ALASKA LABOR RELATIONS AGENCY
3301 EAGLE STREET, SUITE 208
P.O. BOX 107026
ANCHORAGE, ALASKA 99510-7026
(907) 269-4895
Fax (907) 269-4898

ALASKA STATE EMPLOYEES ASSOCIATION/AFSCME LOCAL 52, AFL-CIO, (RAYMOND JOHNSON),

Complainant,

vs.

STATE OF ALASKA,

Respondent.

CASE NO. 94-301-ULP

DECISION AND ORDER NO. 193

This case was heard on May 8, 1995, before a panel of the Alaska Labor Relations Board, Vice Chair Stuart H. Bowdoin and Members Robert A. Doyle and Raymond P. Smith, participating, and Hearing Examiner Jan Hart DeYoung, presiding. The record closed on May 8, 1995.

Appearances:

Alison Reardon, business agent III, for complainant Alaska State Employees Association/AFSCME Local 52, AFL-CIO; and Art Chance, labor relations analyst, for respondent State of Alaska.

Digest:

Because the labor organization did not prove a causal link between the discipline of a shop steward and protected activity, it did not establish a violation of AS 23.40.110(a)(1), (3), or (4).

DECISION

This case concerns ASEA's allegations that the State violated AS 23.40.110(a)(1),(3), and (4) by retaliating against ASEA shop steward Raymond Johnson for performing his duties as a shop steward, including his filing of grievances against the State. ASEA alleges the State retaliated against Johnson by supervising his work more closely, assigning him to a different supervisor against his wishes, investigating his handling of permanent fund dividend contacts with families, assigning him a full caseload without considering his entitlement to nine hours of steward time each month, and holding him to a higher standard of job performance than his peers. The State of Alaska maintains that these allegations should be deferred to arbitration because they concern matters that should be handled under the parties' grievance procedures and the fact that the employee is a union shop steward should not elevate the dispute to an unfair labor practice. The State argues in the alternative that it did not commit an unfair labor practice.

Findings of Fact

1. The Alaska State Employees Association/AFSCME Local 52, AFL-CIO (ASEA), is the certified bargaining

representative of the State's general government bargaining unit (GGU).

2. The parties' collective bargaining agreement expired on December 31, 1992. At the time of the hearing, the parties were in the process of negotiating a successor agreement and were operating under the predecessor agreement. The agreement contains a grievance procedure culminating in arbitration. Alaska State Employees Association/AFSCME Local 52, AFL-CIO v. State of Alaska, Decision & Order No. 174, at 2 (April 19, 1994), appeal pending 3AN-94-4342 CI (filed May 18, 1994). At the first step of the procedure, the grievant or a steward can file. At the second step only a shop steward or ASEA business agent can file.

3. Raymond Johnson became employed as a social worker for the Division of Family and Youth Services (DFYS) on August 28, 1991. Before that he had worked for South Central Counseling Center and Anchorage Community and Mental Health Services, a part of South Central. Johnson earned a social work degree from the University of Alaska, Anchorage, in 1989.

4. Johnson was hired by Rita Hutchinson at DFYS. Johnson worked as a social worker III in one of the on-going units. He described his job as to reunify families, by referring members to other agencies and by working with them directly, using a case management approach. Among his responsibilities was the responsibility to make placement studies and recommendations and arrange travel after a recommendation was approved. DFYS also has in-take, licensing, and adoption units.

5. Another social worker, Patricia Driggins, described the difficult nature of the work. Because of the nature of their work, which often results in the removal of children from families, DFYS receives a number of complaints. All of the witnesses agreed that social workers perform highly stressful work under less than ideal conditions.

6. Johnson believes his work for DFYS was praiseworthy. He also believes that he had no problems at DFYS until a "run-in" with Patricia Mitchell.

7. Patricia Mitchell is the staff manager of the district office of DFYS. She was first employed by DFYS on May 1, 1992. She supervises directly the social worker IVs and reports to the division director. Mitchell is a classified employee and a member of the State’s supervisory bargaining unit. Mitchell supervised Johnson’s supervisor, a social worker IV.

8. Mitchell described her work with social workers in part in the context of "staffing" cases. On more complicated cases a supervising social worker IV might ask her to staff a case, which means Mitchell would meet with the supervisor and the social worker directly assigned the case and brainstorm to come up with the best plan for a family. This process gave her an opportunity occasionally to interact directly with Johnson and other social workers. She estimates that she might meet with each social worker an average of once a month in this process.

9. Mitchell was asked to assess Johnson’s overall ability as a social worker and responded by stating that he lacked follow through. She gave as examples the absence in one case of a written case plan required for a special meeting and in another of a special request for funds that was needed.

10. Mitchell’s confrontation with Johnson is at the center of ASEA’s case against the State. Johnson believes his problems at DFYS began with this confrontation. Johnson described it by stating that Mitchell started yelling at him about changing arrangements to transport a child. He states the confrontation was without provocation.

11. Mitchell also described the confrontation. In her version it was provoked by Johnson’s failure to follow a direct order. Mitchell states that Johnson on June 24, 1993, had failed to follow the written instructions of his immediate supervisor in the selection of a person to transport a foster child from Anchorage to Nome. Alan Martin, who was Johnson’s supervisor at the time,[1] told Mitchell that he had instructed Johnson in a memorandum about moving a child to Nome. The Anchorage foster family did not support the decision to move the child. Martin therefore had instructed Johnson not to arrange for the foster family to move the child to Nome but to have the Nome family come to Anchorage to pick up the child as this would be less stressful. Martin brought it to Mitchell’s attention that despite Martin’s instructions Johnson had arranged for the Anchorage family to transfer the child to Nome. Mitchell then met with Johnson about the issue. However, because the travel arrangements were commencing the next morning, she

decided that changing the plans at this late date would cause tremendous conflict. She therefore believes that she gave Johnson very clear instructions in their meeting not to change the travel arrangements. She said, "Leave it just the way it is and we will talk about it the next day." She said that Johnson said, yes, and she was sure that he understood that he was not to do anything further on the case. The next morning she discovered, she believes from Martin, that Johnson left her office and did exactly what she had told him not to do. He did make new travel arrangements consistent with his first directive. Mitchell was very aggravated by this discovery and confronted Johnson in his office. She remembers saying, "What is this about? Why did you do this?" Mitchell admits that she probably raised her voice.

12. Patricia Driggins, another social worker and ASEA shop steward at DFYS, heard Mitchell and was concerned at the tone she was using.

13. The incident resulted in a letter outlining the conduct, declaring that Johnson was "grossly insubordinate" and suspending him for five days without pay. D. Wing, letter to R. Johnson (July 15, 1993), Exh. 1.

14. This letter resulted in the first of seven grievances ASEA filed on behalf of Johnson over his employment at DFYS. Exh. 2 (A93-G-0236). The suspension was overturned. Mitchell believes that the reason was a political one. Johnson believes that his problems after this date stem from his having "challenged Ms. Mitchell and won." ASEA Brief at 2.

15. The outcome of the grievance Johnson pursued for his July 15, 1993, suspension was a settlement reimbursing Johnson for his lost wages and benefits for the suspension and substitution of a letter of instruction for the letter of suspension. Letter of Grievance Resolution (Dec. 30, 1994), Exh. 4. The letter of instruction includes the statement that Johnson does "not have the discretion to choose to follow, or not to follow, the directions of your supervisors." Id., at 2.

16. Johnson was transferred from his initial supervisor Rita Hutchinson to Doris Bergeron. Johnson said he opposed the transfer because he knew it would be a hostile environment for him. When asked to describe why the environment was hostile, Johnson stated, "Because he was being transferred without his OK and without any real justification. I told Patricia Mitchell and Doris that, after my run-ins with them, I did not trust them and I knew they were out to get me." On cross examination, however, it was disclosed that the transfer first occurred as a result of Hutchinson's prolonged absence when all social workers under her supervision were reassigned.

17. Mitchell rated Johnson's supervisor Rita Hutchinson. She found that Hutchinson's greatest asset, her nurturing nature, could also be a weakness and that Hutchinson lacked the ability to deal with problems. Mitchell believed Hutchinson's unit had problems keeping records current and Hutchinson was having difficulty holding her staff accountable and working with them to address this problem.

18. Mitchell confirmed that the initial transfer to Alan Martin and Doris Bergeron had been due to Hutchinson's absence. Hutchinson was out of the office a number of months, between January and June of 1993, due to vacation and illness. Johnson was the only social worker that did not eventually return to Hutchinson's supervision. The reason was that, during Hutchinson's absence, problems with Johnson's case tracking came to Mitchell's attention and Mitchell concluded that Bergeron would be a better supervisor for him. The specific incident Mitchell named was Johnson's failure to file a petition to extend custody as custody was about to or had expired, which had been brought to Bergeron's attention by a guardian ad litem. Bergeron then reviewed Johnson's caseload and found some other cases needing attention. Mitchell asked Bergeron to work with Johnson and find some ways of helping him develop systems for case tracking. Mitchell left him with Bergeron when Hutchinson returned because Bergeron was strong in this area and Hutchinson was not, and she felt Johnson's potential for improvement was higher with Bergeron. In May of 1994 Mitchell believed Johnson to be among the weakest of the staff in time management and documentation. Mitchell believed she had an employee in need of skills but that Johnson had potential.

19. Doris Bergeron began work for the State in July of 1987 as a licensing worker. She transferred to an on-going unit for two years and then transferred to the adoptions unit for two years. In June of 1992 she became a supervisor. She supervised Ray Johnson between June of 1993 and March 1, 1995. Before she became Johnson's supervisor, she audited his cases in response to a report by a guardian ad litem that Johnson had allowed custody to lapse in one of his cases. During the audit Bergeron discovered a case in which the State had continued to pay foster care even though the guardianship had been completed and the family was no longer eligible, cases where case reviews were due and not

completed, cases without records of contacts (ROC forms), and cases with bills from providers that had not been addressed. She concluded that Johnson's case files were less well organized than those of other social workers.

20. Bergeron said Johnson often did not do what she told him. She said Johnson was not defiant. He just did not do what she said. She discussed this problem with him. She believes that her instructions were clear. She concluded that Johnson did not trust her from comments that he made. She believes he felt that she was attacking him personally when she brought matters to his attention but she was only trying to accomplish her job. She tried to solicit Johnson's input so he could succeed in correcting his behavior. Her example was to solicit Johnson's views on time management. She jointly prepared a memorandum with Johnson and provided him a copy. She tried to teach Johnson organizational tools, trying such systems as one involving a dictaphone and another with a notebook partitioned by family. She had "ROC sheets" to record communications prepared with his name on them. Because of Johnson's computer literacy, they spoke about his developing a computer system to help him.

21. ASEA offered into evidence Johnson's evaluation for the period June 28, 1992, to September 15, 1993. Evaluation (Feb. 2, 1994), Exh. 5. It sets forth Johnson's strengths as his ability to work with difficult children, cooperate with other social workers, and his sense of humor. It identified weaknesses in organizational skills, meeting important deadlines, documentation, and writing and establishes goals to assist in remedying these weaknesses. It provides a rating of low acceptable for overall effectiveness in the job. Id. Attached to the evaluation is Johnson's rebuttal, showing he clearly disagrees with the evaluator's assessment of weaknesses. The evaluation was signed by Doris Bergeron. Id.

22. Johnson was asked if he had ever been late in his report writing. He stated that he had but that he had not been disciplined by DFYS. He had, however, been sanctioned by the court. Johnson felt he was in the wrong place at the wrong time -- that the court was sending a message to all of the social workers not to file late reports.

23. The second grievance protested a letter of reprimand and suspension. Exh. 3 (A93-G-0319). In that incident Johnson was disciplined for failure to follow the DFYS policy for notifying parents that DFYS would not be applying for permanent fund dividends for their children. At the hearing Johnson stated DFYS policy provided the option of notification by telephone or in writing. Social worker Driggins concurred that the option of written or oral notification was available to the social workers. Johnson claims the letter of warning was provided even after his supervisor Doris Bergeron confirmed with the families that he had in fact contacted them. He believes he followed the procedures, no children missed their permanent fund dividend check, and the letter was entirely unjustified. On cross examination, Johnson did not remember that two children in his caseload the previous year had not received permanent fund dividend checks. Later he remembered that two had not been filed another earlier year and that it had been a military family that chose, although eligible, not to participate.

24. The previous year the Office of the Ombudsman wrote the director concerning Johnson's and social worker Mark Garlock's failure to notify parents of the need to file a PFD, which resulted in the reexamination of the office's PFD policy. Exh. T.

25. Mitchell described DFYS's permanent fund policy in detail. The 1994 policy was in writing and contained some changes from the 1993 policy. Exh. P. The policy included a draft letter for social workers to send to parents of children for whom DFYS was not filing applications. The purpose of the letter was to document notice to the parents. Sample letter (Jan. 20, 1993), Exh. R; see also S. McComb, memorandum to supervisors (Jan. 18, 1994), Exh Q. The packets were provided to staff by supervisors. The policy manual was not updated and the policy in the manual reflected the 1990 policy, which did allow social workers to notify parents orally. Exh. 11. Although the policy manual was inconsistent with the written policy, there was no evidence supporting the conclusion that any of the social workers were confused by the discrepancy. One social worker, Patricia Driggins, testified that she rarely looked at the manual and, if she had questions, she raised them with her supervisor.

26. Bergeron described how she handled DFYS's permanent fund application policy with the staff in her unit. She set aside a day, February 3, 1994,[2] to focus on permanent fund dividends that began with a breakfast pot luck. Johnson was present at this meeting. Bergeron went over the directions in the policy line by line. She gave out copies of the form letter. It was not acceptable just to call the parents. Exh. R. The staff were each given several copies of the letter and

told to send a copy to parents whose children were in state custody but were in their own home. Johnson did not send such letters. She asked him and he told her that he had not sent letters. She asked if he had contacted the families. He said that he had and that he had recorded the contacts. She could not confirm that he recorded them, although she attempted to do so. He later admitted that he had not documented the contacts. She contacted two families to verify the contacts -- one family could not recall; another had talked to Johnson.

27. Mitchell stated the Ombudsman's letter of the previous year probably did subject Johnson to a higher level of scrutiny the next year.

28. On April 22, 1994, Johnson was sent a letter of warning regarding his failure to document his contacts with families notifying them that DFYS would not be applying for permanent fund dividends for their children. D. Bergeron, memorandum to R. Johnson (April 22, 1994), Exh. 7.

29. On June 2, 1994, Doris Bergeron provided Johnson with a letter of reprimand for exceeding his authorization and not following procedures regarding an out-of-state placement for a child. Exh. 8. On June 2, 1994, Johnson was suspended for five days without pay for his actions in another case. Exh. 9. The problems included absent and inadequate documentation, providing untrue and misleading information to the court, among others, and failure to pursue a case plan in the best interest of the child.

30. Johnson believed that he was singled out for different treatment and other social workers did the same things he did without the same response. However, when asked for specific examples, Johnson did not provide any except to say that their caseloads required them all to cut corners.

31. One example of a different response to similar conduct was provided by Mark Garlock. Mark Garlock is a social worker and shop steward. He described himself as a fishing buddy of Raymond Johnson. He described his understanding of the policy for permanent fund dividend applications for children that was consistent with Bergeron and Mitchell's description. After children are released to their parents, DFYS no longer assumes responsibility for filing dividend applications and it notifies the parents of that fact. Garlock stated that this last year the policy had been to notify parents in writing but in earlier years notification had been by telephone. Garlock had failed to notify a parent during a previous year and that parent did not apply. As a result, the child will have to wait and apply when the child is 18. Garlock stated that he was not disciplined. He informed his supervisor of his omission. He also stated that he missed a court date and was fined by the court but not disciplined. Mitchell stated that Garlock and Johnson were the only two social workers sanctioned by the court. When Garlock was asked why he thought Johnson was disciplined when he had not been, Garlock stated that he thought he had kept his supervisor informed when things were coming down the pike.

32. Any apparent differences in the State's response to the actions of Garlock and Johnson evaporates upon examination. Both Johnson and Garlock were named in the Ombudsman's report for failing to provide parents with notification of DFYS PFD policy. Exh. T. Neither was apparently disciplined that first year. Subsequently, after the policy changed to require written notification, Johnson failed to follow the policy and was disciplined. Garlock understood and followed the policy that year. In addition, both employees were sanctioned by the court and neither was disciplined for that action. Moreover, both men were shop stewards and Garlock had pursued five grievances against the State during his four or so years as a steward. Even if the two employees were treated differently, activities as a shop steward or participation in grievances would not explain the difference because both employees shared this history.

33. Garlock believes his work as a shop steward was a factor in his not being chosen for a licensing position despite his ten years experience.

34. Social worker III, Patricia Driggins, testified about her belief that Mitchell had targeted Johnson. Driggins, who has been a shop steward since July of 1994, believes that discipline is not consistent at DFYS. As an example of disparate treatment, Driggins stated that she had heard "professionals" complaining about certain social workers but had not seen those social workers disciplined. She also stated she knew of one employee who, instead of being disciplined, was transferred to a position with a smaller workload. Driggins attributed this difference to Johnson's union activities. However, she did not provide any names, dates, or any facts from which this Agency could draw this same conclusion.

35. Driggins also believes that she has been discriminated against for her union activities. Driggins believes that she was transferred to the intake unit in retaliation for her work for the union. She was not consulted for her preference. None of the others were transferred and more experienced social workers were not transferred. Mitchell explained the transfer as due to Driggins' experience with the DFYS, which was lacking in the unit to which she was transferred. Mitchell stated she talked to Driggins about the reassignment. She does not remember her stating that she did not want to move. Mitchell denied that the move was related to the fact that Driggins was a shop steward.

36. Johnson was appointed a shop steward some time in 1993. Mitchell was unaware that Johnson was a shop steward until some time after he had been appointed. Mitchell did not see the written notice usually provided when a shop steward was appointed.

37. We find the absence in Johnson's testimony of any statement that his treatment or work environment was linked in any way to his work as a shop steward or on behalf of the union to be significant. He believed he was retaliated against for filing a grievance against Patricia Mitchell. The sole activity recounted in which he performed as a shop steward was in representing a social worker III who was written up for failure to follow a directive from his supervisor. This employee was not disciplined in any way. On redirect Johnson attempted to attribute this disparate treatment to his work with supervisors on behalf of the social workers. Johnson stated he did not participate in many formal evaluations but did work with supervisors to resolve matters informally. But except for his own grievances, Johnson's union work with supervisors remained unclear.

38. Neither Bergeron or Mitchell dealt with Johnson in his role as a shop steward. Bergeron stated that Johnson had not come to her in his capacity as a shop steward on behalf of others. Mitchell stated that she had no problem with Johnson's work as a steward. She had only one meeting with him in his role as a shop steward and it had occurred long after the time period at issue in this hearing. Mitchell could remember no confrontations with him in his role as a steward.

39. Johnson did engage in union picketing during the time period at issue. Johnson stated that he participated with others in picketing the office during his lunch hour for the purpose of urging the State to return to the bargaining table in its negotiations with ASEA. Driggins stated the time period of the picketing as the summer of 1994.

40. Mitchell was asked her reaction to picketing. She said she got a chuckle out of it. She thought others were more concerned about the picketing than they needed to be.

41. Union animus is an issue in this case. Garlock heard management level employees say they did not like the union, naming Gwen McAlpine, the social worker IV who runs the licensing unit, and Patricia Mitchell.

42. Mitchell testified about her feelings about unions. She had come to Alaska from a state in which she had a choice whether to join the union and she chose to join it. When she first began to work for the State in 1990, she sought information about the union and was perturbed that she did not have a choice whether to join the union.[3] Mitchell stated she had always been able to work out her own problems with management. However, Mitchell stated she supported unions and their role.

43. Mitchell states she harbors no animosity toward Johnson. He is a likable person and she likes him. Bergeron stated that Mitchell never communicated anger at having a grievance filed by Johnson.

44. Bergeron did not remember when she became aware of Johnson's role as a union steward. She stated that the fact of his union involvement did not influence her actions as a supervisor.

45. Johnson stated he had never been denied time to perform shop steward duties. At one point he was asked along with other shop stewards to keep track on time sheets of the time he used.

46. Johnson states that he was denied use of a conference room for union meetings. He had been allowed to use one previously. He believes this was in retaliation. Mitchell stated that the issue was a calendaring one and the use of the conference room had not been denied. Dr. Faye Moore had asked that room requests be in writing to allow proper

calendaring. According to Mitchell, notice was the issue.

47. ASEA also raised the issue of an audit that was performed. Mitchell requested the audit to assist in identifying resource needs and to see what the caseloads really looked like. She was interested in benchmarks. It notes deficiencies in documentation and home visits, among other things. Exh. 10, at 3.

48. Mitchell spoke with the auditors about the audit. Auditor Steven McComb mentioned Johnson as the weakest social worker in some of the deficiencies identified in the audit.

49. Harriet Lawlor, business agent for ASEA, testified about her opinions on a number of matters. She stated, for example, that some management is more accepting of shop stewards and some management is more threatened. She also testified about her participation in ASEA's investigation on behalf of Johnson and the conclusions she reached. Lawlor's opinions, however, cannot be

credited as evidence. They are not facts on which the Agency can rely to form a conclusion about the legal issues in the case.

50. ASEA filed its complaint alleging unfair labor practices by the State in violation of AS 23.40.110(a)(1),(3), and (4) on April 11, 1994.

51. The Agency concluded its investigation on February 9, 1995, finding that probable cause supported the complaint, and on February 13, 1995, it issued a notice of accusation against the State.

52. On February 28, 1995, the State filed a notice of defense, requesting a dismissal of the charges or, in the alternative, a full hearing before the Alaska Labor Relations Board. The State also asked this Agency to reconsider its decision not to defer the case to arbitration, arguing that the pending grievances could be resolved in the near future.

53. On March 1, 1995, the State discharged Johnson.

54. On May 8, 1995, the parties presented testimony and other evidence before the panel and the record closed that same day.

Conclusions of Law

1. The State of Alaska is a public employer under AS 23.40.250(7) and Alaska State Employees Association/AFSCME Local 52 AFL-CIO is a labor organization under AS 23.40.250(5). This Agency has jurisdiction under AS 23.40.110 to consider this matter.

2. Complainant has the burden to prove each element of its claim by a preponderance of the evidence. 8 AAC 97.350(f).

3. Relevant decisions of the National Labor Relations Board are given great weight in determining what constitutes an unfair labor practice under AS 23.40.110. 8 AAC 97.240(b).

I. AS 23.40.110(a)(3)

4. AS 23.40.110(a)(3) prohibits conduct that discriminates "in regard to hire or tenure of employment or a term or condition of employment to encourage or discourage membership in an organization."

5. This subsection is based on section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) (West 1995). The elements of a case for discharge or discipline in violation of this section are (a) employer knowledge that the employee is engaged in union activity and (b) employer discharge or discipline motivated by this knowledge. See 1 Patrick Hardin, The Developing Labor Law 215 (3d ed. 1993).

6. In this case the employer's agents were aware that Johnson was a shop steward, although Johnson does not appear to have been particularly active as a steward and the precise date when the various State supervisors learned that Johnson became a steward is not in the record.

7. The question of motive is more difficult. The Alaska Supreme Court has stated that, "[T]o establish a violation of section 8(a)(3) of the Labor Management\Relations Act, the employer's action generally must have been based on an antiunion motive." Alaska Community Colleges' Federation of Teachers, Local 2404 v. University of Alaska, 669 P.2d 1299, 1307 (Alaska 1983). An employee is not insulated by a position as shop steward from an employer's usual performance standards. It can be difficult to sort out the motive in a discharge case involving a union activist or shop steward. In NLRB v. Wright Line, 662 F.2d 899, 108 L.R.R.M.(BNA) 2513 (1st Cir. 1981), cert. denied, 444 U.S. 989, 109 L.R.R.M.(BNA) 2779 (1982), a court of appeals reviewed the National Labor Relations Board's test in these so-called mixed motive cases, stating,

> The Board may properly provide, therefore that "Once [a prima facie showing] is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." The "burden" referred to, however, is a burden of going forward to meet a prima facie case, not a burden of persuasion on the ultimate issue of the existence of a violation.

Id., at 902, 108 L.R.R.M.(BNA) at 2517 (citations and footnotes omitted). The question whether the employer would have terminated the employee "but for" the protected activity is a convenient formula for deciding whether or not an unfair labor practice has actually occurred -- i.e., for deciding if the determining motive of the discharge was anti-union animus or some valid business reason. . . . If the discharge would not have taken place, it is clear that the determining reason for the discharge was the protected activity, not the reason given by the employer.

Id., at 906, 108 L.R.R.M.(BNA) at 2518 (footnotes omitted).

8. ASEA states it has no smoking gun in this case. It outlined the series of actions and grievances involving Johnson personally that lead ultimately to his discharge. It also offered the testimony of Johnson, two shop stewards, and a business agent who believed that the State's agents were motivated by union animus to retaliate against Johnson. These suspicions, however, are not evidence of motive and were not corroborated in the record.

9. Circumstantial evidence can be sufficient to prove motive. Professor Hardin's examples of evidence of motive include the timing of the employer's action, the pretextual nature of the employer's action, and the employer's shifting justifications for its actions. 1 Patrick Hardin, supra nn. 170 - 172, at 216 . ASEA has not offered such evidence. Prehearing brief, at 5. ASEA did not show, for example, that the State's treatment of Johnson was inconsistent with its past practice or its treatment of other employees. See e.g., NLRB v. Wright Line, 662 F.2d at 909, 108 L.R.R.M.(BNA) at 2520 - 2521.

10. The link between the discipline and Johnson's role and duties as a shop steward was not established by the evidence. While some of the witnesses pointed fingers at union work as the cause of retaliation both for Johnson and social workers Patricia Driggins and Mark Garlock, no evidence corroborated their beliefs that this was true. In reviewing the disciplinary actions in the record and union activities, the two do not appear related. For example, Mark Garlock has been a shop steward for four years or longer and he has not been disciplined. We have only the opinions of persons with an interest in the case -- not the underlying facts from which an opinion could be drawn. These opinions are not themselves evidence of motive.

11. We do not believe that ASEA has established a prima facie case for retaliation or discrimination contrary to AS 23.40.110(a)(3). Under the Wright Line test, there would be no need for the State to come forward with any evidence of an alternative motive for the State's action. Nevertheless, the State has offered such evidence. It presented evidence of Johnson's performance problems and of action taken for reasons independent of Johnson's shop stewardship and his union activities. Mitchell confronted Johnson because she believed that he had been insubordinate. The following discipline was justified by this fact and no evidence showed that it was inconsistent with the State's response to similar conduct by other employees. The letter of warning followed Johnson's failure to follow instructions on how to handle permanent fund dividend applications. The State established that Johnson was weak in documenting his files and meeting deadlines. These weaknesses had resulted in problems in his cases files, such as allowing custody to lapse and sanction by the court.

12. In sum, the State has offered evidence supporting the actions taken regarding Johnson. ASEA has not carried its burden to prove that the State violated AS 23.40.110(a)(3) by its discipline and discharge of Raymond Johnson. See Alaska Community Colleges' Federation of Teachers, Local 2404 v. University of Alaska, 669 P.2d at 1308 - 1309 (finding the University was not motivated by union animus in denying a position and certain benefits to union activists); Carlile v. University of Alaska-Fairbanks, SLRA Order & Decision No. 104, at 5 (April 24, 1987).

II. AS 23.40.110(a)(1)

13. In its complaint ASEA also maintains that the State's conduct violates AS 23.40.110(a)(1). Generally discrimination in hiring, firing and working conditions that violates AS 23.40.110(a)(3) also interferes with employee's rights under PERA in violation of AS 23.40.110(a)(1). Alaska Community Colleges' Federation of Teachers, Local 2404 v. University of Alaska, 669 P.2d 1299, 1307 (Alaska 1983). Subsection (a)(1) prohibits interference with rights under PERA. The National Labor Relations Board finds that discriminating or retaliating against an employee or shop steward for filing or processing grievances violates section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 185(a)(1). See generally 1 Patrick Hardin, supra nn. 451 & 452, at 151. For example, an employer violated section 8(a)(1) of the national act when it discriminated in applying its plant rule on disruptive communications against a shop steward because the evidence showed the steward's communications and brief visits did not disrupt the plant's work. The NLRB had rejected the argument that a shop steward's visits were inherently disruptive. Caterpillar Tractor Co. v. NLRB, 638 F.2d 140, 106 L.R.R.M.(BNA) 2853 (9th Cir. 1981). The NLRB also found a violation of this section for an employer's discipline against a steward for the wording of the grievance. Clara Barton Terrace Convalescent Center, 225 N.L.R.B. No. 139, 92 L.R.R.M.(BNA) 1621 (1976).

14. Participation in grievances against the State is certainly protected activity under AS 23.40.110(a)(1). However, as discussed under AS 23.40.110(a)(3) above, we found no evidence linking the actions of the State's agents to Johnson's filing or processing grievances. ASEA has not carried its burden of proof and we therefore conclude that the State did not violate AS 23.40.110(a)(1).

III. AS 23.40.110(a)(4)

15. Section 8(a)(4) of the National Labor Relations Act is violated by an employer's retaliation against an employee for participating in proceedings under the Act. Courts apply the Wright Line analysis examined above to establish whether participating in Agency proceedings was the cause of the employer's discipline or discharge, rather than some legitimate reason. See Airborne Freight Corp. v. NLRB, 728 F.2d 357, 115 L.R.R.M.(BNA) 3214 (6th Cir. 1984), denying enforcement to 263 N.L.R.B. 1376, 111 L.R.R.M.(BNA) 1580(1982), cited in 1 Patrick Hardin, supra n. 554, at 278. Even if ASEA is correct in assuming that participation in grievances is protected under AS 23.40.110(a)(4), there is no violation because we have concluded that there is no evidence supporting the conclusion that the employer's action was causally related to the protected activity.

16. We therefore do not find a violation of AS 23.40.110(a)(4).

IV. Deferral to Arbitration

17. The State has also argued that this action should have been deferred to the arbitration proceedings that were pending at the time of this unfair labor practice charge. This Agency has adopted the deferral policy of the National Labor Relations Board set forth in United Technologies, 268 N.L.R.B. No. 83, 115 L.R.R.M.(BNA) 1049, 1050 (1984), and Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M.(BNA) 1931, 1936 (1971). Alaska Education Ass'n/NEA-Alaska v. Anchorage School District, Decision & Order No. 128, at 3 (Dec. 10, 1990); Alaska State Employees Ass'n v. State, Decision & Order No. 135 (Sept. 17, 1991).

18. As a general rule the National Labor Relations Board does not defer to arbitration charges under section 8(a)(3) of the National Labor Relations Act that an employer retaliated against an employee for use of the grievance procedures. The reason is that such a charge strikes at the foundation of the parties' grievance procedures and that it is pointless to defer to a procedure that has failed. See 1 Patrick Hardin, supra, at 1031.

19. We agree with this general reasoning. We do not, however, believe that every second incident of discipline

involving an employee is necessarily a response to an employee's grievance following the first incident. An employee remains subject to an employer's usual performance and discipline rules despite participating in a grievance. Before we will decline to defer to the parties' grievance procedures, we will require some evidence that the employer's conduct was motivated by the participation in the grievance procedures. Because a first grievance or participation in that grievance will not insulate an employee from appropriate future employer correction or discipline, there must be some evidence linking that participation to the employer's later conduct. A belief that the employer was motivated by the first grievance, however sincere, is not evidence of motivation.

20. In North Shore Publishing Co., 206 N.L.R.B. 42, 84 L.R.R.M.(BNA) 1165 (1973), for example, the timing of the discharge and the supervisor's statement to the employee to watch himself supported a decision not to defer. In another case, El Dorado Club, 220 N.L.R.B. No. 152, 90 L.R.R.M.(BNA) 1373 (1975), the NLRB declined to defer where it had evidence of specific examples of disparate treatment of employees and no credible explanation for the employer's action against the grievant. In Morrison-Knudsen, Co., Inc., 213 N.L.R.B. No. 48, 87 L.R.R.M.(BNA) 1655 (1974), enforced 521 F.2d 1404, 90 L.R.R.M.(BNA) 3074 (8th Cir. 1975), evidence included observations of a display of resentment against a shop steward's activities, the timing of the discharge, which was immediately after the shop steward telephoned the union, and the absence of any corroborating evidence for the employer's explanation for its actions.

21. In this case, we see no evidence supporting the conclusion that arbitration would be an inappropriate forum to hear this dispute. While witnesses testified to the conclusion that the employer discriminated against Johnson and even themselves for their union activities, we saw no evidence of it. The State's explanations for the actions of its agents were corroborated by evidence. While we have elected to address this case on the merits of the unfair labor practices charged, we believe that deferral would have been appropriate.

ORDER

1. The State did not commit an unfair labor practice charge under AS 23.40.110(a)(1), (3), and (4) when it discharged Raymond Johnson;

2. The complaint filed by the Alaska State Employees Association/AFSCME Local 52, AFL-CIO, in this case is DISMISSED; and

3. The State of Alaska is ordered to post a notice of this decision and order at all work sites where members of the bargaining unit affected by the decision and order are employed or, alternatively, serve each employee affected personally. 8 AAC 97.460.

ALASKA LABOR RELATIONS AGENCY

Stuart H. Bowdoin, Vice Chair

Robert A. Doyle, Board Member

Raymond P. Smith, Board Member

APPEAL PROCEDURES

An Agency decision and order may be appealed through proceedings in superior court as provided in the Alaska Rules of Appellate Procedure and the Administrative Procedures Act.

The decision and order becomes effective when filed in the office of the Agency, and unless proceedings to appeal it are instituted, it becomes final on the 31st day after it is filed.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of ALASKA

STATE EMPLOYEES ASSOCIATION/AFSCME LOCAL 52, AFL-CIO, (RAYMOND JOHNSON) v. STATE OF ALASKA, CASE NO. 94-301-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 26th day of September, 1995.

Victoria D.J. Scates

Administrative Clerk III

This is to certify that on the 26th day of September, 1995, a true and correct copy of the foregoing was mailed, postage prepaid to

Alison Reardon, ASEA

Art Chance, State

Signature

1Alan Martin apparently was assigned to supervise Johnson in the absence of Doris Bergeron, who was substituting for Rita Hutchinson, but on vacation at this time.

2Bergeron at first testified that this day was February 3, 1993, but later corrected herself.

3Mitchell did not distinguish in her testimony between being a member of a bargaining unit and being a member of a union. Public employees do have a choice over union membership, although if they are in a bargaining unit, their collective bargaining agreement may require payment of a service fee for representation regardless of union membership. AS 23.40.110(b).