

BEFORE THE STATE OF ALASKA LABOR RELATIONS AGENCY

ALASKA PUBLIC EMPLOYEES ASS'N)
and EDWARD C. THOMPSON,)
 Complainants,)
)
 vs.)
)
STATE OF ALASKA,)
 Respondent,)

)

Case No. ULPC 81-2

ORDER AND DECISION NO. 69

BACKGROUND

In May 1981 the Labor Relations Agency received this Unfair Labor Practice accusation. The Agency investigated the accusation and determined that probable cause existed in support of the complaint. The Agency's attempts to eliminate the dispute by informal means were not successful.

On July 23, 1981, the complainants and respondent presented their respective cases at an Anchorage hearing. The Agency has reviewed and considered a written transcript of this hearing.

The factual background of this case begins March 5, 1981, when complainant Edward G. Thompson signed an affidavit concerning the Point McKenzie timber sale which was entered into the Anchorage Superior Court. Mr. Theodore Smith, Mr. Thompson's ultimate supervisor and Director of the Division of Forest, Land, and Water Management

of the Department of Natural Resources, was first informed of the affidavit on the date it was filed, while he was in Juneau. He requested John Sturgeon, Mr. Thompson's immediate supervisor, to investigate if any State resources were used in preparing the affidavit. Mr. Sturgeon found no such wrongdoing concerning the affidavit, but he did find alleged wrongdoings of Mr. Thompson unrelated to the Point McKenzie affidavit. He pursued these improprieties as part of his normal functions. His investigations resulted in Mr. Thompson's suspension for five days pending further investigations on March 11, 1981.

On March 13, 1981, the State presented Mr. Thompson with thirteen allegations, the two most serious being Mr. Thompson drank beer and smoked marijuana while on official State business. At a meeting on March 19, 1981, between Mr. Smith, Mr. Thompson, and APEA representative Kimberly Krayly, all thirteen allegations against Mr. Thompson were discussed. Testimony as to whether or not Mr. Thompson was cleared of all thirteen charges at this meeting was contradictory. Mr. Thompson was suspended an additional five days at this meeting. He also received a written memorandum demoting him to Forester II and transferring him from Big Lake to Anchorage. The State continued its investigation after this March 19 meeting.

The first charge against the State involved a phone conversation on the morning of March 27, 1981. Mr. Thompson alleged that Mr. Sturgeon told him that the beer and marijuana charges might be revived if Mr. Thompson appealed his demotion and suspension. On April 13, 1981, APEA did file a grievance with the State protesting the prior suspensions taken against Mr. Thompson. Mr. Smith requested a meeting

with Mr. Thompson for April 22, 1981, to discuss the beer and marijuana charges. On April 22, APEA field representative John Marton delivered a letter to Mr. Smith on behalf of Mr. Thompson wherein Mr. Thompson refused to meet with Mr. Smith. APEA asserted that the prior thirteen allegations, including the beer and marijuana charges, had been resolved at the March 19 meeting. Mr. Smith responded by setting another meeting and informing Mr. Thompson that his failure to appear would constitute severe insubordination.

Mr. Thompson met with Mr. Smith April 27, 1981, and was terminated for drinking beer and smoking marijuana while in an official State vehicle while on official State of Alaska business. This unfair labor practice charge immediately ensued.

After hearing the factual testimony, both counsel provided written briefs concerning their respective positions.

ISSUES

The Agency sees two main issues in this unfair labor practice complaint. First is whether the State threatened Mr. Thompson for assertions of his contractual right (i.e., filing an appeal or grievance) on March 27, 1981, in violation of Alaska Statute 23.40.110 (a) (1). Second is whether the State committed an unfair labor practice by terminating Mr. Thompson after he asserted his contractual rights, in violation of Alaska Statute 23.40.110(a) (1).

JURISDICTION

In a July 7, 1981, letter from Mr. Robert Stewart, the State asked the Agency why it was not deferring to the grievance procedure set forth in the collective bargaining agreement.

The Board has often deferred to the grievance-arbitration provisions of any collective bargaining agreement. However, deferral is not appropriate in all instances. The NLRB has adopted a three prerequisite test of pre-arbitral deferral of charges. The test was first announced in Collyer Insulated Wire 192 NLRB 837 (1971). The first prerequisite is the dispute must arise within the confines of a stable collective bargaining relationship without assertions of enmity between the respondent and charging party. Secondly, the respondent must be willing to arbitrate. Thirdly, the center of the dispute must be contract interpretation.

The Board cannot defer in this case: the center of the dispute is not contract interpretation, but rather an allegation of interference with an employee's rights and coercion in the exercise of his collective bargaining rights.

The NLRB refuses deferral in cases involving allegations of basic employee rights. NLRA 8(a)(1) and 8(a)(3) are very similar to AS 23.40.110(a)(1) and (a)(2). The instant petition was filed alleging a violation of AS 23.40.110(a)(1). Therefore the Board properly heard this ULPC case. The Board must decide whether to take pre-arbitral

jurisdiction on a case-by-case basis. It does not adopt Collyer per se and extend its ramifications to all sections of PERA, but will consider the Collyer criteria in cases involving pre-arbital deferral. The Board is reluctant to make a sweeping adoption of Collyer, but does look to it in determining the appropriateness of pre-arbital deferral.

ISSUE #1

The Board has reviewed the entire record, heard the witnesses testify, and evaluated their testimony. This testimony was disputed. Mr. Sturgeon did not recall telling Mr. Thompson his appeal might result in revival of the beer and marijuana charges. Mr. Thompson testified that Mr. Sturgeon had said that Mr. Thompson's appeal "might" result in revival of the beer and marijuana charges and entered an exhibit made contemporaneously with the phone call.

This Agency gives prior NLRB ruling great weight. Controlling Federal holdings do establish that an employer who makes threats against an employee for exercising his contractual grievance rights has committed an unfair labor practice. NLRB v. Intertherm, 596 F.2d 267 (8th Cir. 1979); NLRB v. Albion, 593 F.2d 936 (10th Cir. 1979); Frito Lay v. NLRB, 585 F.2d 62 (3rd Cir. 1978). Imposing discipline for filing a grievance is also an unfair labor practice. Keokuk Gas Service Company v. NLRB, 585 F.2d 328 (8th Cir. 1978).

Only two individuals know what was said during the March 27, 1981, phone conversation: Mr. Thompson and Mr. Sturgeon. Mr. Sturgeon could not recall making the alleged statement. Mr. Thompson's testimony concerning

the alleged statement was brief and inconclusive. According to Mr. Thompson's testimony, he knew from fellow employee Steve Strube that a written statement concerning the beer and marijuana allegations was forthcoming. He knew the investigation was ongoing, and that Mr. Ted Smith would make the final decision to fire or retain him. No evidence was presented from Mr. Sturgeon or Mr. Smith confirming an ulterior motive for firing Mr. Thompson. Mr. Thompson never inquired of Mr. Sturgeon as to whether Mr. Sturgeon's alleged statements were threatening in nature. The record is clear that Mr. Smith was pursuing the allegations regardless of what Mr. Sturgeon said.

FINDINGS OF FACT ON ISSUE #1

Based on all the evidence presented to the Board, we find:

1. Neither Mr. Sturgeon nor any agent of the State told Mr. Thompson that if he filed an appeal of his demotion and temporary suspensions through APEA that the beer and marijuana charges against him would be revived.
2. No explicit or implicit threat was ever made by Mr. Sturgeon that affected Mr. Thompson's assertion of his statutory or contractual rights under Alaska Statute 23.40.110 et seq.
3. No violations of Mr. Thompson's statutory or contractual rights occurred during the March 27 phone call or meeting between Mr. Sturgeon and Mr. Thompson.

ISSUE #2

Issue #2 is whether Mr. Thompson was terminated for asserting his contractual rights; in particular, whether the beer and marijuana charges of March 13, 1981, were dismissed by Mr. Smith at the March 25 meeting.

Mr. Thompson presented his own testimony and that of Kimber Krayly concerning the March 25 meeting. Ms. Krayly of APEA also testified she thought all charges were dropped completely at that hearing; Mr. Thompson concurred. However, Ms. Krayly testified that her notes of the meeting do not say the charges were "dropped." Rather they reflect that the beer and marijuana charges were "not proved."

Mr. Smith testified that the beer and marijuana charges were not proven at the meeting and that the investigation had not been completed at that date.

The distinction between charges being dropped and not proven is important. Evidence presented at the hearing is full of references to the ongoing investigation of the beer and marijuana charges. No written statements were prepared after the March 25 hearing which set forth the mutual understandings of the parties. Mr. Smith was rightfully hesitant to conclude his investigation without gathering further evidence.

The burden is on the Petitioner to establish the discriminatory motive of the State against the employee, or the interference and coercion with an employee's statutory rights. G.W. Davis Corporation and Barbara Joan Carver, 202 NLRB #35 (1973). The motive for Mr. Thompson's

dismissal was entirely proper. State employees cannot drink beer and smoke marijuana while on official State business.

Based on all the testimony presented at the hearing the Agency makes the following Findings of Fact:

FINDINGS OF FACT ON ISSUE #2

1. Charges brought at the March 25, 1981 meeting were not dismissed by the State. Those charges were under investigation and the investigation was ongoing before and after the March 25 meeting.
2. The State continued its investigation and finally fired Mr. Thompson after the investigation was complete.
3. The State did not interfere with, restrain, or coerce Mr. Thompson in the exercise of his rights guaranteed by Section 80 of Alaska Statute 23.40.070 et seq.
4. Mr. Smith's firing of Mr. Thompson on April 25, 1981, was not based on Mr. Thompson's assertion of his rights under AS 23.40 et seq.

CONCLUSION

Based on the foregoing Findings of Fact, the Board makes the following Conclusions of Law:

1. No unfair labor practice occurred.
2. No violation of Alaska Statute 23.40.110 et seq. occurred.
3. The unfair labor practice should be dismissed on the merits.

O R D E R

This action having been heard by the Board on July 23, 1981, and the Board having considered the evidence presented before it:

IT IS ORDERED that the Complainant has not met its burden of proving that unfair labor practices occurred. Therefore this action is dismissed on the merits. Each party is to bear its own costs and attorney's fees.

DATED this 23rd day of October, 1981

SIGNED:

C. R. "Steve" Hafling, Chairman

SIGNED:

Morgan Reed, Member

SIGNED:

Ronald M. Henry, Member

[Signatures on File]