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

HENRY T. MUNSON,

Complainant,

vs.

STATE OF ALASKA, DEPARTMENT OF CORRECTIONS,

Respondent.

VERNON L. GILLIAM,

Complainant,

vs.

STATE OF ALASKA, DEPARTMENT OF CORRECTIONS,

Respondent.

CASE NOS. 95-357-ULP & 95-401-ULP (Consol.)
CASE NOS. 95-361-ULP & 95-398-ULP (Consol.)

DECISION AND ORDER NO. 206

Digest: (1) By tolerating an employee with supervisory responsibilities to serve as a union shop steward, an employer interferes with the formation, existence or administration of a labor organization in violation of AS 23.40.110(a)(2); and

(2) By refusing an employee's request for a shop steward at an investigative interview that the employee reasonably believes could result in discipline and by continuing the interview, an employer violates AS 23.40.110(a)(1).

DECISION

Statement of the Case

These four cases involve the supervision of bargaining unit members by other members of the same bargaining unit -- the State of Alaska general government unit represented in bargaining by the Alaska State Employees Association.[1] General government unit member Henry T. Munson filed an unfair labor practice charge against the State of Alaska on December 7, 1994, case no. 95-357-ULP. In it he alleged actions by a shop steward and supervisor in violation of AS 23.40.110(a)(1), (2), and (4). On January 17, 1995, he amended the charge to allege retaliation for his activities in support of an organizing drive for the Public Safety Employees Association under AS 23.40.110(a)(3). He filed a second charge against the State on April 17, 1995, case no. 95-401-ULP. That charge raises five unfair labor practices under AS 23.40.110(a)(1)-(5). The first concerns training sessions where work time on union matters was addressed; the second concerns strict enforcement of uniform dress codes in retaliation for protected activity; the third alleges interference with a recall effort of a shop steward and a decertification petition; the fourth alleges retaliation for charging unfair labor practices and for attempting to change the bargaining representative; and the fifth alleges

retaliation against correctional officer Goguen for filing grievances.

The Alaska Labor Relations Agency conducted an investigation into Munson's first unfair labor charge, 95-357-ULP, found the charge supported by probable cause, and issued a notice of accusation on June 5, 1995. The State filed its notice of defense on June 20, 1995, requesting a hearing. The Agency conducted an investigation of the second charge, 95-401-ULP; found probable cause to support charges under AS 23.40.110(a)(1),(2),(3), and (4); and issued a notice of accusation on June 16, 1995. The Agency found that charges under AS 23.40.110(a)(5) were not supported by probable cause and dismissed them. On July 7, 1995, the charges in 95-357-ULP and 95-401-ULP were consolidated.

The unfair labor practice charges filed by general government unit member Vernon L. Gilliam are similar to those filed by Munson. Gilliam filed his first unfair labor practice charge against the State on January 9, 1995, 95-361-ULP, and his second charge on April 28, 1995, 95-398-ULP. The Agency conducted an investigation into Gilliam's first charge, 95-361-ULP, found probable cause to believe violations of AS 23.40.110(a)(1) and (2) had occurred, and issued a notice of accusation on June 6, 1995. The Agency however concluded that charges under AS 23.40.110(a)(4) were not supported and dismissed them. It completed its investigation of the second charge in 95-398-ULP and issued a notice of accusation in that case on June 16, 1995. The charges referred for hearing were under AS 23.40.110(a)(1),(2),(3), and (4). Charges under As 23.40.110(a)(5) were dismissed.

On July 14, 1995, the Agency ordered the consolidation of the two cases Gilliam filed in 95-361-ULP and 95-398-ULP. The two Munson cases were consolidated for hearing with the two Gilliam cases on July 14, 1995.

On September 20, 1995, Munson moved in 95-357-ULP and 95-401-ULP for the Agency to compel the production of documents from the State. The Agency denied the motion. Order (Sept. 27, 1995).

These two consolidated matters were heard on October 9 and 10, 1995, in Anchorage, Alaska, before a panel of the Alaska Labor Relations Board. The record closed on October 10, 1995.

Panel: Chair Alfred L. Tamagni, Sr., and Member Robert A. Doyle, present in Anchorage, and Member Raymond P. Smith, participating by review of the record.

Appearances: Complainant Henry T. Munson; complainant Vernon L. Gilliam; and Art Chance, labor relations analyst, for respondent State of Alaska, Department of Corrections.

Procedure in this case is governed by the Administrative Procedure Act, AS 44.62.330 -- 44.62.630, AS 23.40.130, and 8 AAC 97.340. Hearing examiner Jan Hart DeYoung presided.

Issues

1. Was the consolidation of these four unfair labor practice charges an appropriate exercise of discretion under 8 AAC 97.380?

2. Did the State interfere with the exercise of rights under the Public Employment Relations Act and thereby violate AS 23.40.110(a)(1) by the following acts:

a. accusing members of the bargaining unit of theft on union letterhead;

b. threatening discipline or disciplining employees responding to the accusation of theft;

c. denying employees union representation at an investigatory interview;

d. retaliating against employees for pursuing grievances on such subjects as uniform policy;

e. retaliating against employees who sought the recall of a shop steward under the ASEA constitution;

f. retaliating against complainant Henry Munson for organizational activity in support of another labor organization, the Public Safety Employees Association.

3. Did the State discriminate against an employee to encourage or discourage union membership by the actions named in paragraphs (2)(a) -- (f) and thereby violate AS 23.40.110(a)(3)?

4. Does tolerating a correctional officer III with supervisory duties to serve as a union shop steward constitute domination or interference with the formation, existence or administration of an organization so as to violate AS 23.40.110(a)(2)?

5. Did the State discriminate against Henry Munson for participating in an unfair labor practice charge against it in violation of AS 23.40.110(a)(4)?

6. Are the supervisory employees whose conduct forms the basis of these claims agents of the State?

7. Are the supervisory employees whose conduct forms the basis of these claims included in the term "public employer" defined in AS 23.40.250(7)?

8. Is harm such as demotion, discharge, or discipline a necessary element to finding a violation of AS 23.40.110?

9. Is it a defense that position classification is within the sole discretion of the State?

10. Is it a defense that the State believed its placement of correctional officer II and III positions in the general government unit was required under Agency decisions?

11. If the State employees whose conduct forms the basis of these charges were acting in their capacity as union shop stewards, does the State have any responsibility for their actions?[2]

Summary of the Evidence

A. Exhibits

Complainants Henry T. Munson and Vernon L. Gilliam offered the following exhibits that were admitted into the record:

2. S. Galvano, memorandum to all SCCC Shop Stewards (Nov. 4, 1994) page 1; S. Galvano, memorandum to Sisters and Brothers (Nov. 10, 1994) page 2;

3. Petition for recall election (Nov. 15, 1994);

4. V. Gilliam, letter to S. Galvano (Nov. 17, 1994);

6. Admitted pages 1-3: S. Galvano, memorandum to V. Gilliam (Nov. 21, 1994) (letter of instruction) page 1; Petition for recall election (Nov. 15, 1994) pages 2-3;

7. Admitted pages 1-2: H. Munson, charge against employer in 95-357-ULP (Dec. 6, 1995);

9. Admitted pages 1-3: H. Munson, letter to J. Ward (Jan, 16, 1995) page 1; H. Munson, amended charge against employer in 95-357-ULP (Jan. 17, 1995) pages 2-3;

10. L. Kincheloe, memorandum to distribution SCCC (June 23, 1995) (regarding shift rotation);

11. ASEA/AFSCME Corrections United Newsletter (Aug. 4, 1995);

12. Extract, Agency case no. 93-136-ULP (July 23, 1992) (which resulted in decision and order no. 161A);

16. Admitted pages 2 & 3, 7-25, 31-40: V. Gilliam, grievance form (Dec. 9, 1994) page 2; V. Gilliam, grievance form (Dec. 9, 1994) page 3; D. Goguen, grievance form (Jan. 24, 1995) and other documents related to D. Goguen, pages 7-

23; C. O'Connell grievance form filed on behalf of Sherrie Miller (April 13, 1995) page 24; S. Miller, grievance form (Mar. 30, 1995) page 25;C. O'Connell, letter to L. Dillon, H. Munson and S. Miller (Sept. 20. 1995) pags 31-32; Letter of grievance resolution (Sept. 23, 1995) (and comments) page 33; E. Shaw, letter to D. Williams (Dec. 29, 1994) page 34; T. Reimer, letter to D. Goguen (Oct. 2, 1995) (EAP referral and related pages) pages 35-40;

17. Admitted pages 7-23: Extract, Dep't of Corrections, Policies and Procedures;

18. Admitted pages 1-10 & 12-21: H. Munson, charge against employer in 95-401-ulp (April 12, 1995) (and attachments) pages 1-10 & 12-21;

19. C. O'Connell, letter to H. Munson (April 24, 1995), and attachments (Munson uniform grievance records), pages 1-33;

20. Admitted pages 8-9, 12-13, and 15-20: H. Munson, letter to L. Hames (Oct. 4, 1991) pages 8-9; G. Armstrong, letter to E. Shaw (Dec. 4, 1991) page 12; Extract, Dep't of Corrections, Policies and Procedures, page 13; C. O'Connell, letter to F. Sauser (April 11, 1995) (and attachments related to D. Goguen grievance), pages 15-20;

21. A. Chance, letter to H. Munson (Oct. 4, 1995);

22. Admitted pages 2-5: Interview notes (April 27, 1988), pages 2-4; E. Shaw, memorandum to operations supervisors (April 11, 1991), page 5;

23. J. Casto, memorandum to C. Withers (April 13, 1995); and

24. ASEA/State agreement (undated), page 47.

Complainants Henry T. Munson and Vernon L. Gilliam offered the following exhibits that were not admitted into the record:

1. H. Munson, letter to J. Ward, objection sustained;

5. H. Munson, file on result of S. Galvano disciplinary threat, objection sustained;

6. Pages 4-5, Munson file on result of Galvano disciplinary threat of respondent, objection sustained;

7. Pages 3-4, Munson records named "ULP resulting from events of Exhs. 1-6," were withdrawn;

8. Munson personal notebook, objection sustained;

9. Pages 4-8, Amended ULP, objection sustained;

13. Munson file on retaliation, objection sustained;

14. Munson file on retaliation, objection sustained;

15. Munson file on retaliation, objection sustained;

16. Pages 1, 4-6, & 26-30, Munson file on retaliation, objection sustained;

17. Page 1; Munson file on retaliation, objection sustained; pages 2-6, withdrawn;

18. Pages 11 & 22-31, Munson file on retaliation, objection sustained;

20. Pages 1-4, 7, 10-11, 14, & 21-24, Munson file on grievances, objection sustained; pages 5-6, withdrawn;

22. Extract of treatise, page 1, considered as authority; extract of transcript (undated), pages 6-8, objection sustained

25. Extract, objection sustained.

Respondent State of Alaska offered the following exhibits, which were admitted into the record:

A. Position Description Questionnaire, Gilliam PCN 20-8045;

B. Position Description Questionnaire, Munson PCN 20-8100;

C. Position Description Questionnaire, Kincheloe PCN 20-8001;

D. Position Description Questionnaire, Ewert PCN 20-8002;

E. Position Description Questionnaire, Shaw PCN 20-8008;

F. Position Description Questionnaire, Sampson PCN 20-8201;

G. Position Description Questionnaire, Charron PCN 20-8131;

H. Position Description Questionnaire, Galvano PCN 20-8133;

I. Position Description Questionnaire, Reimer PCN 20-8130;

J. M. Pugh, memorandum to all Department of Correction supervisors (Mar. 3, 1995);

K. Class specifications, correctional officer I, II, & III;

L. State/Alaska State Employees Association, agreement (1990-1993); State/Alaska State Employees Association, interim agreement (July 1, 1995 -- June 30, 1996).

B. Testimony

The complainants presented the testimony of Correctional Officers II Sherrie Miller, Daniel Goguen, Thomas F. Connor, Keith Conlin, Henry Munson, and Vernon Gilliam.

The respondent presented the testimony of Assistant Superintendent Earl Shaw, Assistant Superintendent Coleen Ewert, and Correctional Officers III Thomas Reimer, Louis John Charron, and Sal Galvano.

C. The Agency's case files in 95-357-ULP, 95-401-ULP, 95-361-ULP, and 95-398-ULP. 8 AAC 97.410.

Findings of Fact

The panel, by a preponderance of the evidence, finds the facts as follows:

1. The Alaska State Employees Association/AFSCME Local 52, AFL-CIO (ASEA), is the certified bargaining representative of the State's general government unit.

2. Henry T. Munson is a member of the State's general government unit. He is not a union member and pays an agency fee rather than union dues. He has been employed at the Spring Creek Correctional Center in Seward since May 23, 1988. Munson v. ASEA, Decision & Order No. 161A, at 2 (Aug. 23, 1993), affirmed 3AN-93-8752 (Super. Ct. Sept. 13, 1994) (memorandum and order).

3. Munson's battles with ASEA and the State have a long history and are set forth in the earlier decision and order. Id., at 3-9. See also, Exh. 18, at 8.

4. Part of the Agency's file in case no. 93-136-ULP, which resulted in Munson v. ASEA, Decision & Order No. 161A, was admitted as relevant to Munson's charge that the State and its agents retaliated against Munson for the charge he

brought against the ASEA. Exh. 12, at 2-9. The file in Munson's earlier charge against the State in case no. 94-251-ULP was also admitted. Id., at 10-21. The case against the State settled. Notice of Dismissal (July 18, 1994), Id., at 21. These files were admitted to establish participation in protected activity; they were not admitted for the purpose of reconsidering the charges made in the files.

5. Vernon Gilliam is a member of the State's general government unit, and is a correctional officer II at the Spring Creek Correctional Center in Seward.

6. The Spring Creek facility has 154 general government unit employees. Of these 16 are correctional officers III. The facility has five employees who are members of the supervisory unit represented by the Alaska Public Employees Association(APEA).

7. Sal Galvano is a correctional officer III (CO III) at the Spring Creek Correctional Center. He is in the general government unit and a member of the ASEA. Galvano is unit manager of a segregation unit. Exh. H. Galvano is a 40-hour employee and shop steward for the 40-hour employees. He serves as chief steward of the nine stewards located in the Spring Creek facility. The employees Galvano supervises are on an 84-hour work schedule.

8. Correctional officers III (CO III) carry the title sergeant and are the first line supervisors at the Spring Creek facility.[3] Exh. K, at 7; see e.g., Exhs. G, H, & I. They direct the work. They assign the correctional officers I and II to posts and shifts and may assign overtime. They prepare and sign evaluations. They participate in the hiring decision by serving on the hiring board, which interviews candidates and makes hiring recommendations. They recommend whether a new hire has successfully completed probation, but their decisions are reviewed. They have the authority to recommend discipline and issue letters of instruction, which are a step in progressive discipline. They attend management staff meetings. Other COs III include John Louis Charron and Thomas Reimer. Charron characterized himself as responsible as the employees's direct line supervisor to see that the employees do what they are paid to do. Reimer broke down his work time as 80 percent supervising or directing staff and 20 percent working with offenders.

9. On November 4, 1994, Galvano wrote a memorandum to all SCCC shop stewards, stating,

> There continues to be a problem with shop stewards conducting official union business without first notifying their supervisor. Stewards are reminded that the SS OR HOUSE SUPERVISOR need to be notified prior to you leaving your assigned post.
>
> Your cooperation is appreciated.

Exh. 2, at 1; Exh. 18, at 13.

10. On November 10, 1994, Galvano wrote a letter on union stationery stating:

> Dear Sisters and Brothers;
>
> Some rather disturbing information has been brought to my attention by our Food Service brothers and the administration. Once again, it concerns the "distasteful" topic of paid staff meals.
>
> In the four months of July, August, September, and October a total of 123 days, 2460 breakfast meals were prepared and 3075 dinner meals were prepared. During that same time period, a total of only 16 breakfasts and 447 dinners were paid for.
>
> This theft, as I see it, amounts to a loss for this institution's budget of over $10,000 for four months and over $40,000 for the year, money we could use for .....
>
> In my opinion, this abuse could result in those meals being discontinued, causing an inconvenience to many of our brothers and sisters. Before it comes to that, let me ask you on more time to *please pay for what you eat; take only what you pay for.*

In solidarity,

/s/

Sal Galvano

ASEA/AFSCME Local 52

Seward Chapter

Chief Steward

Exh. 2, at 2; Exh. 18, at 14. Galvano posted this memorandum on the union bulletin board in the employee break room.

11. A petition to recall Galvano was circulated in the Spring Creek institution. The petition sets out concerns about Galvano, which for the most part accuse him of siding with management against the correctional officers on what appears to be a longstanding food dispute.[4] The petition includes the signatures of 22 employees, apparently on the C shift, including several employees who testified in this case: Henry Munson, Sherrie Miller, Vernon L. Gilliam, Thomas Connor, and Daniel Goguen. Exh. 3, at 1.[5] A second copy of the petition, labeled D shift, is signed by eight employees. Exh. 6, at 2.

12. Gilliam also responded to Galvano's memorandum in writing, Exh. 4, at 1; Exh. 18, at 15:

November 17, 1994

Sal Galvano, Union Representative ASEA

RE: Your memo

> This letter is to inform you that some of your letter if not all of it is in error.
>
> First of all, I do not eat in the staff lunch room. I do not consider the food that is served in the staff dining room fit for human consumption, and I would not pay $2.00 for it.
>
> Second, there is no breakfast set up for the oncoming 0600 hours staff, so we don't have the opportunity to even eat this stuff. I have been working back there and I know that there has been no Officer eating breakfast.
>
> Third, you were elected to represent our interests, not those of the administration. I believe that it would be to our benefit if we were no longer served meals. It would relieve us of the responsibility of accepting blame for someone else's shortcomings.
>
> Fourth, I am not your brother. Unlike you, I know who all of my brothers and sisters are; and you are not one of them.
>
> It is my personal opinion that our elected officials are sadly lacking and are only instead furthering their own interests.

Vernon Gilliam, C.O. II

/s/

Gilliam posted one copy of his letter on the ASEA bulletin board in the institution and provided one copy through the distribution system to Galvano's mail box.

13. Assistant Superintendent Earl Shaw found Gilliam's letter disrespectful and insubordinate to a senior officer. Shaw

said the letter, because of its contents, was entirely inappropriate for posting in the institution.

14. Galvano responded to Gilliam's letter by issuing Gilliam a letter of instruction. Galvano's supervisor, Assistant Superintendent Shaw, did not approve the letter before it was issued but did not disagree with its contents. Galvano was not Gilliam's supervisor. Gilliam's supervisor, Reimer, tried to stay out of what he considered to be a personality dispute. Galvano's letter states:

> On 11/17/94 while on duty for the Department of Corrections, State of Alaska, I became aware of a memo addressed to me, signed by you that was posted on the ASEA bulletin board. On 11/18/94 while also on duty, I received a copy of this same memo in my institutional distribution box.
>
> In this memo you addressed your concerns and stated your opinion regarding a letter that I posted to our ASEA union members.
>
> While no one will argue that you are entitled to voice your opinion, you memo was an attack on me personally. It defamed my family and was abusive and profane in nature. This is a clear violation of Department of Corrections Policy and Procedure 202.01, section VI, (A), (6) and 13.AAC 85.230. The department will not tolerate that kind of abuse from you or any other state employee.
>
> You are hereby instructed to read and become familiar with Policy and Procedure 202.01 and 13 AAC 85.236 and to adhere to them in their entirety.
>
> Any future violation of this type will result in a disciplinary action up to and including dismissal.
>
> SG:sjl
>
> cc: Earl Shaw, Acting Superintendent, SCCC
>
> Personnel File, SCCC

Exh. 6 (emphasis added); Exh. 18, at 16.

15. The letter was placed with Assistant Superintendent Shaw's concurrence in Gilliam's personnel file. Exh. 16, at 34.

16. The Department of Corrections has disciplinary action guidelines in its policies and procedures manual. Exh. 17, at 7. The steps for progressive discipline begin with verbal and written warnings, verbal and written reprimands, and end with dismissal. Id., at 9. A "warning" is defined as follows:

> Warning: Used when the intent of the supervisor is to put an employee on notice that his/her behavior is not appropriate.
>
> a. The supervisor must inform the employee of the specific nature of the infraction, the reason the behavior must change and warn the employee that the infraction must not be repeated.
>
> b. The first warning may be verbal; subsequent warnings shall be written and shall be placed in the employee's worksite personnel file.

Id., at 12.

17. The contents of the letter of instruction to Gilliam make it apparent that this letter of instruction is a warning. It cites a rule, advises of a violation, and warns of future discipline for a second violation.

18. Gilliam grieved the letter of instruction on December 9, 1994, to Shaw. Exh. 16, at 2-3. Munson wrote Gilliam's grievance but ASEA did file it.

19. As a result of the grievance, the letter of instruction was removed from Gilliam's file at the direction of the Director of the Division of Institutions, Frank Sauser. Exh. 16, at 2 & 34.

20. Sherrie Miller, a correctional officer II at the Spring Creek facility, filed a complaint about Galvano with the ASEA. ASEA convened a judicial panel to consider the removal of Galvano as shop steward.

21. The panel did remove Galvano from his position as shop steward but permitted him to stand for reelection.

22. Galvano ran unopposed and was reelected shop steward of the 40-hour employees. The Spring Creek shop stewards then elected him chief steward.

23. After the ASEA judicial panel released its decision removing Galvano from his job as shop steward, Miller talked on the telephone about the decision in violation of the work rule that only shop stewards may participate on union business while on duty.

24. The work rule is that shop stewards may use nine hours per month for union business. There is no provision in the contract for employees who are not stewards to engage in union business on work time.

25. Miller asked for a shop steward in an interview with COs III Reimer and Charron about her use of the telephone and her hanging up on Reimer when he first inquired about her use of the telephone. Reimer felt that her initial refusal to discuss the incident with him was insubordination. Miller reasonably believed this interview could result in discipline.

26. Reimer and Charron denied Miller a shop steward and continued the interview. After the interview, Miller was disciplined, although not to Reimer's satisfaction. She received an oral warning from Assistant Superintendent Shaw. Exh. 19, at 26. At a subsequent meeting with Charron and Reimer, Miller was allowed a shop steward after her request. The shop steward was

Officer McGinness (the other party to the telephone conversation under investigation).

27. Apparently to establish a pattern of retaliation against grievants, complainants presented the testimony of Daniel Goguen, a correctional officer II at the Spring Creek facility. The evidence did not establish that Goguen was the subject of discipline or other adverse employment action as the result of an exercise of a protected right or union activity.

28. Goguen stated he was not allowed a shop steward, but he did not ask for one.

29. On March 30, 1995, Sherrie Miller filed a grievance concerning proper winter clothing and rain gear. Exh. 16, at 31.

30. On April 17, 1995, Munson also filed a grievance concerning required clothing. Exh. 19, at 2. Munson had attempted to obtain reimbursement for the purchase of a pair of black boots, which had been denied. Exh. 19, at 4-5 & 6. ASEA business agent Chuck O'Connell handled Munson and Miller's similar grievances as a larger class action grievance. Exh. 16, at 24 & 31; Exh. 19, at 1, 13-16.

31. On March 23, 1995, Superintendent Kincheloe issued a directive that, effective the following work week, all uniformed staff were required to be in uniform as set out in department and Spring Creek facility policy and procedures. Exh. 18, at 20; Exh. 19, at 9.

32. Department of Corrections policy and procedure on correctional staff uniform, appearance and rank insignia set forth specific uniform requirements. Exh. 19, at 10-11.

33. The ASEA collective bargaining agreement addresses the State's obligation to provide clothing in Article 28. Exh. 19, at 12; Exh. L, at 146.

34. Strict enforcement of the uniform policy was not caused by employee grievances about uniforms. Instead it was the direct result of a videotape of a training scenario that showed management that employees were out of compliance with

the policy.

35. Another concern to the complainants were staff meetings in late March and early April, 1995. In a meeting on April 1, 1995, attended by Miller, Gilliam, and Munson, CO III Reimer told his employees he was tired of "steward bashing." He also stated that too much union business was being conducted at work.

36. Reimer was aware of clothing grievances at this time but these grievances were not the reason he convened the April 1 meeting. Reimer's motive was his concern that union duties were taking priority over job duties at the institution. He had observed CO Kevin Anderson, a shop steward, spend more time on union business as a shop steward than he did on the work he was paid to perform. At the meeting Reimer announced the rule that shop stewards would be required to account for their time on union business by notifying their supervisor.

37. During the time at issue another labor organization, Public Safety Employees Association, was undertaking an organizational campaign among the correctional officers, including the COs III then represented by ASEA.

38. State officials made an effort to communicate to management employees the need to maintain neutrality by sending a written directive, which stated, in part "In order to facilitate this process in a professional manner, it is extremely important that all managers and supervisors remain neutral and not voice an opinion, either personal or professional, on this issue." Exh. J. This memorandum was distributed to employees at the supervisory unit level and above.

39. Grievances can result from conflicts between employees and their immediate supervisors. Representation of supervisors and the employees they supervise in the same bargaining unit creates opportunities for conflicts of interest by the bargaining representative. CO III Reimer described an incident in which he believed he did not get adequate representation in the general government unit: an ASEA business agent represented an employee under Reimer's supervision against Reimer without contacting him. Reimer believed his interests were not fairly represented.

40. A supervisor serving as a shop steward is inherently coercive and may chill the exercise of protected rights. As Galvano stated, employees have to be aware that, not only is he a steward, but he is a sergeant.

Discussion

The Agency in this case confronts the problem of combining supervisors with the employees they supervise in the same bargaining unit. Henry Munson, a journey level correctional officer, complains that the State committed unfair labor practices when its supervisors and agents conducted supervisory responsibilities while serving as union stewards. Vernon Gilliam's charges are similar and involve the same incidents.

Munson and Gilliam perceive the conduct of supervisors in staff meetings, and enforcement of State policies and work rules as retaliation for grievances and their exercise of rights set forth in PERA and in their collective bargaining agreement. We are genuinely concerned about some of the facts in this case and do conclude that the State committed two unfair labor practices. However, the conduct of some of these correctional officers concerns us. The Public Employment Relations Act is not a shield allowing employees to ignore State work rules and supervisors' orders. Ignoring or defying a work rule or order is insubordination. Insubordination justifies discipline.

The State, on the other hand, defends the conduct of its supervisors in large part by denying responsibility. The State is responsible under the doctrine of agency for its supervisors. It will be liable for the actions of its agents acting within the scope of their apparent authority even when those agents purport to act in their capacity as shop stewards.

1. Objection to Procedure: Consolidation of the complaints.

Munson objects to the consolidation of these four cases for hearing. The charges involve related incidents. Both Munson and Gilliam initially filed charges complaining about an incident involving a correctional officer III at Spring Creek Correctional Facility -- Sal Galvano. Each filed a second charge related factually to the first, alleging that supervisors and the State responded inappropriately to the employees' efforts to protect their rights after the first incident. Munson also claims retaliation because of an earlier unfair labor practice adjudicated before this Agency.[6] While there are some differences between the four cases, the cases share more similarities than difference. Because of the similarity of the

parties, facts, and legal issues, these four cases were consolidated for purposes of hearing. Upon hearing the consolidated cases the appropriateness of issuing a single decision became obvious. The cases are too much alike to hear or determine separately.

Munson objects to the consolidation on the grounds of hardships due to "logistical barriers." The sole logistical barrier identified was the difficulty reaching Gilliam. Munson further argues that the consolidation put him at a disadvantage and favored the State.

8 AAC 97.380 provides, "The labor relations agency will, in its discretion, consolidate or sever cases." That discretion was exercised reasonably in this case. While coordinating with Gilliam was sensible, avoiding unnecessary duplication of exhibits and briefing, it was not required. Munson certainly could have proceeded alone and prepared his exhibits and witnesses without coordinating with Gilliam.

On the other hand, consolidation resulted in substantial economies. The witness lists in the four cases named many of the same witnesses. Consolidating the hearings avoided duplication in testimony and exhibits and saved hearing time. Moreover, on the basis that two heads are better than one, we disagree with Munson that the consolidation put him at a disadvantage. Both Munson and Gilliam could call witnesses and crossexamine the State’s witnesses.

Hearing the cases separately would have resulted in duplication and repetition. The decision to consolidate these matters for hearing was an appropriate exercise of the hearing examiner's discretion.

2. AS 23.40.110(a)(1): Did actions of the State interfere with the exercise of rights under the Public Employment Relations Act.

AS 23.40.110(a)(1) provides that interference, restraint or coercion against an employee's exercise of rights protected in AS 23.40.080 is an unfair labor practice. AS 23.40.080 provides:

> Public employees may self-organize and form, join, or assist an organization to bargain collectively through representatives of their own choosing, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

This section is aimed at prohibiting conduct that could chill or interfere with employees's exercise of protected rights. The employer's motive is not at issue. The question is whether the employer engaged in conduct that can be said to interfere with the free exercise of a protected right. 1 Patrick Hardin, The Developing Labor Law at 76, (3d ed. 1992).

Munson and Gilliam each name a number of acts that they believe interfered with their exercise of rights protected under PERA.

a. Accusing members of the bargaining unit of theft on union letterhead.

Several bargaining unit members took offense at the letter Sal Galvano posted on union letterhead about employee theft of meals, in which he asked his "brothers and sisters" to "take only what you pay for." Exh. 2, at 1. Although Galvano used union stationery, his message would have been appropriate from a supervisor. However, Galvano’s letter does not interfere at all with the free exercise of rights under PERA. It is not directed at any protected conduct. Galvano in strong language is demanding that a theft problem that he perceives be stopped. Our only reservation about this communication is the mixing of the roles of supervisor and bargaining representative in one person. This issue is addressed under AS 23.40.110(a)(2), in section 4 below.

b. Threatening discipline or disciplining employees responding to the accusation of theft.

Gilliam responded to the memorandum Galvano posted with a letter of his own rebutting some of Galvano's statements and attacking Galvano personally. Gilliam was disciplined for this memorandum with a letter of instruction placed in his personnel file. Gilliam grieved the discipline, and the memorandum was removed. These series of actions cannot be said to interfere with his exercise of rights. If there were a violation, the State corrected it and mooted the issue by removing the letter of instruction.

However, Gilliam's letter may not have been protected activity in any event. Gilliam was not acting in concert with other employees or to protect rights under PERA. The activity must be for the purpose of collective bargaining or for the purpose of other mutual aid or protection. 1 Patrick Hardin, supra, at 144. Gilliam states that he was offended. He is not participating in conduct that could be said to be "concerted activities for the purpose of collective bargaining or other mutual aid or protection." AS 23.40.080. Gilliam did not, by posting this letter, engage in rights protected under AS 23.40.080.

If the conduct were protected and the employer had not remedied it in a grievance proceeding, we would need to address the effect of the language Gilliam used. Clark Equipment Co., 250 N.L.R.B. No. 178, 105 L.R.R.M.(BNA) 1071 (1980) (employee's use of the word "bastard" did justify discipline); but see Union Fork & Hoe Co., 241 N.L.R.B. No. 140, 101 L.R.R.M.(BNA) 1015 (1979) (NLRB found that an employer who discharged a shop steward for being disrespectful while processing an employee grievance was not justified and committed an unfair labor practice). We would also need to address whether the letter's distribution violated work rules. Gilliam posted the letter without permission in one location. If this action were in violation of a work rule, he may have exceeded the limit of the protection in AS 23.40.110(a)(1). The employer has the right to maintain order and control the work place. 1 Patrick Hardin, supra, at 146. An employer's concern for order and control in a correctional institution is particularly justified.

In this case, Gilliam's language was disrespectful but probably did not exceed the limits of activity protected under AS 23.40.110(a)(1). On the other hand, if Gilliam posted the letter in violation of work rules, he would have exceeded the limits of the protection in AS 23.40.110(a)(1).

c. Denying employees union representation at an investigatory interview.

Employees have rights during an investigatory interview to union representation. The NLRB in N.L.R.B. v. Weingarten, 420 U.S. 251, 88 L.R.R.M.(BNA) 2689 (1975), set out the limits on this right. The employee must first request union representation; the employer does not have an obligation to inform the employee of the right. Second, the employee must reasonably believe that the interview will lead to discipline. Third, the representation may not interfere with legitimate employer interests. The employer may respond to the request either by granting it or terminating the interview. Fourth, if a union representative does attend the interview, the employer has no obligation to bargain with him or her. See generally 1 Patrick Hardin, supra, at 152.

This Agency has not before addressed the Weingarten decision and the extent of employees's rights under PERA to union representation during an investigatory interview. The Agency, however, gives great weight to decisions of the NLRB and the federal courts, 8 AAC 97.450. The rule in Weingarten is based on section 8(a)(1) of the Labor Management Relations Act, 29 U.S.C.A. § 158(a)(1) (West 1996), which is similar to AS 23.40.110(a)(1). We adopt the Weingarten rule and apply it here.

The State ignored this right in one instance. Reimer and Charron denied a steward to Sherrie Miller after her request during their meeting on her inappropriate use of the telephone for union business. Reimer attempted to distinguish a disciplinary interview from an operational one and stated that a union shop steward was not required in the latter. However, Reimer states he was investigating Miller's conduct and in fact recommended discipline after the investigation, although it was not carried out to his satisfaction.

Under these facts Miller could reasonably have believed that discipline could result from her interview. Reimer's choice after the request was to grant the request or terminate the interview. He did neither.

Gilliam also complained that his rights to a shop steward were denied. He stated he was not advised he was entitled to a shop steward during his investigatory interview. In addition, Goguen, who also believed that he should have had a shop steward, also did not make a request for a steward. The employer is under no obligation to advise employees of their right to a shop steward. The request for union representation is an essential element to establishing a Weingarten violation.

d. Retaliation against employees for pursuing grievances on such subjects as uniform policy.

AS 23.40.110(a)(1) protects an employee from discharge or discipline for pursuing a grievance. 1 Patrick Hardin, supra, at 150. This protection extends even to an employee filing "numerous" grievances. Ad Art, Inc., 238 N.L.R.B. 1124, 99 L.R.R.M.(BNA) 1626, enforced, 645 F.2d 669, 106 L.R.R.M(BNA) 2010 (9th Cir. 1980).

Munson recounted four grievances filed on the subject of uniform policy. He believes that stricter enforcement of the policy was a result of the grievances. The complainants did not present any evidence that enforcing the uniform policy was in any way related to punishing employees for filing grievances. The State, however, brought forward substantial evidence that tied stricter enforcement of the uniform policy to escape training that had been videotaped. One of the employees on the videotape was wearing a jacket that did not comply with the uniform policy. When the superintendent reviewed the tape, he became concerned about the noncompliance with policy and determined that stricter enforcement was necessary for the safety of the employees.

Another example Munson gave of retaliation was a meeting in which Reimer told the assembled employees that they were spending too much time with grievances and on union business. The State is within its rights to require that work time be spent on work rather than union business. We are, however, concerned with the statement of a supervisor to employees to stop "steward bashing." Such a statement could discourage or chill employees in the free exercise of their rights under PERA. This concern is addressed under AS 23.40.110(a)(2), at section 4, infra.

Another correctional officer who has been active in filing grievances is Daniel Goguen. Goguen, a correctional officer for four and one-half years, filed a number of grievances about actions taken by various supervisors. Daniel Goguen filed a grievance about a letter of warning provided by his supervisor John Charron after Goguen called in sick. Exh. 16, at 8, 10. He grieved a "letter of counseling" about an absence from his assigned module and about an inmate being seen in Goguen’s chair. Exh. 16, at 20; Exh. 18, at 17. He got some relief following his grievances. Exh. 16, at 11.

More recently, Goguen met with Charron and Reimer. They provided him with his evaluation, which rated him unsatisfactory in interpersonal relationships. They delivered a letter of instruction from Spring Creek Superintendent Larry Kincheloe. The letter was the result of an investigation about the intimidation of a staff member and witness in a future arbitration hearing. Id., at 36. At the same meeting they delivered a memorandum reassigning Goguen from C shift to B shift. Id., at 37. At the meeting shift supervisor Reimer referred Goguen to the employee assistance program (E.A.P.). Id., at 35. Goguen grieved this meeting on October 2, 1995, Id., at 38.

Goguen believes that these actions were taken in retaliation for previous grievances and that the shift transfer was intended to interfere with his participation in this hearing. Id., at 7 & 39. In a response to Goguen’s claims, Superintendent Kincheloe stated that his memorandum was not discipline but rather instruction and the transfer was not in retaliation for anything Goguen may have done in the past and advised that Goguen "may take business or annual leave to attend to union business as you and your union might see fit." Id., at 40.

The evidence in the record supports the conclusions that the discipline and other actions against Goguen were work related and not pretextual and not the result of any protected activity.

Another instance of retaliation offered was the State’s decision to rotate staff. Exh. 10. This change applied to all employees. Complainants did not present evidence linking this change to the exercise of protected rights. There is, however, evidence of a legitimate reason for the rotation unrelated to protected activity. See Id., at 10.

We found no evidence supporting the conclusion that the State retaliated against employees for pursuing grievances.

e. Retaliating against employees who sought the recall of a shop steward under the ASEA constitution

Munson and Gilliam believe that the State is retaliating against them in part for their support for the recall of Galvano. They also claim that the State retaliated against Sherrie Miller when her supervisor disciplined her for talking excessively on the telephone after the ASEA issued its decision removing Galvano as a shop steward. With regard to Miller, the facts established discipline unrelated to her views on union issues or exercise of protected rights.

The facts do not show any State interference with the rights of employees who sought Galvano's removal.

> f. Retaliating against complainant Henry Munson for organizational activity in support of another labor organization, the Public Safety Employees Association.

The rights to join or assist a labor organization are important rights protected under AS 23.40.110(a)(1). This right would encompass the right to assist or support a labor organization engaged in an organizational campaign in a unit represented by another organization. See generally 1 Patrick Hardin, supra, at 107. Nothing in the record supported the charge that the State or its agents retaliated against Munson for support of PSEA.

3. AS 23.40.110(a)(3): Did the State discriminate against an employee to encourage or discourage union membership.

AS 23.40.110(a)(3) provides that it is an unfair labor practice for 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." Discriminating in terms or conditions of employment can violate this section if "the discrimination is motivated by an antiunion purpose" or is inherently destructive of collective bargaining rights and "has the foreseeable effect of either encouraging or discouraging union membership." ACCFT v. University of Alaska, Decision & Order No. 204, at 10 (Aug. 20, 1996), citing 1 Patrick Hardin, supra, at 190 & 191. AS 23.40.110(a)(3) is aimed at employer discrimination that is intended or has a natural and foreseeable adverse effect on employee rights under PERA. Motive is an essential element of this section unless the conduct is necessarily inherently destructive of protected rights.

Thus, to establish a violation, a complainant must show discrimination intended to discourage or encourage union membership or with a foreseeable adverse effect on protected rights. Munson and Gilliam between them allege a number of actions in violation of this section -- accusing members of the bargaining unit of theft on union letterhead; threatening discipline or disciplining employees responding to an accusation of theft; denying employees union representation at an investigatory interview; retaliation against employees for pursuing grievances on such subjects as uniform policy; retaliating against employees who sought the recall of a shop steward under the ASEA constitution; and retaliation for organizing activity.

In none of these actions, however, do Munson or Gilliam show any discrimination in employment or any impact on employment. Munson alleged in his amended complaint in 95-357-ULP that he was removed from a position as lead officer in retaliation for organizing activity. He did not, however, introduce any evidence in support of his allegation. He only offered evidence documenting that he had made the allegation. Exh. 9. Neither Munson nor Gilliam show that the State discriminated in hire, discharge, or the terms or conditions of employment in any manner. None of the conduct complained about has affected the employment of Munson or Gilliam.

In addition, the complainants offered evidence of the grievance activity of two other employees who testified in this case -- Goguen and Miller. Both employees received letters of instruction after participating in grievances. Neither establish any connection between the discipline and their grievance activity. Miller's discipline was for violation of a work rule. She conceded at the hearing that she knew she had made a mistake. Goguen was the subject of discipline but the evidence did not even raise an inference of improper motive or any impact on rights under PERA. An employer has the right to discipline for good cause to maintain order and efficiency in the work place. Laidlaw Corp., 171 N.L.R.B. 366, 68 L.R.R.M.(BNA) 1252 (1968), enforced on other grounds 414 F.2d 99, 71 L.R.R.M.(BNA) 3054 (7th Cir. 1969), cert. denied 397 U.S. 920, 73 L.R.R.M.(BNA) 2537 (1970).

4. AS 23.40.110(a)(2): Does tolerating a correctional officer III with supervisory duties to serve as a union shop steward constitute domination or interference with the formation, existence or administration of a labor organization?

Employer domination or interference with or support of a labor organization is an unfair labor practice. AS 23.40.100(a)(2) provides that

> A public employer or an agent of a public employer may not . . . dominate or interfere with the formation, existence, or administration of an organization.

Congress's purpose in adopting the similar section 8(a)(2) in the Labor Management Relations Act was to eradicate the

company union. 1 Patrick Hardin, supra, at 289. A claim that the State dominates ASEA is inconsistent with these parties' litigation before this Agency since ASEA's certification. See e.g., State v. Alaska State Employees Ass'n, No. S-6600/6630 (Aug. 2, 1996); Alaska State Employees Ass'n v. State, Decision & Order No. 195 (Sept. 26, 1995); Alaska State Employees Ass'n v. State, Decision & Order No. 178 (June 15, 1994); Alaska State Employees Ass'n v. State, Decision & Order No. 174 (April 19, 1994). But it is also an unfair labor practice to interfere with or provide financial support to a labor organization. Cases under section 8(a)(2) of the similar federal law commonly arise when supervisors participate in union activities and when an employer's agents express favoritism between contending unions. 1 Patrick Hardin, supra, at 303.

In this case two rights protected under PERA are competing -- the right of employees to select a bargaining representative and the right of employees to an organization free from employer domination or interference. In the Spring Creek facility the shop stewards are elected by the employees they represent -- there are two stewards for each of the A, B, C, and D, shifts and one steward for the 40-hour employees. When a bargaining unit member filed a complaint against shop steward Galvano, the ASEA conducted a hearing and removed him from his office. It allowed him to run for reelection and Galvano was returned to his position two weeks later. The record does not suggest that the State departed from a position of neutrality during this procedure.

However, this shop steward, Galvano, is also a supervisor of a work group in the correctional institution. Galvano did make some effort to keep his roles separate but was not always successful. For example, he spoke with one of the signers of the petition to recall him as a shop steward, Officer Connor. When Galvano approached Connor to ask him to remove his name from the petition, Galvano stated that he wore two hats, one as a supervisor and one as a steward. Galvano told Connor he was talking to him in his capacity as a steward. While Connor did not feel threatened, we believe an employee could reasonably feel threatened under these circumstances. In another instance Galvano allowed his roles as supervisor and steward to become confused. When an employee responded to a notice Galvano posted as a shop steward, Galvano disciplined the employee as a supervisor. Higher level management, Assistant Superintendent Shaw, agreed with the discipline, although it was rescinded at a higher level by Director Sauser.

The problems of a supervisor serving as a shop steward are obvious. Supervisors' interests are aligned with management. These interests conflict with the interests of the rank and file. Perhaps in recognition of this conflict, the LMRA does not give supervisors bargaining rights. Shop stewards are called upon to perform basic member services, largely in the area of individual employee grievances. Often a grievance is directed against the actions of the supervisor. If the shop steward is a supervisor, there is a question of divided loyalty and of the supervisor's effectiveness as a shop steward. N.L.R.B. v. General Steel Erectors, 933 F.2d 568, 137 L.R.R.M.(BNA) 2466 (7th Cir. 1991), enforcing 297 N.L.R.B. No. 116, 133 L.R.R.M.(BNA) 1174 (1990). Appointing a supervisor as a shop steward could discourage employees from exercising their rights, particularly in the area of grievances.

But by prohibiting the supervisor from serving as a shop steward, the employer interferes directly with the administration of the union and the employees's right to choose their representatives. Removing an employee from a position as a supervisor because the employee is a shop steward could be discrimination in employment penalizing union activity under AS 23.40.110(a)(3).

The NLRB has resolved the dilemma in favor of the independence of the labor organization. Under the LMRA it is a per se violation of section 8(a)(2) for a supervisor to be a union officer. Id. The employer is responsible to insure that such conflicts do not occur. In N.L.R.B. v. General Steel Erectors, the director of safety also served as the president of the local that dispatched employees to the employer. The NLRB issued a cease and desist order to the employer to insure that, so long as the employee was a supervisor, he was not a union officer. Id.; see also Vanguard Tours Inc., 300 N.L.R.B. No. 30, 136 L.R.R.M.(BNA) 1149 (1990), enforcement den'd in part 981 F.2d 62, 142 L.R.R.M.(BNA) 2041 (2d Cir. 1992); Russ Togs, Inc., 253 N.L.R.B. No. 99, 106 L.R.R.M.(BNA) 1067 (1980); Nassau & Suffolk Contractor's Ass'n, 118 N.L.R.B. 174, 40 L.R.R.M.(BNA) 1146 (1957) (employer acquiescence to union placement of supervisors in union negotiating committee is an unfair labor practice); 1 Patrick Hardin, supra, at 302.

We conclude that, by acquiescing in Galvano's dual roles as shop steward and supervisor, the State interfered with the administration and operation of ASEA in violation of AS 23.40.110(a)(2).

In addition Munson alleges that the State retaliated against him for his support of PSEA in an organizing drive. An employer can violate section 8(a)(2) if a supervisor's act could be interpreted as signaling favoritism for one of the rival unions even if the employer does not know of the action, authorize it, or ratify it. 1 Patrick Hardin, supra, at 307. However, neither Munson nor Gilliam presented evidence of any State preference for ASEA over the PSEA. Moreover, the State presented evidence of its efforts to maintain neutrality. Exh. J.

5. AS 23.40.110(a)(4): Did the State discriminate against Henry Munson for participating in an unfair labor practice charge against it?

An employer may not discriminate against an employee for participating in an unfair labor practice charge. AS 23.40.110(a)(4). This section protects employees who participate in Agency proceedings. Henry Munson filed an action against the State in the past. Munson v. State, case no. 93-251-ULP (filed Sept. 13, 1993). He also was the complainant and a witness in a case against ASEA that proceeded to hearing. Munson v. ASEA, Decision & Order No. 161A. It would be an unfair labor practice for the State to discharge or otherwise discriminate against Munson for these activities.

Munson, however, remains a State employee, and he has not brought forward evidence of any discrimination in employment. He has not been disciplined. He claimed in argument that he had been overlooked for transfer and in a letter that he had lost his lead officer status in retaliation for protected activities, Exh. 9, at 1, but presented no evidence to support these claims.

There is no evidence that the State discriminated against Munson in any way. It did not discharge or discipline him. The State therefore has not retaliated against Munson for his participation in a proceeding under PERA in violation of AS 23.40.110(a)(4).

If Munson had been discharged or shown that he had been disciplined, this Agency would next examine the State's motive. An employer may discharge or discipline for good cause. To distinguish between conduct motivated by legitimate reasons from improper or pretextual reasons, the NLRB requires a complainant to show protected activity, the employer’s knowledge of the activity, and union animus. Then the burden shifts to the employer to show that the improper motive played no part in its discharge or discipline. See 1 Patrick Hardin, supra, at 277. In other words the employee must show evidence supporting the inference that protected conduct was a motivating factor, and the burden then shifts to the employer to show it would have acted the same way even in the absence of the protected conduct. Wright Line, 251 N.L.R.B. 1083, 105 L.R.R.M.(BNA) 1169, 1175 (1980). Because Munson has not established an action adverse to him, we cannot examine the State’s motive for the action.

6. Are the supervisory employees whose conduct forms the basis of these claims agents of the State?

The State raises a number of issues in defense of the charges against it. It questions whether the supervisors whose conduct is at issue are agents of the State so that their conduct should be attributed to it. AS 23.40.110(a) prohibits unfair labor practices by "a public employer or an agent of a public employer." Emphasis supplied. In addition, AS 23.40.250(7) defines "public employer" to include "a person designated by the public employer to act in its interest in dealing with public employees."

Similar language in the Wagner Act was interpreted to hold employers liable for the acts of supervisors and even employees below the level of supervisor. 2 Patrick Hardin, supra, at 1600 & n. 170, citing Machinists Lodge 35 v. N.L.R.B., 311 U.S. 72, 7 L.R.R.M.(BNA) 282 (1940). The Wagner Act later was amended so that the employer was liable only for the acts of its agents. The common laws of agency apply and employers are now liable for the acts of supervisors acting under apparent authority. Aladdin Industries 147 N.L.R.B. 1392, 56 L.R.R.M.(BNA) 1388 (1964); 1 Patrick Hardin, supra, at 1600 & n. 173. Under the LMRA an employer is presumed liable for the acts of a supervisor, but the employer can rebut the presumption. Id.

We agree with the NLRB that the rules of agency should govern an employer's liability for the actions of its supervisors, and rely on the use of the word "agent" in AS 23.40.110(a) and the definition of "public employer" in AS 23.40.250(7), in addition to precedent under the LMRA.

We have found Galvano, Charron, and Reimer to be supervisors. Their actions are presumed to be within the scope of their agency unless the State can rebut the presumption by showing they lacked actual or even apparent authority. The State has not offered any evidence limiting the supervisory duties and authority of these employees.

Charron and Reimer did not exceed their authority when they investigated suspected disciplinary problems by employees under their control, and they were agents of the State when they denied the presence of a shop steward to an employee who requested one. It was also within the apparent authority of these supervisors to hold staff meetings, at which they enforced the work rules of the employer. In addition, Galvano's letter of instruction to Gilliam was an action within his authority as a supervisor. Although Galvano was not the direct supervisor of Gilliam, he was able to place the letter in Gilliam's personnel file. The assistant superintendent of the facility concurred in this action. It required a grievance to remove the letter.

Although we did not find all of the actions of the supervisors that were complained about to be violations, we do find that they were acting within the scope of their authority as agents, and the State is responsible and liable where violations were proven.

7. Are the supervisory employees whose conduct forms the basis of these claims included in the term "public employer" defined in AS 23.40.250(7)?

AS 23.40.250(7) defines "public employer": It specifically includes "a person designated by the public employer to act in its interest in dealing with public employees." The common understanding of a supervisor is of a person designated by the employer to deal with its employees, and we conclude "public employer" includes supervisors. We also note the language in AS 23.40.110(a) that provides for conduct by an employer or "an agent of a public employer" to be an unfair labor practice. Thus, PERA expressly prohibits agents of the employer to commit unfair labor practices. PERA plainly provides that conduct by an agent or a person designated to deal with public employees may be an unfair labor practice.

If the State means by this argument that supervisors cannot be both an "employee" as defined in AS 23.40.250(6) and a "public employer" as defined in AS 23.40.250(7), it is wrong. The State acts through its agents. Those agents will be either public employees or appointed or elected officials. The courts are expansively construing the term "employee" in AS 23.40.250(6). See Alaska State Employees Ass'n v. State, No. 3AN-94-0879 (Super. Ct. July 7, 1994) (order and judgment), reversed in part State v. Alaska State Employees Ass'n, No. 0806 (Jan. 24, 1996) (memorandum opinion and judgment). The State cannot restrict agency authority to appointed or elected officials and accomplish its business. The terms "agent" or "person designated to deal with employees" and "employee" cannot be mutually exclusive.

8. Is harm such as demotion, discharge, or discipline a necessary element to finding a violation of AS 23.40.110?

Each statutory prohibition against an unfair labor practice in AS 23.40.110 protects a particular right. To prove an unfair labor practice under some sections may require an impact in employment, such as discharge or discipline, as an element of the prima facie case. See AS 23.40.110(a)(3) & (4). Under other sections it is not. AS 23.40.110(a)(5). The elements needed to prove up a particular unfair labor practice will be addressed under that charge.

9. Is it a defense that position classification is within the sole discretion of the State?

The Alaska Supreme Court has held that position classification and salary range assignment are not mandatory subjects of bargaining. Alaska Public Employees Ass'n v. State of Alaska, 831 P.2d 1245 (1992). Relying on this case, the State maintains that the Agency may not review the "appropriate classification of the disputed positions" or "any attributes of the classification process." The Agency concurs that it may not review the State's classification decisions. But this restriction does not prevent the Agency from considering the unfair labor practice charges made by Munson and Gilliam at issue in these consolidated cases. Whether the State has committed an unfair labor practice under AS 23.40.110(a) is within this Agency's jurisdiction. This decision and order should not affect the State's classification plan in any way.

10. Is it a defense that the State believed its placement of correctional officer II and III positions in the general government unit was required under Agency decisions?

The State argues in defense that the placement of the correctional officer II and III positions in the general government unit was justified by Agency unit clarification decisions. This decision, however, does not rely on the definition of "supervisor" in 8 AAC 97.990(5). That section defines supervisor for purposes of applying 8 AAC 97.090, which prohibits combining nonsupervisory employees with supervisors in the same bargaining unit. Whether these employees are supervisors under that section was not at issue in this case; we did not rest our decision on it or even address it. If the supervisory CO IIIs had been in a separate bargaining unit, the State may have avoided at least one of the unfair labor practices we found in this case. But the fact that these employees have been placed in the general government unit does not excuse the State from liability for their acts as supervisors that might conflict with the interests of other members of the bargaining unit.

11. If the State employees whose conduct forms the basis of these charges were acting in their capacity as union shop stewards, does the State have any responsibility for their actions?

The State is responsible for the actions of its agents acting within the scope of their apparent authority. See section 6 supra; 2 Patrick Hardin, supra, at 1600. The fact that these employees may also be agents of a labor organization does not relieve the State from liability for their actions within the scope of their authority as supervisors.

12. Remedy

Munson asks for an order for the State to cease and desist its violations, for his expenses, and for compensation for his time. The remedy Gilliam requests is the removal and destruction of his letter of instruction, criminal prosecution of three supervisors, realignment of the bargaining unit, and for costs of this action.

AS 23.40.140 sets forth the power of this Agency to remedy unfair labor practices:

> If the labor relations agency finds that a person named in the written complaint or accusation has engaged in a prohibited practice, the labor relations agency shall issue and serve on the person an order or decision requiring the person to cease and desist from the prohibited practice and to take affirmative action which will carry out the provisions of AS 23.40.070 -- 23.40.260. If the labor relations agency finds that a person named in the complaint or accusation has not engaged or is not engaging in a prohibited practice, the labor relations agency shall state its findings of fact and issue an order dismissing the complaint or accusation.

The section does not include any express authority to award damages although returning parties to the status quo can result in a financial award in a case. See Alaska State Employees Ass'n, AFSCME Local 52 v. State, Decision and Order No. 158 (May 14, 1993). These employees did not suffer any wage loss. They did not lose a salary increase or time at work due to any of the events addressed in these cases. They have not suffered any financial loss as a result of the two violations we found -- Miller's Weingarten violation and the unfair labor practice under AS 23.40.110(a)(2).

Munson and Gilliam seek their expenses and an amount that would compensate them for their time in pursuing these actions. Neither incurred attorney's fees, but their request is comparable to a request for costs and attorney's fees. Express statutory authority is needed for such an award.

An appropriate award for the unfair labor practices in this case is an order to the State to cease and desist its violation. Such an order would mean for agents of the State to stop refusing requests for the presence of shop stewards during investigatory interviews that an employee could reasonably believe would result in discipline. It would also require the State to insure that its supervisor Sal Galvano does not serve as a shop steward of general government employees.

We do not need to address the letter of instruction in Gilliam's personnel file because it was removed and we did not find a violation.

We do not refer any persons for criminal prosecution because, even if we have the authority, such a referral is not warranted under the facts in this case.

Conclusions of Law

1. This Agency has jurisdiction under AS 23.40.110 to consider this matter.

2. As the complainants in these unfair labor practice charges, Munson and Gilliam each has the duty to prove the elements of the charges by a preponderance of the evidence. 8 AAC 97.350(f).

3. Charron, Reimer, and Galvano are supervisors and agents of the State under AS 23.40.110(a).

4. Employees's rights to union representation during an investigatory interview under AS 23.40.110(a)(1) are set forth in N.L.R.B. v. Weingarten, 420 U.S. 251, 88 L.R.R.M.(BNA) 2689 (1975).

5. When State supervisors refused a request by Sherrie Miller for union representation and continued the investigative interview after denying the request, the State violated AS 23.40.110(a)(1).

6. The evidence does not support the remaining charges under AS 23.40.110(a)(1).

7. By acquiescing to a supervisor serving as a shop steward in the Spring Creek Correctional Facility, the State interfered with the administration and existence of the Alaska State Employees Association in violation of AS 23.40.110(a)(2).

8. The evidence in the record does not support violations of AS 23.40.110(a)(3) and (4).

9. Consolidating the four cases for hearing and decision is an appropriate exercise of discretion under 8 AAC 97.380.

ORDER

1. The State of Alaska is ordered to cease and desist violating Weingarten rights protected in AS 23.40.110(a)(1);

2. The State of Alaska is ordered to cease and desist its violation of AS 23.40.110(a)(2) by insuring that Sergeant Sal Galvano does not serve in the dual capacity of supervisor and shop steward;

3. The remaining charges filed by complainants in these consolidated actions are dismissed;

4. 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

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 HENRY T. MUNSON v. STATE OF ALASKA, DEPARTMENT OF CORRECTIONS, and VERNON L. GILLIAM v. STATE

OF ALASKA, DEPARTMENT OF CORRECTIONS, CASE NOS. 95-357-ULP & 95-401-ULP (Consol.) and CASE NOS. 95-361-ULP & 95-398-ULP (Consol.), dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 20th day of September, 1996.

Margie Yadlosky

Administrative Assistant

This is to certify that on the 20th day of September, 1996, a true and correct copy of the foregoing was mailed, postage prepaid to

Henry T. Munson, Complainant

Vernon L. Gilliam, Complainant

Art Chance, State

Signature

1The Alaska State Employees Association is the respondent in related charges brought by complainants Henry T. Munson and Vernon L. Gilliam in 95-358-ULP and 95-362-ULP.

2For the first time in his prehearing statement, Munson raised the issue of 8 AAC 97.225, which addresses complaints or accusations by employees. The regulation provides that an employee may not file a complaint against an employer without first proving that a labor organization committed an unfair labor practice and, second, exhausting internal union remedies. The regulation requires employees to rely upon their exclusive union representatives when proceeding against an employer. That regulation was adopted and became effective on April 14, 1995. However, the first of Munson and Gilliam's complaints were filed before April 14, 1995, and the regulation would not have applied. Nevertheless, 8 AAC 97.225 did not preclude consideration of the complaints filed in these four cases, and it had no impact on the investigation and the Agency's decision.

3Not all correctional officers III are supervisors. Some perform training and others are disciplinary sergeants, with disciplinary duties over inmates.

4Food service for State employees at the Spring Creek Correctional Facility was the subject of another unfair labor practice charge in Alaska State Employees Association v. State of Alaska, Decision & Order No. 195 (Sept. 26, 1995) (the sack lunches case).

5The complainants appear to think significant the fact that all of the petitions circulated could not be accounted for. We do not see the materiality of this fact.

6See discussion, infra, at Section 5, p. 24.