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ALASKA STATE EMPLOYEES
ASSOCIATION, AFSCME LOCAL 52,
AFL-CIO,

COMPLAINANT,
)
vs.)
)
STATE OF ALASKA,)
)
RESPONDENT.)
_____)

Case No. 99-1027-ULP
DECISION AND ORDER NO. 252

Digest: An employer violates AS 23.40.110(a)(3) and AS 23.40.110(a)(1) when it terminates an employee because the employee contacted a union steward about an agreement to extend the probationary period.
Appearances: Harriet Lawlor, Business Agent for the Alaska State Employees Association (ASEA); and Kent Durand, labor relations analyst for the State of Alaska (State).
Panel: Aaron Isaacs, Jr., Dick Brickley, and Raymond Smith.

DECISION

Statement of the Case

On December 14, 1999, ASEA filed an unfair labor practice charge against the State of Alaska, on behalf of state employee Kandace Wafer. The charge, amended on December 27, 1999, alleges that the State wrongfully terminated Wafer because she requested that her union review an extension-of-probation memorandum. The State disputes the charge, contending that it "followed all appropriate procedures in effectuating the non-retention, and that the non-retention decision "was not based on any consideration" regarding protected and concerted activity.

The Agency panel heard this dispute on June 28, 2000. Hearing Examiner Mark Torgerson presided. This matter was decided based on the evidence submitted and the testimony of witnesses at the June 28, 2000, hearing. The record closed on August 29, 2000, after Board member Isaacs had the opportunity to finish reviewing the hearing tape and evidence.

Issues

1. Did the State violate AS 23.40.110(a)(3) and (1) by terminating the employee because the employee exercised rights protected under AS 23.40.080?
2. If the State committed a violation, what is the remedy?

Findings of Fact

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

1. ASEA filed a complaint on behalf of Kandace Wafer on December 13, 1999 (Exh. 1 at 57-58). The nature of the complaint states: "Ms. Wafer was issued a letter to extend her probation. Ms. Wafer requested the

letter be reviewed by the shop steward. After doing this the employer terminated the employee without further explanation." (Exh. D). The State responded that "[o]n 11/30/99 at 2:30 pm, Ms. Wafer advised her supervisor that she had spoken with her union representative, Marcos, on Friday (11/26/99) and she had decided not to sign the extension of probation letter." (State April 6, 2000, Notice of Defense; Exh. D). The State thus denied relief on the complaint. The complaint went through all steps required by the parties' contract and the State denied relief at each step.

2. Wafer began working as an Administrative Clerk II for the Department of Corrections in Palmer on June 1, 1999. Her last day was November 30, 1999.

3. Rebecca Brunger was Wafer's supervisor. She is a Probation Officer III. She has been a supervisor for a year and is a member of the Alaska Public Employees Association. She has worked as a probation officer for 12 years. Brunger started to get concerned about Wafer's performance and discussed her concern with her supervisor, Colleen Tafs, the Chief Probation Officer for the Department's Southcentral Region.

4. Tafs has worked for the Department for 17 years. The two began discussing Wafer's performance in September. Due to Wafer's starting date of June 1, 1999, Wafer was supposed to get an interim, three-month evaluation in September 1999, halfway into the six-month period. Tafs told Brunger it was imperative to do a timely interim evaluation to give Wafer adequate time to improve her performance. Tafs told Brunger Wafer needed to be able to have the chance to improve her performance if she was going to be able to "make probation." However, Brunger did not complete the interim evaluation until October 1999. The evaluation covered a four-month period (June 1 to September 30) instead of three months. She gave Wafer the evaluation sometime in October, and both parties signed the evaluation on October 19. Tafs said they were very busy in the fall of 1999.

5. Brunger gave Wafer a letter of instruction, regarding a performance issue, in a meeting on November 8, 1999. Following that meeting, Brunger began to consider extending Wafer's probationary period, which was due to expire on November 30, 1999. She discussed this possibility with her supervisor, Colleen Tafs. Brunger was told that the only other option besides an extension was to do a "non-retention," which means the employee would be terminated from employment at the end of the probationary period.

6. On November 23, 1999, Brunger approached Wafer and first discussed with her the possibility of extending Wafer's probationary period. Brunger offered Wafer a 90-day extension period. Wafer considered it and inquired about the possibility of a 60-day period. They discussed the two alternatives, and Wafer asked for time to think about it. On November 24, 1999 Wafer told Brunger she would agree to a 60-day extension of her probationary period. Brunger agreed to the extension and said she would draw up the necessary paperwork after making sure it was acceptable to the Department's personnel division.

7. On November 30, the last day of Wafer's probationary period, Brunger completed a memorandum summarizing the 60-day extension of probation. (Exh. 2). At approximately 2:30 p.m., she called Wafer into her office and gave Wafer the memorandum, which describes the extension of the probationary period and the discussions that had occurred between them. The memorandum states in full:

According to the GGU Contract, the probationary period is 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 judgment of the Employer, have not or will not or will not [sic] satisfactorily pass the probationary period shall not be retained in the job class. Article 11.02 A.1.b, specifies that the Employer may, after written mutual agreement with the Employee, extend the probationary period of an Employee in ranges 5 through 13 for a period not to exceed three (3) months.

On November 23, 1999, I met with you to discuss the possibility of extending your probationary period in order to provide you with additional time to demonstrate satisfactory job performance as well as to allow myself additional time to observe your performance so it may be evaluated. The following day, November 24, 1999, you advised me that you would be willing to agree to having your probationary period extended, however [you] preferred that the period of time be two months rather than three months. As such, the necessary paperwork will be forwarded to personnel to activate the extension of your probationary period from December 1, 1999 to February 1, 2000.

(Exh. 2).

8. The parties dispute what happened and what was said when Brunger and Wafer discussed the extension-of-probation memorandum on November 30, 1999, the last day of Wafer's probationary period. Wafer testified that after she reviewed the memorandum, she asked Brunger if she could speak to her union representative about the memorandum. Wafer testified that she had never been a union member before; she didn't understand everything about the extension and wanted to discuss it with her union representative. Wafer said that when she asked Brunger to let her speak to Marcos Perez, her union steward, Brunger looked shocked and said "fine" but told Wafer that Brunger needed the signed document before the end of the day. Wafer said she talked to Perez right away, at approximately 2:30 p.m. When she finished her discussion with Perez, she went back to her desk and signed the document. She tried to contact her supervisor after she signed it, but her supervisor's door was shut. Wafer said everyone knew that if Brunger's door was shut, you don't knock. Brunger came out of her office one time, and Wafer attempted to give her the extension agreement (Exh. 2) and Wafer's personal letter agreeing to extend her probation (Exh. 3). However, Brunger refused to accept the documents, saying: "Not now."

9. Brunger testified on direct examination that after she called Wafer into her office and gave her the memorandum, Wafer said she did not wish to extend her probationary period. Wafer told Brunger she had a conversation with her steward, Marcos Perez the previous Friday, and Perez said Wafer was in effect being punished because she received a late performance evaluation. Brunger said she asked Wafer if Wafer was sure she did not wish to extend her probationary period, and Wafer said she did not wish to do so. Brunger said Wafer indicated she would be calling Perez "to make sure." Brunger testified there is no doubt in her mind that she was not confused about Wafer's statement regarding the extension of probation. Brunger did not ask Wafer why she changed her mind on extending the probationary period.

10. On cross-examination, Brunger testified that Wafer took a look at the memorandum and said she decided she would not sign it, and she was looking forward to completing her probationary period. Brunger was convinced that Wafer understood that if she did not sign the extension, she would be given a non-retention memorandum. Brunger understood that Wafer was going to talk to her union steward.

11. Brunger was shocked when Wafer said she did not want to extend her probationary period, especially considering the fact that Wafer had agreed previously to the extension.

12. Marcos Perez is a probation officer with the Department of Corrections in Palmer. He received a phone call from Wafer at approximately 2:30 p.m. on November 30, 1999. Wafer asked Perez questions about the memorandum extending her probationary period, and also contract issues, which were the focus of her concern. He discussed the probation extension with Wafer and told her it was a positive move for her. Perez's impression was that the employee was concerned about approaching Perez. She told Perez that Brunger seemed shocked when she told Brunger she wanted to contact Perez about the memorandum.

13. After contacting Perez, Wafer signed the extension agreement and dated it November 30, 1999. She also wrote a separate letter (also dated November 30, 1999) expressing agreement to the extension. (Exh. 3).

14. Colleen Tafs, Brunger's supervisor, spoke with Brunger by phone on the morning of November 30 and asked if everything was in place. Brunger called Tafs at approximately 2:30 p.m. and told her Wafer did not want to extend her probation. Brunger told Tafs Wafer refused to sign the extension and did not want the extension. Tafs said Brunger seemed surprised by Wafer's change of mind. Brunger figured it was just a matter of getting the extension document signed. Tafs told Brunger she would drive to Palmer and do a non-retention. However, Brunger said something to Tafs that led Tafs to believe Brunger had left Wafer "with an opening." Tafs' impression was Wafer was going to get back to Brunger if Wafer reconsidered. Tafs told Brunger that if Wafer changed her mind, let her know and they would call Steve Porter, the Labor Relations Specialist with the Department of Corrections. Tafs was available by cell phone as she drove from Anchorage to Palmer.

15. Tafs arrived in the Palmer office a little before 4:00 p.m. on November 30. Tafs was not sure what she would do if Brunger informed her Wafer had reconsidered. She asked Brunger if Wafer had reconsidered. Brunger said Wafer had not gotten back to her.

16. Sometime between 4:15 and 4:20 p.m., Brunger brought Wafer into Brunger's office. Tafs had told

Brunger that Tafs would do the talking. Tafs handed Wafer her termination (non-retention) notice and told her that they had decided they were not going to retain her. Wafer immediately asked Brunger: "What happened?" She then began talking to Brunger when Tafs interrupted her and said the decision to non-retain her was coming from Tafs, and Wafer was to direct any comments to Tafs. Then, Tafs continued on and told Wafer about direct deposit rules, paperwork to complete the process and other such termination information. The conversation ended at 4:25 p.m.

17. Marcos Perez received a phone call from Wafer shortly after 4:30. It was "heartbreaking" to him when Wafer told him she had been terminated. He was distraught about Wafer not receiving the extension. Perez then called Brunger, who put the phone call on speakerphone with Tafs. Perez asked them if Wafer's non-retention had anything to do with his talking with her. They said "no."

18. Tafs said the basis of Wafer's non-retention was her refusing or rejecting the extension.

19. We find all witnesses were credible. However, we find that Wafer's testimony regarding her agreement to extend the probationary period fits more consistently with the testimony of the other witnesses. Therefore, we find Wafer did not tell Brunger that she would not sign the extension agreement and that she was looking forward to the completion of her probationary period. We find Wafer asked Brunger to be allowed to discuss the written extension agreement with her union steward.

DISCUSSION

I. Did the State violate AS 23.40.110(a)(3) and (a)(1) by terminating the employee because the employee exercised rights protected under AS 23.40.080?

ASEA contends the employee was unlawfully discharged because she contacted a union steward to discuss the agreement to extend her probation. The State argues that the decision to non-retain the employee had nothing to do with her contacting the union steward. The State asserts that the employee was not retained because she decided she did not want to extend her probationary period, and she refused to sign the extension agreement.

AS 23.40.110(a)(1) prohibits an employer from interfering with, restraining, or coercing an employee in the exercise of the employee's rights guaranteed in AS 23.40.080. Among other rights, AS 23.40.080 protects the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

AS 23.40.110(a)(3) prohibits employer discrimination in regard to hire or tenure of employment to encourage or discourage union membership. The language in this section of the Public Employment Relations Act is similar to that in section 8(a)(3) of the National Labor Relations Act. This latter section of the NLRA is discussed in 1 Patrick Hardin, *The Developing Labor Law*, at 191 (3d ed. 1992):

Although the statute literally prohibits only discrimination "to encourage or discourage [union] membership," the courts have long maintained that Congress intended section 8(a)(3) to protect more than "bare membership" and have long held that discrimination generally designed to encourage or discourage union activities or support is unlawful. The term "membership" thus refers to all types of indicia of union support. We find the question for decision is whether or not the employee was terminated because she engaged in protected activity. ASEA contends that the activity engaged in by Wafer was her contacting steward Marcos Perez to get advice on the extension-of-probation agreement, and to obtain information about a contractual clause cited in the agreement. We find, by a preponderance of the evidence that Wafer was non-retained because she contacted the union.

We find Wafer is a credible witness. We therefore find credible her testimony that she told Brunger she wanted to discuss the agreement with her union steward. We find she did not tell Brunger she had decided to turn down the extension. Although we find Brunger a credible witness, we can only conclude she did not hear Wafer correctly when they discussed the signing of the extension agreement on November 30, 1999. If Wafer had decided to not extend her probationary period, it would make little sense for her to contact her union steward. Moreover, Marcos Perez credibly testified that Wafer called and requested information on the extension of probation. Perez said the focus of her concern was provisions in the collective bargaining agreement. This testimony dovetails with that of Wafer, who said this job was the first union job she ever

held, and she was confused by a citation to contract language. She called Perez to get an explanation of this section.

We find Brunger and Tafs' testimony credible. However, we reduce the weight of Brunger's testimony, as it is not as consistent with the facts as is Wafer's testimony. It does not make sense, for example, that Wafer would say she did not want to extend her probation, but she would then take the probation extension document from Brunger's office and discuss it with Perez, her union steward. If she were so adamant about refusing to extend her probation, as suggested in Brunger's testimony, there would be no apparent reason for her to discuss the decision with Perez. Moreover, Perez testified that Wafer called to ask about a contractual clause in the contract. During that conversation, Perez told her the extension was a positive step for her.

In addition, we find Wafer's undisputed statement to Brunger in the November 30 termination meeting, "what happened", consistent with a statement of surprise. We find that Wafer felt they had an agreement to extend probation, she had contacted her union steward to verify the written agreement to extend was consistent with the oral agreement, and she was subsequently surprised when she was instead terminated from employment. We believe Wafer felt she and the employer had an agreement to extend probation, and she was taken aback by the sudden change of decision by the employer.

After the non-retention meeting with Tafs and Brunger, Wafer again expressed surprise and consternation when she contacted Perez. We do not think Wafer would be surprised if she were given the very termination notice that the employer thought she wanted. Wafer also expressed concern to Perez that her contact with Perez earlier that afternoon may have caused her termination. She could not think of any other reason for the decision to terminate. Perez must have felt the same way, because he immediately called Tafs and Brunger to ask if Wafer's contact with him was a possible reason for the termination.

Finally, Wafer signed the extension agreement and dated it November 30, 1999. She also signed another letter, on November 30, in which she accepted the extension. If the employee did not intend to extend her probation, she would not have signed these documents.

Accordingly, we conclude that the employee was terminated from her employment because she contacted her union steward. We find this is a violation of AS 23.40.110(a)(3) and AS 23.40.110(a)(1).

II. Remedy.

On behalf of Wafer, ASEA asked that if we find a violation occurred, it requested that the employer make the employee whole "for any lost wages and benefits she would have otherwise earned and to provide her employment equal in pay and nature and condition to that which she was deprived where she can have a reasonable expectation of succeeding." (ASEA Prehearing Statement dated May 3, 2000).

We find the following is an appropriate remedy. The employer must make the employee whole for any lost wages and benefits she would have otherwise earned. In addition, the employer must return her to the work position she had when she was terminated. The parties may mutually agree to return the employee to the office where she was, or to another office mutually agreed to. If they cannot agree, the employee must return to the office she worked in during the June 1 to November 30, 1999, period.

After Wafer returns to work, the State must extend her probationary period for the agreed upon 60-day period.

CONCLUSIONS OF LAW

1. The State of Alaska is a public employer under AS 23.40.250(7), and the Alaska State Employees Association is an organization under AS 23.40.250(5). This Agency has jurisdiction under AS 23.40.110 to consider this matter.
2. As complainant, ASEA has the burden to prove each element of its case by a preponderance of the evidence.

3. ASEA has proven by a preponderance of the evidence that the State of Alaska violated AS 23.40.110(a) (3) and (1) when it non-retained employee Candace Wafer on November 30, 1999, because she contacted her union steward.

ORDER

1. The complaint by the Alaska State Employees Association is GRANTED.
2. The State of Alaska shall reinstate employee Candace Wafer to the position she held on November 30, 1999, and extend Wafer's probationary period by 60 days.
3. The State of Alaska shall make the employee whole for any lost wages and benefits she would have otherwise earned, as indicated in the "remedy" section of this decision.
4. The State of Alaska shall 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

Aaron Isaacs, Jr., Acting Chair

Raymond Smith, Board Member

Dick Brickley, Board Member

APPEAL PROCEDURES

This order is the final decision of this Agency. Judicial review may be obtained by filing an appeal under Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of filing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the order in the matter of ALASKA STATE EMPLOYEES ASSOCIATION, AFSCME LOCAL 52, AFL-CIO, vs. STATE OF ALASKA, Case No. 99-1027-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 14th day of December, 2000.

Donna Bodkin

Administrative Clerk III

This is to certify that on the 14th day of December, 2000, a true and correct copy of the foregoing was mailed, postage prepaid, to
Harriet Lawlor, ASEA
Kent Durand, State

Signature