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ALASKA PUBLIC EMPLOYEES ASS'N/AFT, AFL-CIO (Vern Ably),
Complainant,

vs.

KETCHIKAN GATEWAY BOROUGH,
Respondent.

Case No. 03-1244-ULP

DECISION AND ORDER NO. 269

The board heard this dispute on May 18, 2004, in Ketchikan. This decision is based on evidence admitted into the record and testimony of witnesses at hearing. The record closed on May 18, 2004. The Agency issued an abbreviated order on June 18, 2004. This memorandum decision follows.

Digest: The Alaska Public Employees Association/AFT, AFL-CIO (APEA) failed to prove by a preponderance of the evidence that the Ketchikan Gateway Borough (Borough) discriminated against APEA member Vern Ably, because of Ably's union activity, when the Borough denied his request for a salary advance on July 2, 2003.

Appearances: Pete Ford, Business Agent for APEA; Scott Brandt-Erickson, Attorney for the Borough.

Panel: Aaron Isaacs, Dennis Niedermeyer, and Randall Frank.

DECISION

Statement of the Case

APEA filed an unfair labor practice complaint against the Borough on behalf of Vern Ably, one of APEA's bargaining unit members. APEA alleges the Borough discriminated against Ably in denying his request for a salary advance on July 2, 2003. APEA contends the

Borough denied the request because of Ably's participation in union activities. APEA asks for a damages award.

Issues

1. Did the Borough violate AS 23.40.110(a)(3) and (1) by discriminating against Vern Ably, because of protected, concerted activity under AS 23.40.080, when it denied his request for a salary advance?

2. If so, what is an appropriate remedy?

Findings of Fact

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

1. APEA is recognized as the exclusive bargaining representative for the general government unit at the Borough.

2. APEA and the Borough entered into a collective bargaining agreement for the period March 1, 2000, through February 28, 2003.

3. Vern Ably is a member of the APEA general government unit that works for the Borough. Ably is an aircraft rescue fire fighter/ rescue technician. He has worked for the Borough for ten years. He has been a member of APEA for eight years and has actively participated as a union representative or negotiator on the bargaining team for each of the eight years.

4. During his employment at the Borough, Ably periodically requested monetary advances on his salary. He was never denied a request for an advance until July 2, 2003.

5. On June 30, 2003, Ably went to the Borough Manager's office and handed former Borough Executive Secretary Debbie Otte[1] a form titled "Request For Time Off Or Advance Pay." (Exhibit R). The request asks for an advance payment amount of $1,600.68, to be picked up by July 1 at 3:00 p.m. The employee name at the top of the form is Vernon R. Ably. There is a signature at the bottom of the form; Ably denies the signature is his.

6. The "remarks/reason" section of Exhibit R states: "'advance' on 'back monies owed' per ALRA - Holiday pay and shift differential for advance tickets for son's surgery. July 1st is last day to buy the advance tickets, or lose discount." There are spaces on the document for supervisor approval, department head, and HR (Human Resources) Director. The document does not contain any approval signatures.

[1] Otte worked at the Borough until July 23, 2003.

7. The same day Otte received the request, she faxed it to Clark Corbridge, Human Resources Manager for the Borough.

8. Corbridge was the Borough's Human Resources Manager from October 2001 through January 2004.

9. Corbridge knows Ably -- who was part of Corbridge's workload -- both as a union officer and as an employee in non-union related matters such as training and requests for payroll advances.

10. Corbridge reviewed the request and noticed errors on the document. Corbridge did not like to receive requests unless they went through the proper channels, such as obtaining the signature of the employee's supervisor. He also stated he had not previously approved requests for advance pay on grievances. Ably was "freaked out" about his son's medical condition and felt an urgent need to get the pay advance to cover the cost of plane reservations to Seattle.

11. Ably submitted a second request on the required form on July 2, 2003. (Exh. J). The second request asks for a $1700.00 advance, to be deducted from paid time off. The "remarks/reason" states: "Needed for travel for medical purposes. Will initially be charged against accrued PTO [paid time off.] Later adjustment may be made to reflect settlements in two pending grievances." Ably requested a check on July 3, or as soon as possible.

12. Corbridge discussed this second request with Ably and APEA Business Agent Pete Ford on July 2, 2003, during a break in the parties' negotiations for a new contract. Corbridge found the request reasonable based on the nature of the request -- family medical procedure. Corbridge told Ably and Ford that although he could not guarantee a check by July 3, he would request that the process be expedited.

13. In Corbridge's view, he had an understanding with Borough Manager Roy Eckert that Corbridge could approve pay advances. Based on this understanding, Corbridge would contact Eckert as a courtesy after Corbridge made pay advance approvals. Corbridge would notify Eckert of approvals either in writing or during their once or twice-weekly meetings. However, Corbridge admitted that Borough procedures vest the Borough Manager with discretionary and final authority to approve or deny advance pay requests.

14. Corbridge contacted Eckert on July 2 to notify him of the Ably request. Eckert was out inspecting some property with Borough Finance Officer Al Hall. After Corbridge described the Ably request, Eckert denied it. At the time, Eckert did not elaborate on his reasons for denial, and Corbridge did not ask him.

15. Corbridge suspected that Hall might have influenced Eckert's decision. Corbridge heard Hall talk disparagingly about Ably and his union activities. However, Corbridge heard Hall speak in this manner only once, and the particular incident occurred approximately a year before Ably's July 2, 2003, request.

16. Eckert denied Ably's request because he thought the request related to a potential settlement of a grievance. Eckert did not see a written request at the time he denied it. He recalls that the exchange with Corbridge was entirely verbal. Eckert could not think of a reason to deny the request if he had known it was for accrued paid time off. At the same time, he could not think of a reason why he would ever approve an advance on a potential settlement.

17. Eckert did not hear Hall or anyone else make disparaging remarks about Ably at the time of Ably's July 2, 2003, request.

18. A subsequent pay advance request by Ably, submitted on July 30, 2003, was approved on August 1, 2003. (Exhibit K).

19. Ably and his wife, Lori Ably, believe there was a pattern by Borough management to make things difficult for Vern at times. Other than the July 2 denial, Ably could not recall any other specific incidents. Lori Ably said Al Hall had been "bad-mouthing Vern [Ably]" and she believes Eckert decided to take a stand against Ably.

20. Mrs. Ably did not provide any specific incidents of bad-mouthing by Hall. She did describe a conversation she had with Eckert in which she says she stated to Eckert that her son's life was at stake, and Eckert replied, "I don't care."

21. Between July 1, 2002, and July 1, 2003, the Borough approved Ably's advance pay requests several times, and the Borough did not deny any of Ably's pay requests. (Exhibits F, G, H, and I).

22. There was no evidence that the Borough ever approved a pay advance for any employee when there was a grievance or potential grievance settlement connected to it. There was no evidence that any employee had previously applied for a pay advance with this connection.

ANALYSIS

1. Did the Borough discriminate against Ably because of his union activities when it denied his request for a salary advance?

APEA contends that the Borough discriminated against Vern Ably because he had participated in union activities. APEA argues that the discrimination resulted in the Borough's denial of Ably's July 2, 2003 request for an advance payment on salary.

The Borough asks us to dismiss APEA's complaint. The Borough argues that Borough Manager Eckert has discretionary authority to deny pay advance requests, and Eckert denied Ably's request because he thought the request related to a potential settlement of a grievance. Eckert could not think of a reason to deny the request if he had known it was for accrued paid time off. The Borough maintains that it never discriminated against Ably in any fashion because of his union membership.

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. The guarantees in AS 23.40.080 include the right to organize, choose a bargaining representative, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. AS 23.40.110(a)(3) prohibits conduct that discriminates "in regard to hire or tenure of employment or a term or condition of employment to encourage or discourage membership in an organization."

The Agency has previously addressed claims of discrimination. In *Sharon Lee Shields vs. City of Unalaska, Parks, Culture and Recreation*, Decision and Order No. 217 (February 25, 1997), an employee alleged that the employer discharged or discriminated against her during her employment because of her support for union organizing. The Board panel found that the "elements of a case for discharge or discipline in violation of this section are (a) employer knowledge that the employee is engaged in union activity, and (b) employer discharge or discipline motivated by this knowledge." Decision and Order No. 217 at 10; *ASEA (Raymond Johnson) v. State*, Decision and Order No. 193, at 12-13 (Sept. 26, 1995).

In this case, the Borough was aware of Ably's involvement in union activity. Ably participated actively in union activities and as a negotiator for the general government unit. Further, Al Hall made a disparaging remark about Ably and his union activity. This evidence is sufficient to satisfy the element of employer knowledge.

However, APEA failed to prove that the Borough violated the second element, motive. The Board panel in *Shields* noted that AS 23.40.110(a)(1) is based on section 8(a)(3) of the National Labor Relations Act. (29 U.S.C.A. § 158(a)(3)). The Alaska Supreme Court has stated that, "[T]o establish a violation of section 8(a)(3) . . . , the employer's action generally must have been based on an antiunion motive." *Alaska Community Colleges' Federation of Teachers, Local 2404 v. University of Alaska*, 669 P.2d 1299, 1307 (Alaska 1983); *ASEA (Raymond Johnson) v. State*, Decision & Order No. 193, at 12-13.

While APEA maintains that the Borough's motive was discriminatory in denying Ably his pay advance request, the Borough contends its decision to deny Ably's request was motivated by Eckert's concern that the request was connected to the unresolved amount of settlement of a grievance Ably filed. The Borough had not previously approved such a request. Further, the Borough points out that the Borough Manager has complete discretion to approve or deny advance pay requests.

The evidence illustrates a so-called "mixed motive" case. In other words, there is some evidence of union animus against Ably -- Hall's derogatory remarks -- and there is some evidence that the Borough's decision was unrelated to Ably's union activities.

We apply the *Wright Line* test in mixed motive cases. Decision and Order No. 217, at 10. In *Shearer's Foods, Inc.*, 340 NLRB No. 132, 173 L.R.R.M. (BNA) 1459 (November 28, 2003), the National Labor Relations Board (NLRB) described the *Wright Line* test:

> To prove a violation of Section 8(a)(3) and (1) under our decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel [of the NLRB] must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's decision. *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). Once the General Counsel makes a showing of discriminatory motivation by proving the employee's union activity, employer knowledge of the union activity, and animus against the employee's protected conduct, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089.

340 NLRB No. 132, at 2. *See American Gardens Management Company and Bailey Gardens Realty Corporation*, 338 NLRB No. 76, 171 L.R.R.M. (BNA) 1265 (November 22, 2002); *Matson Terminals, Inc. v. National Labor Relations Board*, 114 F.3d 300, 324 U.S. App. D.C. 446 (1997).

Mixed motive disputes are often difficult to discern. However, we do not find significant difficulty under the facts of this case. We reviewed the record, including the testimony of all the witnesses. We have considered all of the parties' arguments. We have concluded that there is insufficient evidence to prove by a preponderance that Ably's union activity was a motivating factor in the Borough's decision to deny his request.

There is little evidence to support animus, and that evidence is dated. The only specific incident provided in testimony or documents was Clark Corbridge's statement that he heard Al Hall make a disparaging comment about Ably and his union activities. But this comment occurred a year before Eckert's denial of the July 2, 2003, pay request that, APEA alleges, discriminated against Ably. We do not believe a negative comment that occurred a year before the denial caused Eckert to make the denial.

Moreover, in the year since Hall made the disparaging comment, the Borough approved several advance pay requests submitted by Ably. There is no evidence that the Borough ever denied any of Ably's requests during that time, or any previous time. Further, Eckert – and not Hall – was the final authority on pay advance decisions. There is no evidence that Eckert ever made a disparaging remark about Ably and his union activities.

Eckert's verbal denial and his reasons for the denial are plausible. He believed -- and there is no evidence to the contrary -- that there was settlement money tied into the pay request. Eckert was apparently concerned about the use of settlement monies for a pay request when the amount of the settlement had not yet been determined. There is no evidence that Eckert had ever approved a pay request connected to a grievance settlement. His denial here cannot be deemed unreasonable or in any way discriminatory against Ably.

Still, we found the Borough's procedure in this instance confusing and baffling. We do not understand why Eckert did not delay a decision until he saw the paperwork connected to the request for pay advance. Had he taken more time, reviewed the documents, and discussed the

request in more detail with Corbridge, he may have decided differently. Given the alleged emergency nature of the request, the Borough was less than accommodative. However, Borough rules give full discretion to the Borough Manager to decide pay advance requests, and the evidence in the record is insufficient to show that the Borough's decision to deny Ably was motivated by union animus.

We conclude that APEA has failed to prove by a preponderance of the evidence that the Borough discriminated against Ably because of his activities or involvement with APEA. Accordingly, we will deny and dismiss the complaint. Because we have denied the complaint, we need not address remedies.

CONCLUSIONS OF LAW

1. The Alaska Public Employees Association is an organization under AS 23.40.250(5), and Ketchikan Gateway Borough is a public employer under AS 23.40.250(7).

2. This Agency has jurisdiction under AS 23.40.110 to determine whether the Borough committed an unfair labor practice.

3. As complainant, APEA has the burden to prove each element of its case by a preponderance of the evidence.

4. APEA has failed to prove by a preponderance of the evidence that the Borough violated AS 23.40.110 (a)(3) & (1) when it denied Vern Ably's July 2, 2003, advance pay request. Denial of Ably's pay advance was motivated by concern that the advance would be paid with grievance settlement proceeds. There is little evidence that denial occurred due to protected, concerted union activity.

ORDER

1. The complaint by the Alaska Public Employees Association is denied and dismissed.

2. The Ketchikan Gateway Borough 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., Vice Chair

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Dennis Niedermeyer, Board Member

_____
Randall Frank, 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 Public Employees Association/AFT, AFL-CIO vs. Ketchikan Gateway Borough*, Case No. 03-1244-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 30th day of August, 2004.

_____
Sherry Ruiz,
Administrative Clerk III

This is to certify that on the 30th day of August, 2004, a true and correct copy of the foregoing was mailed, postage prepaid, to
Pete Ford, APEA
Scott Brandt-Erickson, Ketchikan Gateway Borough

_____
Signature