

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

GREG MARSHALL,)
)
 Complainant,)
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 vs.)
)
 STATE OF ALASKA,)
)
 Respondent.)
)
 _____)
 CASE NO. 95-386-ULP)

DECISION AND ORDER NO. 199

This case was heard on June 14, 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 June 14, 1995.

Appearances:

Greg Marshall for complainant Greg Marshall; and Art Chance, labor relations analyst, for respondent State of Alaska.

Digest:

An employee claiming he was discharged in retaliation for exercising rights under the Public Employment Relations Act did not meet his burden of proof. The testimony elicited at the hearing supported the facts that he was discharged during his probationary period for failure to follow an order to appear to work.

DECISION

This case concerns Greg Marshall's allegations that the State violated AS 23.40.110(a)(1) by interfering with rights protected under AS 23.40.080. Greg Marshall believes he was discharged while on probation in retaliation for involving the union in a dispute with the Alaska Pioneers' Home about his work schedule. The State disputes the facts as alleged by Marshall, claiming that Marshall failed probation for failure to appear at work, as ordered.

A hearing was conducted on June 14, 1995, at which the parties presented testimony and other evidence. The record closed that same day. Upon consideration of the record, the panel finds the facts as follows:

Findings of Fact

1. Greg Marshall was employed in a nonpermanent position as a registered nurse for the Alaska Pioneers' Home, a 220 bed facility, on or around September of 1994.
2. At the time of his hire in this position, Marshall also worked as a "non-perm or on-call" registered nurse for the Department of Corrections.

3. The director of nursing for the Pioneers' Home is Nancy Bourne. She directly supervises five employees, including Marshall's immediate supervisor, and indirectly supervises 50 employees. She reports to John Vowell, the administrator of the Home.
4. Bourne stated that Marshall worked periodically and effectively on-call as a nonpermanent registered nurse for the Home during either day or evening shift.
5. Bourne sought to hire Marshall in a full-time, day shift position, effective January 1, 1995. Marshall was responsive and quick to learn and Bourne was looking forward to having him full-time. While Marshall was not among the highest scoring candidates on the register, she wanted to hire him and did hire him in accordance with State personnel policy.
6. Marshall was on the State's register for a nursing position but was seeking a full-time permanent position at the Department of Corrections.
7. Bourne offered Marshall the full-time position at the Pioneers' Home on or around December 21, 1994. Marshall believes he accepted it on or around December 27, 1994.
8. This position is part of the general government bargaining unit, represented by the Alaska State Employees Association/AFSCME Local 52, AFL-CIO (ASEA).
9. Bourne knew Marshall had other jobs when he was in the nonpermanent position. Bourne told Marshall, she believes in January, that the State expected productive and full-time service from its full-time employees, and he needed to quit his second job. Bourne remembers that she and Marshall had a clear understanding that he would quit his other job and even remembers specific assent.
10. Marshall remembers the conversation occurring in December, when he was discussing the permanent position at the Pioneers' Home. Marshall, however, states that he did not believe Bourne was serious about his quitting his second job with the Department of Corrections and he did not quit it. One of the reasons he did not believe Bourne was serious was because he thought the request was unethical.
11. Marshall did not notify the Home of his second position on the form required for that purpose and was unaware of the requirement.
12. Bourne described the Home's policy on flexibility in work schedules and the role of the person scheduled to work. To maintain required staffing levels means that other employees' schedules have to be shuffled to cover unplanned absences. The employee desiring a change in the schedule is responsible for finding a substitute and then is expected to reciprocate at some other date, without the Home's incurring any overtime liability. The record is silent on whether or how this policy was communicated to employees, including Marshall.
13. Marshall began working for the Pioneers' Home full-time, day shift on January 1, 1995. Marshall was on probation under the ASEA/State collective bargaining agreement:

The Probationary period shall be regarded as a part of the examination process which shall be utilized for closely observing the employee's work and adjustment to the position. Employees who, in the judgment of the Employer, have satisfactorily passed the probationary period shall be retained and given permanent status in the job class at the end of this applicable probationary period. Employees who, in the judgement of the Employer, have not or will not satisfactorily pass the probationary period shall not be retained in the job class.

ASEA/State Agreement, Art. 11, sec. 2 (1990-1993 extended), Exh. B.

14. On February 6, 1995, Marshall raised with Bourne a problem he had with his work schedule. He was afraid the frequent changes to the schedule without specific notice to employees affected would cause him to miss a work day.
15. Marshall asked for and believes he was provided the "final" schedule for the month of February. Marshall appears to

lack insight on the Home's need to revise its schedule to accommodate unplanned employee absences. The February schedule showed that Marshall was not scheduled to work on Saturday, February 18, 1995. On or about February 9 or 10, 1995, Marshall arranged to work on February 18 for the Department of Corrections. This was the first time Marshall had arranged to work for Corrections since he had been hired in the full-time position at the Pioneers' Home.

16. The work week at the Home is from Sunday to Saturday. During the week of Sunday, February 12, 1995, Marshall's regularly scheduled days off were Monday and Tuesday. To staff the Home, Bourne wanted at least three licensed nurses on each shift, one of whom had to be a registered nurse.

17. On February 13, 1995, Marshall's day off, Marshall went to Valdez. He planned to return in time for his shift on Wednesday, February 15, 1995, but was unable to depart Valdez as planned because the airport closed. While Marshall remained in Valdez, he kept the Home advised of his situation. Bourne was informed that Marshall could not leave Valdez due to high wind conditions there. This absence was not excused but Bourne understood that this happens in Alaska, and she did not intend to discipline him.

18. Marshall did not return to work until Friday, February 17, 1995, missing two days of scheduled work. On that day he saw his name on a staffing slip for the next day, Saturday, February 18, 1995. The schedule had been changed due to Marshall's absences that week. Marshall approached Bourne around 3:00 p.m. that afternoon, telling her he could not work the next day. Bourne told him they needed him. Marshall was in a hurry so Bourne asked him to call after he got home. Marshall did call her at around 6:30 that evening and stated that he could not work due to his Corrections job.

19. Bourne knew she needed to communicate to Marshall that his not working was not possible. Marshall needed to work at his full-time job, at which he had already been absent four days that week. She told him that he could not have that many days off in one week and that she had scheduled him to work on February 18, 1995. She said, you need to be here at 6:30 a.m. He again said that he could not be. She told him that he must be or she would not schedule him, meaning there would be no job. Marshall explained that he was worried about his liability to Corrections and about a prisoner with paralysis who needed his care. Marshall told her the Pioneer Home could squeeze by with the two remaining licensed nurses. Bourne told him that this was not his decision to make and that he needed to be there at 6:30 in the morning. She told him he was making a mistake, "think this through, you are talking about a full-time job versus an occasional job with Corrections." She tried to allay his concerns about being charged with abandonment and said 11 hours notice was not abandonment. Because she felt she was not getting through to Marshall, she urged him to talk to someone else. She told him to be there in the morning and he said he would not be. Bourne believes she plainly communicated that there would be no job if Marshall did not show up.

20. Before ending the conversation, Bourne told Marshall that if he did not work Saturday, to come in and talk to her on Tuesday, February 21. Bourne's position was that, by failing to work when ordered, Marshall "fired himself." She considered the meeting a termination interview and was genuinely curious about why he gave up the job.

21. Marshall did not understand that he was terminated at this time. He said that during this meeting Bourne referred to a waiver, which he never saw or signed, as the basis for her authority to order him to work. Whether or not Marshall understood fully the consequences of his decision not to follow the order to work, he did understand that he had been ordered to work.

22. We find that Bourne plainly and unequivocally ordered Marshall to work on Saturday, February 18, 1995.

23. Following the telephone meeting, Bourne wrote a memorandum to her supervisor, Vowell, in which she stated she had ordered Marshall to work and, if he failed to appear, so far as she was concerned, he was terminated.

24. Marshall did not show up for work on Saturday, February 18, 1995, and another employee worked overtime in his place.

25. Vowell first learned of the incident involving Marshall when he returned to the office after one week's leave. He returned on a Sunday evening and reviewed his E-mail and the message from Nancy Bourne reviewing the circumstances of Marshall's being told to work that Saturday.

26. Marshall and Bourne met on Tuesday, February 21, 1995, at 9:00 a.m. Bourne remembers that she asked Marshall how it was that he did not care about the job and Marshall reiterated his commitment to Corrections. According to Bourne, Marshall did not ask for or bring a union representative to this first meeting. The meeting concluded after Marshall and Bourne agreed to meet again after Vowell was available later that morning.

27. Marshall remembers that Bourne told him that his second job could not conflict with his responsibilities for the Alaska Pioneers' Home and referred to the State's conflict of interest form. Marshall had not seen or signed the form. Marshall states that he was never told he was being fired. He thought he was being disciplined. Marshall told Bourne at the end of the meeting that he had been wronged by the threatened discipline and that he wanted to be paid for two days and wanted to involve a union representative. Marshall states that this is when he was told he would automatically fail probation.

28. Both Marshall and Bourne claim responsibility for bringing Vowell into a second meeting between them. Bourne states that it was routine for Vowell to be present at a termination interview. She wanted Vowell present in this case because she believed Marshall might feel more comfortable stating the reasons for his actions with Vowell. Bourne states she arranged with Vowell a signal for Bourne to leave the room if something came up that would be better discussed with Bourne absent.

29. Marshall states he wanted to bring in Vowell into the discussion as a mediator.

30. Bourne states the word "mediator" was not used and she would have corrected Marshall if he had used it.

31. Vowell's version is that he was paged by Bourne. Bourne advised that she had had to make a decision not to retain Marshall. She asked Vowell to attend a second meeting to obtain Marshall's side of the story. Vowell reviewed with Bourne Marshall's history. Marshall had been a very excellent employee as a nonpermanent employee and later as a permanent employee. By the time Vowell knew of the situation, Bourne had dismissed Marshall.

32. The participants recollections of this second meeting also vary. Bourne remembers providing Vowell with background on the situation. Marshall then told Vowell about his second job. Bourne stated that a supervisor needs employees who are responsive, and gave the example that, if Vowell ordered her to work, she would go to work, even if it were 3:00 in the morning. Bourne stated she told Marshall that, had she known that he did not quit the corrections job, she would have taken him to Jean Tarbox to sign the required ethics conflict of interest form for disclosure of secondary employment. Marshall stated that he was not familiar with this form. So Bourne had Tarbox read the form to Marshall over the telephone. Marshall stated that he would not have signed the form and that no one should have to. Bourne states that at no time at either meeting did Marshall mention a union. Marshall did bring up a federal mediator or ruling. Bourne states that she or Vowell told him about locating ASEA, his union. Bourne states that at no time did either Vowell or Bourne say that, if Marshall contacted the union, he would fail probation. Marshall had failed probation earlier when he did not show up for work. Bourne said Marshall was red in the face and overly loud.

33. Vowell remembers that, when he joined the meeting, Bourne and Marshall were already there. Marshall reviewed the circumstances of his not working that week. Marshall asked Vowell if he agreed with the waiver form. Vowell said it was State policy. Marshall then said that Marshall and Bourne were at an impasse. Vowell remembers Marshall asking him if Bourne had the authority to schedule him to work on that Saturday. Vowell said he confirmed that Bourne had this authority. Marshall asked Vowell if Bourne had the authority to terminate him. Vowell said it was his understanding that she had this authority and Vowell supported the decision. They repeatedly discussed these points. Marshall challenged the decision to require three licensed nurses because on occasion the Home had had only two on a shift in the past. Vowell remembers Marshall stating that he disagreed with Vowell; that the issue should go to the National Labor Relations Board; and that, although he did not like to work with the union, he felt he needed union representation. The meeting then ended. Vowell states that both Vowell and Bourne supported the decision to go to the union and that no statements were made that Marshall would fail probation if he went to the union.

34. Marshall's recollection differs on a very key point. He states that Bourne told him that, if he involved the union in his dispute, he would automatically fail his probation. He thought this point was so significant, he asked Bourne to repeat it. Marshall remembers that he said he wanted to be paid the two days he was told not to work and the response was that this was not an option. Marshall said he wanted to involve the union on the issues involving these two days

and the "waiver" form he had not signed. Marshall then remembers that Vowell told him that, as a probationary employee, he did not have the right to file a grievance.

35. Bourne understood when Marshall left the meeting that he was going to speak to ASEA. Bourne did not speak with Marshall again.

36. The alleged threat of retaliation is inconsistent with Bourne's background. Bourne says she does not harbor ill-will towards unions in general or any particular union. Bourne is a member of the supervisory unit and a member of the Alaska Public Employees Association. She has used her union's services. In the past APEA filed a grievance on her behalf. She also is called upon to work with the ASEA periodically. For example, leave approval for employees is more restrictive than in the past due to budget considerations, and Bourne worked with the union on the issue. The ASEA business agent assigned to the Pioneers' Home is Alison Reardon. Bourne has known Reardon for 13 or so years, as the opposition and as her own representative. While Bourne states she does not always agree with Reardon, she believes they have a good working relationship. Bourne also works with ASEA's shop stewards on issues.

37. The parties' recollection of the events and meetings is inconsistent in small details and on two significant facts -- the timing of the termination and whether Bourne threatened retaliation for involving the union in the dispute. On these two important issues, we credit Bourne's testimony. She appeared direct. Her statements on key points are corroborated by Vowell. Vowell understood that Marshall had failed his probation before his meeting with Bourne and Marshall and he did not hear any threats about the union. Bourne was persuasive on the point that she was dumbfounded that Marshall would refuse to work and thereby lose a permanent, full-time job. Whether or not Marshall understood the situation, the evidence supports the fact that he failed probation at the time he refused the direct order to appear at work. His failure to understand under the circumstances seems obtuse but is consistent with his apparent refusal to accept the fact, however communicated, that Bourne had the authority to order him to work. Marshall did not understand another fact, which appears to have been communicated to him clearly, that Bourne wanted him to resign his job at corrections. Marshall testified that he did not believe the statement was serious. Thus, we find Bourne more credible and conclude that she did not make any threat to retaliate against Marshall for involving the union in his dispute and that Marshall failed probation when he refused a direct order to work on Saturday February 18, 1995.

38. Marshall did contact ASEA business agent Reardon. Marshall found Reardon unsympathetic. Marshall states Reardon informed him that his employer had the right to order him to work at any time. Reardon told Marshall he could be fired for insubordination. She told him that his employer had every right to fire him for insubordination because he was told to work and he did not go. She said that committing to work elsewhere was not a valid reason for not working. Reardon asked Marshall if he wanted his job back and Marshall said that he did. Marshall asked Reardon if she would file a complaint under the collective bargaining agreement on his behalf. She informed him that he did not have any grounds for one. Reardon did say she would talk to Bourne on Marshall's behalf.

39. Reardon spoke with Bourne on Marshall's behalf. Bourne told Reardon that Bourne would accept Marshall's resignation in lieu of a probationary drop.

40. Marshall states that Reardon related to him that Bourne would accept a resignation from Marshall or that Bourne would terminate him.

41. When Bourne did not hear from Marshall, she telephoned him, leaving messages on his voice recorder. Bourne had told Reardon that Marshall could resign if he did so quickly. Marshall never returned Bourne's telephone messages.

42. By the time Marshall sent a letter to Bourne resigning, his discharge was effective because the paperwork had been processed.

43. The reason for the discharge was that Marshall was not retained during his probationary period for failure to appear at work when ordered.

44. Marshall filed an unfair labor practice charge under AS 23.40.110 against the state on March 1, 1995, seeking one month's pay and eligibility for rehire by the State.

45. The Agency conducted an investigation of the charge and issued its notice of accusation on March 17, 1995.

46. The State filed its notice of defense denying the allegations on April 3, 1995.

47. The case was set for hearing on June 14, 1995.

Conclusions of Law

1. The State of Alaska is a public employer under AS 23.40.250(7), and 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. The sole issue referred for hearing in this case is whether the State of Alaska committed an unfair labor practice when its agent threatened Marshall with termination if he sought assistance from his bargaining representative and then subsequently terminated him for this conduct.

4. Such allegations, if true, would violate AS 23.40.110(a)(1).¹ AS 23.40.110(a)(1) restricts an employer or its agent from acting in a manner that will "interfere with, restrain, or coerce an employee in the exercise of the employee's rights guaranteed in AS 23.40.080."

5. However, we find that the allegations are not supported by the evidence. We credited the testimony of the State witnesses who disputed that Marshall was subjected to adverse action because he sought union assistance. Instead, the facts established are that Marshall did not satisfy probation because he was insubordinate. He did not follow a direct order by management to appear to work.

6. We also feel it is appropriate to note that the Alaska Executive Ethics Act requires State employees to report any employment outside of the employee's agency. AS 39.52.170. The law is not made contingent upon actual notice to an employee of the law's requirements.

ORDER

1. The State did not commit an unfair labor practice charge under AS 23.40.110 when it nonretained Greg Marshall for failing probation when he refused to comply with an order to work;

2. The complaint filed by Greg Marshall 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 GREG MARSHALL v. STATE OF ALASKA, CASE NO. 95-386-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 17th day of January, 1996.

Margie Yadlosky

Administrative Assistant

This is to certify that on the 17th day of January, 1996, a true and correct copy of the foregoing was mailed, postage prepaid to

Greg Marshall

Art Chance, State

Signature

In his brief, Marshall also references AS 23.40.110(a)(4). That provision prohibits retaliation for participation in proceedings before this Agency. The charge was not referred for hearing under that subsection and Marshall's allegations, if true, would not support a violation of that subsection. The reason is that Marshall has not alleged that he participated in any proceedings before this Agency before his termination.