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ALASKA STATE EMPLOYEES ASSOCIATION/AFSCME LOCAL 52, AFL-CIO (sack lunches),

Complainant,

vs.

STATE OF ALASKA,

Respondent.

CASE NO. 95-336-ULP

DECISION AND ORDER NO. 195

This case was heard on March 7, 1995, before a panel of the Alaska Labor Relations Agency, Chair Alfred L. Tamagni, Sr., and Member Robert A. Doyle, participating, and Member Karen J. Mahurin, participating after review of the record. Hearing Examiner Jan Hart DeYoung presided. The record closed on March 7, 1995.

Appearances:

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

Digest:

The labor organization did not satisfy its burden to prove that the employer removed an employee benefit in retaliation for the filing of a complaint under the collective bargaining agreement in violation of AS 23.40.110(a)(1).

DECISION

This dispute concerns the sack lunch policy of the Department of Corrections at its Spring Creek correctional facility in Seward. ASEA states that the actual issue of providing sack lunches is in arbitration and the issue before this Agency involves the consequences of the filing of that grievance. ASEA claims that, when the State discontinued sack lunches for the night shift, it acted in retaliation for a grievance that was filed about the policy, thereby violating AS 23.40.110(a)(1), (3), and (5).

The State denies that the Department of Corrections acted in retaliation by stopping sack lunches and denies any unfair labor practice. Moreover, the State asks the Agency in this case to reconsider its policy of declining to defer unfair labor practice charges to grievance procedures solely because retaliation is charged.

We find in this case that the State's actions were based on independent business reasons and that it did not retaliate against the filing of a grievance, and we conclude that the State did not commit an unfair labor practice. Nevertheless, we do feel the need to comment on the tone of the State's briefing and presentation in this case. Paternalistic comments such as "send[ing] the Union to its room, ground[ing] it for a week, or tak[ing] the car keys away" are not conducive to

collective bargaining. Obviously the bargaining unit members feel strongly about the sack lunch issue. The reason appears to stem from their personal living circumstances and the absence of dining alternatives in Seward. Moreover, retaliation or punishment for filing a grievance is a serious charge. Such conduct would discourage employees from using the complaint and grievance procedures in their agreement and would be very destructive of rights protected under PERA. This Agency considered these charges seriously, although we did not find that they were proven.

A hearing was conducted on March 7, 1995, at which the parties presented testimony and other evidence. Upon consideration of the record, the Agency finds the facts as follows:

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 ASEA/State collective bargaining agreement contains grievance arbitration and complaint provisions.

3. The collective bargaining agreement does not specifically address the issue of providing lunches or meals to bargaining unit members.

4. Mike Swick is a correctional officer II and has been employed by the State in that capacity at the Spring Creek correctional facility in Seward, Alaska, for over five years.

5. Swick resides in Anchorage and commutes to Seward. Swick estimates that 40-45 percent of the employees choose not to relocate to Seward and, like Swick, commute from another part of the State. Many of the commuters "hot bunk it." Swick shares a house with other correctional officers during his shift rotation.

6. The Spring Creek facility has about 30 persons employed during each shift. There are four work shifts. At any time one shift is on duty. The work schedule is seven 12-hour days. One shift will work the night schedule and the other will work the day schedule. Shift breaks occur at 6 a.m. and 6 p.m. After seven days off, a work shift will return to work, rotating from nights to days or vice versa, depending on the last shift worked.

7. When Swick began working at Spring Creek, the practice at the facility was to leave the steam line open with leftovers from the previous meal for employees on the night shift at no charge. At some point the facility discontinued the hot meal line for the night shift. Swick believes the reasons were health concerns and possibly financial accountability.

8. Earl Shaw is the assistant superintendent at the Spring Creek facility. He has worked for the Department of Corrections for over eight years, beginning in 1986, at Cook Inlet pretrial facility. Shaw hired on at Spring Creek in October of 1989 as a correctional officer II. In August of 1990 he was promoted to a correctional officer III and in February of 1991 he was promoted to his present position. He supervises nine correctional officer IIIs directly.

9. Shaw remembers that the facility used to provide leftovers to the night shift employees on a steam line at approximately 10:00 p.m. Some time in 1994 this practice was discontinued. The reasons were that meals were not being paid for as required under policy and there were problems with the lack of portion control on the line. The facility then changed to a sack lunch policy. Shaw believes that the reason for providing the night meal was for the convenience of the commuting staff. While Shaw did not participate in the decision to discontinue the sack lunches until after the decision was made, his personal opinion is that the facility should not be providing meals to staff.

10. The department’s staff meal policy for the Spring Creek Correctional facility was to provide 30 sack lunches to be available for the night shift at a cost of $2.00. Department of Corrections, Policies and Procedures 77.302.13 (eff. May 7, 1992), Exh. 2, at 1.

11. Swick believes that other correctional facilities are in locations where it is easier to obtain some kind of meal during the night shift meal break. As an example, Swick stated he had worked at the Cook Inlet pretrial facility and workers there would order out for pick up. In Seward, where Spring Creek is located, there are no accessible facilities for night

meals. The only alternative to meals at the facility is to bring in a lunch, which is hard for employees who do not reside in Seward. Another alternative to a meal during the night shift break is to come in before the shift break at 5:00 p.m. and purchase a meal then.

12. Swick is an ASEA shop steward at Spring Creek. Coworkers had been complaining that an inadequate number of sack lunches were being prepared for the evening shift. Swick's first action was to send a memorandum about the issue to the kitchen manager, which did not elicit a response.

13. Next, on June 30, 1994, Swick filed a complaint under the agreement, Exh. 1, at 1, which is the procedure to raise noncontract disputes. The complaint procedure does not end in arbitration, but Swick indicated a complaint may evolve into a grievance, as this one did, which does end in arbitration. Swick filed his complaint with Assistant Supervisor Shaw, the first level supervisor outside of the bargaining unit. Shaw is the person that Swick normally works with in his role as shop steward. Shaw believes he had a good working relationship with Swick when Swick was shop steward. Shaw, however, referred the complaint to the kitchen manager's supervisor, administrative officer Jim Philp.

14. Philp responded to the complaint on July 5, 1994, by stating there would be no changes made. He enclosed with his response a tabulation of meals prepared and paid for and his determination that an adequate number of lunches were being prepared. Id., at 2-3.

15. On July 2, 1994, business agent Harriet Lawlor filed a level II complaint with Director of Institutions Frank Sauser, asking for assurance that an adequate number of sack lunches be provided. Id., at 15-16.

16. Francis Sauser was appointed the Director of Institutions approximately one and one-half years ago. He has been employed at the Department of Corrections since 1973, beginning as an institutional probation officer. Before his appointment as director, Sauser had served as a supervisor of five correctional institutions, including Spring Creek.

17. Sauser states that night meals were not provided at any of the facilities that he supervised. However, night meals were provided in the form of leftovers from the evening meal during his tenure at Spring Creek. He remembers that the facility stopped this practice while he was superintendent because of the discovery that food was actually being prepared for staff.

18. Sauser learned of the sack lunch practice at Spring Creek from the ASEA complaint. He decided to discontinue the night meals because the department's position was that employees may purchase a meal prepared while they are on shift but that the department would not prepare meals for staff. Other facilities to his knowledge do not provide a meal or lunch for the night shift. By cancelling the lunches at Spring Creek, Sauser stopped a practice that he thought was against department policy and put Spring Creek into conformity with the other correctional institutions.

19. Sauser denied any anger or other motive when he discontinued the sack lunches.

20. In the meantime Swick met with Administrative Officer Philp and the chief steward and resolved the sack lunch issue informally to Swick's satisfaction. The problem was that the same number of lunches were made each night but the number eaten would depend on the popularity of the contents. Some items would sell out and less popular meals would go to waste. The solution they reached was for the kitchen to provide a menu and for the workers to order and pay before the kitchen prepared the sack lunches. Swick notified business agent Lawlor that the complaint could be dropped but whether she notified State officials is not in the record. Id., at 17.

21. On July 18, 1994, Director Sauser wrote Harriet Lawlor, stating "It is certainly not policy to make up sack lunches for the night shift" and he had "instructed the facility to discontinue this practice immediately." Id., at 18.

22. Swick learned the afternoon of the same day that he had met with Philp and resolved the issue that Sauser had discontinued the sack lunch program.

23. Lawlor responded by filing a grievance with Commissioner Frank Prewitt, claiming that the sack lunch policy had been discontinued in retaliation because employees had "addressed and resolved concerns with Spring Creek through the union." Id., at 19-20.

24. The response to the grievance, dated August 9, 1994, was to deny it on the grounds that the contract was not violated and there was no department policy to provide sack lunches for the night shift. Id., at 22. ASEA pursued the grievance through the various steps and ultimately on September 9, 1994, requested arbitration. Id., at 27.

25. The Department of Corrections amended its policy effective August 12, 1994, to provide that "No meal service will be available through the Food Service Department." Exh. 2, at 3-4.

26. According to Swick, after the sack lunch practice was discontinued, other members of the unit blamed ASEA for filing the complaint.

27. Swick states there is a morale problem at Spring Creek. Swick believes conditions are dangerous, the facility is overcrowded, and State managers at the facility are not allowed to make decisions.

28. Swick provided other examples where he felt the Department of Corrections had retaliated against complaints made by the union. One dispute involved correctional officer IIs working out of class as correctional officer IIIs. The remedy sought was additional pay. The State's response was to remove lead officer status and responsibility. Another example involved management prohibiting a correctional officer who was a little league coach from attending a little league banquet sponsored by inmates. Swick states former Superintendent Kinchloe threatened that there would be no softball after hours with the inmates if Swick persisted in the issue.

29. On September 19, 1994, ASEA filed its unfair labor practice charge against the State in this case. The Agency concluded its investigation of the charge on December 30, 1994. It found probable cause to support allegations that the State violated AS 23.40.110(a)(1), (3), and (5) and issued a notice of accusation on December 30, 1994. ASEA's charge under AS 23.40.110(a)(2) was dismissed. On January 18, 1995, the State filed its notice of defense against the accusation. At a prehearing conference on January 26, 1995, the complaint was set for hearing on March 7, 1995.

Conclusions of Law

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

2. ASEA, as the complainant, has the burden to prove each element of its claim by a preponderance of the evidence. 8 AAC 97.350(f). The charges referred for hearing were under AS 23.40.110(a)(1),(3), and (5).

I. AS 23.40.110(a)(1)

3. AS 23.40.110(a)(1) provides that the State may not "interfere with, restrain, or coerce an employee in the exercise of the employee's rights guaranteed in AS 23.40.080." The rights in AS 23.40.080 include the right to "self-organize and form, join, or assist an organization to bargain collectively" and the right to "engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

4. Disciplining employees for filing or processing grievances violates AS 23.40.110(a)(1). Alaska State Employees Ass'n/AFSCME Local 52, AFL-CIO (Johnson)v. State of Alaska, Decision & Order No. 193, at 15 (issued this same date); see generally 1 Patrick Hardin, The Developing Labor Law 150 (3d ed. 1992) (addressing the NLRB's practice under 29 U.S.C. § 158(a)(1)).

5. In this case ASEA claims that the State, by changing working conditions in retaliation for pursuing a complaint, has violated AS 23.40.110(a)(1). Proof of removal of a benefit in retaliation for filing a grievance would be a prima facie showing of a violation of AS 23.40.110(a)(1). The burden would then shift to the employer to set forth a legitimate and substantial business reason for suspending the benefit. NLRB v. Wright Line, 662 F.2d 899, 108 L.R.R.M.(BNA) 2513 (1st Cir. 1981), cert. denied, 455 U.S. 989, 109 L.R.R.M.(BNA) 2779 (1982); Texaco, Inc., 285 N.L.R.B. 241, 246, 126 L.R.R.M.(BNA) 1001 (1987) (involving striking employees); Alaska State Employees Ass'n/AFSCME Local 52, AFL-CIO (Johnson)v. State of Alaska, Decision & Order No. 193, at 15.

6. Discontinuing the sack lunch policy was a direct response to ASEA's filing a complaint under the agreement. Without the complaint Sauser would not have learned of Spring Creek's sack lunch practice. Thus, there is a causal connection between the complaint and the State's action. However, the question of the State's motivation remains to be answered.

7. ASEA presented no direct evidence of motive. Circumstantial evidence, however, can be sufficient to prove motive and the timing of an employer's action is circumstantial evidence of motive. Alaska State Employees Ass'n/AFSCME Local 52, AFL-CIO (Johnson)v. State of Alaska, Decision & Order No. 193, at 14. We believe that the timing of the State's action is sufficient evidence of motion to satisfy the showing required under Wright Line to shift the burden to the State to come forward with evidence of an independent, business justification for its actions. NLRB v. Wright Line, 662 F.2d at 906, 108 L.R.R.M.(BNA) at 2518.

8. The State presented evidence that Sauser was motivated by business reasons unrelated to retaliation. Sauser obviously was unaware of Spring Creek's practice of providing sack lunches for the night shift. He does not appear to have checked Spring Creek's policy and procedure manual, which appears to allow the lunches and which his predecessor approved. Nevertheless, Sauser appears to have been genuinely motivated by his perception of a need for

conformity among the correctional institutions and his desire to stop a practice he did not endorse.

9. ASEA's proof of motivation is weak and depends in large part on the timing of the State's action. On the other hand, the State has come forward with evidence of an independent business motive for its action. On balance, we believe that ASEA has not carried its burden of proof to establish motive and therefore conclude that the State did not violate AS 23.40.110(a)(1).

II. AS 23.40.110(a)(3)

10. AS 23.40.110(a)(3) prohibits an employer to "discriminate in regard to hire or tenure of employment or a term or condition of employment to encourage or discourage membership in an organization."

11. The defining element of AS 23.40.110(a)(3) is that it prohibits discrimination between employees on the basis of union activities or membership whose purpose is to encourage or discourage union membership. The element of discrimination is absent in this case. The State did not discriminate between union and nonunion employees or otherwise distinguish between personnel when it discontinued night shift sack lunches. Evidence of discrimination is a required element of an unfair labor practice under AS 23.40.110(a)(3). Addressing the similar provision in section 8(a)(3) of the National Labor Relations Act, the United States Supreme Court stated,

> The language of § 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

Radio Officers v. NLRB, 347 U.S. 17, 42-43, 33 L.R.R.M.(BNA) 2417, 2427 (1954), quoted in 1 Patrick Hardin, supra, at 190. See e.g., Alaska State Employees Ass'n/AFSCME Local 52, AFL-CIO (Johnson)v. State of Alaska, Decision & Order No. 193, at 13 (charge was that employer treated employee differently due to his union activities).

12. The State's nondiscriminatory change in its sack lunch practice at Spring Creek does not violate AS 23.40.110(a)(3).

III. AS 23.40.110(a)(5)

13. AS 23.40.110(a)(5) provides that a public employer may not

> refuse to bargain collectively in good faith with an organization which is the exclusive representative of

employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

14. An unfair labor practice under AS 23.40.110(a)(5) focusses on the bargaining relationship. The section requires the employer to bargain in good faith and it specifically requires the employer to discuss grievances. ASEA's theory under this section is that the failure to honor an informal settlement was a failure to bargain in good faith. See ASEA Prehearing Brief, p. 3. This theory is not supported by the facts and the parties's grievance and complaint procedures in the agreement. Presumably ASEA filed its complaint at the appropriate step. Sauser was the person authorized to respond on behalf of the State at this level. Sauser was not required to defer to a resolution between the Spring Creek administrative officer and the shop steward, who are both members of the ASEA bargaining unit.

15. If the sack lunch practice could be considered an obligation of the State under the collective bargaining agreement, a unilateral change of that policy could be a violation of the duty to bargain in good faith under AS 23.40.110(a)(5). Such an analysis involves construction of the parties's agreement and the merits of the sack lunch issue, which ASEA represented was not being presented to the Agency in this case. We believe this issue, if it had been presented, would be an appropriate one to defer to the parties' pending grievance arbitration.

IV. DEFERRAL

16. The State claims that this Agency's policy is to decline to defer any charge under AS 23.40.110(a)(3) when the facts are disputed. The State argues that arbitration could have resolved this dispute. The special expertise of an arbitrator would be beneficial in this case, for example, to determine whether in fact the parties by contract or conduct have an agreement on a sack lunch policy. The State claims that the parties' standing arbitration panel has developed expertise on the agreement and their relationship. The mere assertion of retaliation should not remove the issue from the arbitrator. Only in the most egregious of cases, the State argues, should this Agency decline to defer cases that could be heard in arbitration.

17. The Agency recently issued a case examining its arbitration deferral policy for charges of retaliation or discrimination under AS 23.40.110(a)(1) and (3). Alaska State Employees Ass'n/AFSCME Local 52, AFL-CIO (Johnson)v. State of Alaska, Decision & Order No. 193. The Agency adopted a rule requiring that the complainant present some evidence of all elements of the unfair labor practice, including, importantly, evidence of motive, before the Agency would decline to defer such charges to arbitration.

18. Applying this rule to this case, the Agency should not defer the charge under AS 23.40.110(a)(3) to arbitration. The evidence in the record, if it had been available at a probable cause investigation under AS 23.40.120, would have been sufficient to defeat a request to defer under this policy. The causal relationship between the complaint and the State's action and its timing are evidence of motive and enough evidence, along with evidence of the other elements of the unfair labor practice, for this Agency to decline to exercise its discretion to defer to arbitration. Such charges, because they are so potentially destructive to collective bargaining, are not appropriate for deferral. North Shore Publishing Co., 206 N.L.R.B. No. 7, 84 L.R.R.M.(BNA) 1165 (1973); Joseph T. Ryerson & Sons Inc., 199 N.L.R.B. No. 44, 81 L.R.R.M.(BNA) 1261 (1972); see generally 1 Patrick Hardin, supra, at 1031.

19. However, deferring a bad faith bargaining charge under AS 23.40.110(a)(5) would be appropriate under 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 (1984), and Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M.(BNA) 1931 (1971). The Agency has adopted and applied the NLRB's deferral policy in Alaska Education Ass'n/NEA-Alaska v. Anchorage School District, Decision & Order No. 128, at 3 (Dec. 10, 1990) and Alaska State Employees Ass'n v. State, Decision & Order No. 135 (Sept. 17, 1991). Absent evidence of union animus and procedural defenses to arbitration, deferral would be appropriate because interpretation of the agreement would be at the center of the parties' dispute.

ORDER

1. The State did not commit an unfair labor practice charge under AS 23.40.110(a)(1), (3), or (5) when it discontinued its sack lunch policy at Spring Creek Correctional Center;

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

Alfred L. Tamagni, Sr., Chair

Robert A. Doyle, Board Member

Karen J. Mahurin, 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 (sack lunches) vs. STATE OF ALASKA, CASE NO. 94-336-UC, 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

Harriet M. Lawlor, ASEA

Art Chance, State

Signature