeals issued its Decision.

10. The State provided no evidence to the Arbitrator as to any alternative or compromise position regarding watch turnover pay.

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11. The only evidence in the record that provides any reasonable basis for quantifying backpay was submitted by the Union (Union Ex. 12) in the form of a spreadsheet showing overtime calculated for watch turnover at the rate of fifteen (15) minutes at the overtime rate, once per shift per person. Assistant Engineer Andrew Smalley testified that he created the spreadsheet to determine how much the Union believes WSF owes engine room employees for watch turnover, based on three different time periods:

- a. April 9, 2007—March 31, 2009 starting 60 days prior to the filing of the grievances (the grievance period from the MEBA contracts).
- b. August 11, 2004—March 31, 2009, starting when the class action lawsuit was filed in Pierce County Superior Court.
- c. August 11, 2001—March 31, 2009, starting three years prior to the filing of the lawsuit.

12. At the time of the April 3, 2009 arbitration hearing, MEBA had calculated total watch turnover wages for the three corresponding time periods above, as follows:

- a. \$1,921,562.81
- b. \$4,245,383.84
- c. \$6,747,952.48

CONCLUSIONS OF LAW

On the basis of the complete record before him, the findings of fact and legal analysis, the Arbitrator makes the following conclusions of law.

1. The Marine Employees Commission has jurisdiction over the parties and the subject matter pursuant to RCW 47.64.280.
2. The 1999-2001 Licensed and Unlicensed MEBA/WSF Collective Bargaining Agreements were in full force and effect during the time covered by this matter.
3. The Washington State Court of Appeals has ruled that engine room employees are to be compensated under the Collective Bargaining Agreements for time spent on watch turnover.
4. Section 6 of the Licensed MEBA/WSF CBA and Rule 11 of the Unlicensed MEBA/WSF CBA provide compensation for work that is extended beyond a regular assigned work day.

DISCUSSION

The collective bargaining process and the interpretation of collective bargaining agreements are not based on traditional contract law. Collective bargaining agreements are to be interpreted by the parties, based on the intent of the parties during the bargaining process. Where the parties cannot agree, arbitration is the negotiated procedure utilized to settle disputes. It is well settled that courts should not get involved in the merits of grievances. Further, it is a well settled principle of labor law that the courts should defer to the opinion of the arbitrator. The U.S. Supreme Court has held repeatedly that interpretation of labor agreements is for the arbitrator, and that the court has no business overruling an arbitrator's award simply because the court believes its own interpretation is the better one. The Steelworkers case cited by the State in its brief set forth the U.S. Supreme Court's view. It is the view of the Commission that the State of Washington Court of Appeals overstepped its bounds and directed us, in advance of arbitration, as to what our findings should be. We strongly believe it was inappropriate of the court to have given advance instructions to the Commission on the interpretation of the collective bargaining agreement.

However, the matter is before us as an agency of the State of Washington and we are governed by the courts of this State. We therefore concede to the directive of the Court and find that the matter of whether or not watch changeover is "work" within the meaning of the statutes of the State of Washington has already been determined, and our challenge is to determine the proper remedy.

It is unreasonable to believe that had this grievance over watch turnover been filed with MEC prior to the Court proceedings, MEC would not have applied the same interpretation of the contract as the Court. The contract specifically provides for overtime compensation when work is performed prior to or beyond the end of a work shift.

The State's argument that presupposes the Court improperly ruled in this matter is not a matter before the Marine Employees' Commission. However, the Court properly concluded that the contract requires watch turnover pay is owed to engine room employees at WSF.

Decisions of the MEC are subject to appeal and modification by the Courts. It is well understood that the MEC has no authority to hear an appeal or overrule decisions of the Courts. While the MEC shares the concerns of the WSF about the intervention of the Court into the collective-bargaining process, the WSF ignored the directive of the Court at its peril. Thus,

when the Court determined watch changeover to be work and deferred the matter back to the grievance procedure, the WSF should have begun a method of record keeping to track the amount of time worked by employees. It failed to do so. It failed to take any position on remedy. Therefore, the only evidence in the record about the amount of time employees worked and should be compensated for is that presented by the Union. We are obligated to make our decision based on the record presented at the hearing. Given the only evidence presented as to remedy came from the Union, WSF is directed to implement the following Award.

AWARD

1. The request for grievance arbitration, filed by District No. 1 Marine Engineers' Beneficial Association against the Washington State Ferries, is sustained. WSF will compensate engine room employees for lost wages for unpaid watch turnover.

2. WSF and MEBA will examine timesheet records and calculate overtime for each instance that an engine room employee was not paid for watch turnover from April 9, 2007 to the date calculations are completed. Such calculations are expected to be concluded within 90 days of receipt of this award. MEBA will provide WSF with a MEBA member to assist WSF in the calculations of backpay, at WSF's expense.

3. In the alternative, the parties may agree on a lump sum backpay settlement, to be distributed by MEBA to the engine room employees.

4. If the parties cannot resolve the issue or complete calculations within the 90 days referred to in paragraph 2 (unless they mutually agree to extend the time), WSF will pay \$1,921,562.81, plus interest, in backpay to the MEBA, plus any additional watch turnover wages accrued from March 31, 2009 until the award is implemented (Union Ex. 12).

5. Upon presentation of affidavits, WSF will reimburse the MEBA for attorney fees incurred in bringing this grievance before the MEC.

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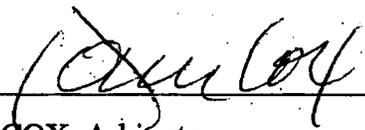
6. Attorney's fees for the firm that prosecuted the class action lawsuit that led to the Court of Appeals Decision are denied. Double damages are denied.

7. WSF will pay interest on the backpay settlement at the rate which would accrue on a civil judgment of the Washington state courts.

8. The Arbitrator will retain jurisdiction over this Award for at least 90 days.

DATED this 24th day of July 2009.

MARINE EMPLOYEES' COMMISSION

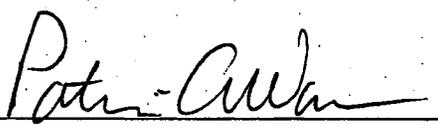


JOHN COX, Arbitrator

Approved by:



JOHN SWANSON, Chairman



PATRICIA WARREN, Commissioner

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

DISTRICT NO. 1, MARINE ENGINEERS'
BENEFICIAL ASSOCIATION,

Grievant,

v.

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION, FERRIES
DIVISION,

Respondent.

MEC CASE NO. 16-08

CERTIFICATE OF SERVICE

I certify that I served a copy of DECISION AND AWARD, DECISION NO. 563-MEC, on all parties or their counsel of record on July 24, 2009 as follows:

- Facsimile and US Mail via Consolidated Mail Service
- US Certified Mail, Return Receipt Requested via Consolidated Mail Service
- Personal Delivery by _____

TO: David Slown/Kara Larsen
Assistant Attorney General
Labor & Personnel
P.O. Box 40145
Olympia, WA 98504-0145

Michael McCarthy
Reid, Pedersen, McCarthy & Ballew
101 Elliott Avenue West, Suite 550
Seattle, WA 98119-4220

(Courtesy copy by US Mail to: Jeff Duncan, Karol Kingery—MEBA; Paul Ganalon, WSF; Jerry Holder, OFM/LRO.)

I certify under penalty of perjury under the laws of the state of Washington, that the foregoing is true and correct.

DATED this 24th day of July 2009 at Olympia, WA.


Linda Hoverter, Spec. Asst.

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

DISTRICT NO. 1, MARINE ENGINEERS'
BENEFICIAL ASSOCIATION,

Grievant,

v.

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION, FERRIES
DIVISION,

Respondent.

MEC CASE NO. 16-08

DECISION NO. 563-A-MEC

ORDER DENYING WSF'S
PETITION FOR
RECONSIDERATION
OF ATTORNEY'S FEES

APPEARANCES

Reid, Pederson, McCarthy and Ballew by *Michael McCarthy*, Attorney, appearing for the District No. 1, Marine Engineers' Beneficial Association (MEBA).

Robert McKenna, Attorney General, by *David Slown* and *Kara Larsen*, Assistant Attorneys General, appearing for the Washington State Department of Transportation, Ferries Division (WSF).

This matter came before the Marine Employees' Commission on August 12, 2009, when WSF filed a Petition for Reconsideration of Attorney's Fees awarded in Decision and Award 563-MEC. On August 20, 2009, the MEBA filed a Response to Employer's Petition for Reconsideration of Attorney's Fees.

ANALYSIS

The Arbitrator acted appropriately and within his contractual authority and obligations. The Employer was on notice from the Court of Appeals that payment for watch changeover was a contractual obligation of WSF. The Arbitrator was put on notice by the Court that WSF and

the State were aware that the Courts have spoken twice and the very language of the Court of Appeals' remand was convincing and compelling.

We emphasize that watch changes are a regular, essential and required work activity for which the State must compensate under the CBA and whether watch changes are work or whether watch changes must be compensated is not an issue for future grievance or arbitration.

(Emphasis added.) It is only reasonable to assume that learned and esteemed counsel exhaustively argued and presented the same rationale and advocacy to the Courts that was advanced to the Arbitrator.

Upon receipt of the Court of Appeals' findings, WSF had every opportunity to work with the Union to pursue an appropriate remedy short of requiring the MEBA to present their members' case to an arbitrator and require additional attorney's fees, in spite of the direction of the Courts.

The Arbitrator is aware that although the decision on its merits is final and binding as to the questions of law and fact, the decision and authority are contractual in nature and are limited to the powers conferred in the RCW's and collective bargaining agreement. After careful review of all relevant facts, the Commission is certain the decision in this case is within its legal and contractual authorities. It also should be noted that a great deal of consideration regarding the parties' operating history, their long, professional enlightened relationship and the Union's desire to settle the issue by offering reasoned alternative proposals influenced the Commission's equitable approach in resolution of the controversy.

It can be argued that our decision has limited merit as to whether the Arbitrator should find an implied obligation in the contract or the RCW's regarding attorney's fees. It can also be argued that the obligations of the Employer to the affected employees were not satisfied by the

decision of the Arbitrator and WSF was not held liable for its complete obligations as enunciated by the Courts.

If the Employer feels a more exhaustive judicial review is appropriate, they can exercise their legal authority.

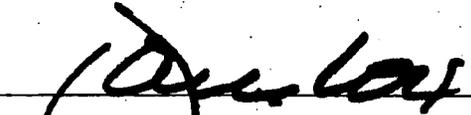
In the present case, the Arbitrator was provided a complete record, the directions of the Courts, a complete representation of all the relevant facts, evidence, testimony and detailed, well-constructed post-hearing briefs. There was no refusal to hear pertinent, material evidence and the decision was reached by careful analysis of the facts and the hearing was, by any standards, a fair hearing.

ORDER

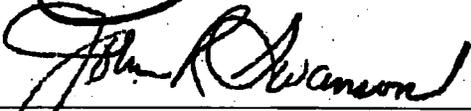
The decision of the Arbitrator and confirmed by the Commission is final and binding. The WSF's Petition for Reconsideration is denied.

DATED this 8th day of September 2009.

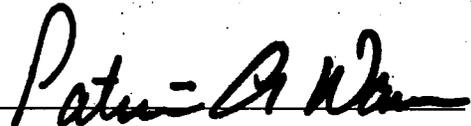
MARINE EMPLOYEES' COMMISSION



JOHN COX, Arbitrator



JOHN SWANSON, Chairman



PATRICIA WARREN, Commissioner

*By telephone
authorization
L. Doucette*

Approved by:

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

DISTRICT NO. 1, MARINE ENGINEERS'
BENEFICIAL ASSOCIATION,

Grievant,

v.

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION, FERRIES
DIVISION,

Respondent.

MEC CASE NO. 16-08

CERTIFICATE OF SERVICE

I certify that I served a copy of ORDER DENYING WSF'S PETITION FOR RECONSIDERATION OF ATTORNEY'S FEES, DECISION NO. 563-A-MEC, on all parties or their counsel of record on September 8, 2009 as follows:

- Facsimile and US Mail via Consolidated Mail Service
- US Certified Mail, Return Receipt Requested via Consolidated Mail Service
- Personal Delivery by _____

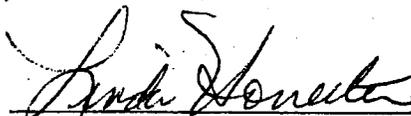
TO: David Slown/Kara Larsen
Assistant Attorney General
Labor & Personnel
P.O. Box 40145
Olympia, WA 98504-0145

Michael McCarthy
Reid, Pedersen, McCarthy & Ballew
101 Elliott Avenue West, Suite 550
Seattle, WA 98119-4220

(Courtesy copy by US Mail to: Jeff Duncan, Karol Kingery—MEBA; Paul Ganalon, WSF; Jerry Holder, OFM/LRO.)

I certify under penalty of perjury under the laws of the state of Washington, that the foregoing is true and correct.

DATED this 8th day of September 2009 at Olympia, WA.


Linda Hoverter, Spec. Asst.

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NO. 41225-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,

Appellant,

v.

MARINE EMPLOYEES' COMMISSION, and
MARINE ENGINEERS' BENEFICIAL ASSOCIATION,

Respondents.

CERTIFICATE OF SERVICE

ROBERT M. MCKENNA
Attorney General

SPENCER W. DANIELS
Assistant Attorney General
WSBA No. 6831
7141 Cleanwater Dr. SW
PO Box 40108
Olympia, WA 98504-0108
(360) 753-6238

COURT OF APPEALS
DIVISION II

11 FEB 24 PM 12:16

STATE OF WASHINGTON

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent ~~Marine~~

BY
DEPUTY

Employees' Commission on all parties or their counsel of record as follows:

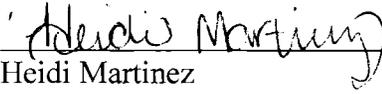
- U.S. Mail to Mr. McCarthy; and
- Personal delivery to Mr. Johnston

TO:

Michael McCarthy
101 Elliott Ave. W., Ste. 550
Seattle, WA 98119

Stewart Johnston
7141 Cleanwater Dr. SW
Labor and Personnel Division
Olympia, WA 98504-0145

DATED this 23rd day of February, 2011, at Olympia, Washington.


Heidi Martinez
Legal Assistant