

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATION LAW JUDGES
WASHINGTON, D.C. 20424

.....
UNITED STATES DEPARTMENT OF
JUSTICE, BUREAU OF PRISONS,
SAFFORD, ARIZONA

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 2313, AFL-CIO

Charging Party
.....

Case No. 8-CA-70470

Jonathan S. Levine, Esq.
For the General Counsel

Yvonne Hinkson, Esq.
For the Respondent

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. section 7101 et seq. (herein called the Statute). It was instituted by the Regional Director of Region 8 based upon an unfair labor practice charge filed on May 18, 1987 by the American Federation of Government Employees, Local 2313, AFL-CIO (herein called the Union) against United States Department of Justice, Bureau of Prisons, Safford, Arizona (herein called the Respondent). The Complaint alleged that Respondent violated section 7116(a)(1) and (8) of the Statute by conducting an investigatory interview with an employee with her exclusive representative present notwithstanding the fact that the exclusive representative was denied the opportunity to participate in a representative capacity on behalf of the employee, and notwithstanding the

fact the employee had a reasonable cause to believe that disciplinary action could be taken as a result of the interview, thereby failing to comply with the provisions of section 7114(a)(2)(B) of the Statute.

Respondent's Answer denied the commission of any unfair labor practices.

A hearing was held before the undersigned in Tucson, Arizona, at which the parties were represented by counsel and afforded full opportunity to adduce evidence and to call, examine, and cross-examine witnesses and to argue orally. Timely briefs were filed by the parties and have been duly considered.

Upon consideration of the entire record in this case, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

Sometime around January 17, 1987, Susan Brannock, who is employed by Respondent as a Service Correctional Officer, was involved in a serious off-duty traffic accident resulting in bruises, lacerations to her right side and severe injury to her sternum area. Brannock started work at the facility in March 1985.

On January 19, 1987, Brannock gave Respondent a note from a physician assistant Richard E. Donnelly indicating her "multiple injuries" and stating that he would advise "when she is ready to work." This note on the letterhead of Ernest Forgach, M.D., P.C. The form indicates that Forgach and Donnelly work together. Respondent for some reason attempts to distinguish the two as separate, but, I find that Brannock was indeed using the services of Dr. Forgach, as well as Donnelly at all times material herein.

When Brannock returned to work on January 29, the pain in her chest was worse than expected, causing her to report to Captain Darrell Johnson. Johnson made a file information note of this conversation which stated as follows:

Per attached memorandum from Officer Brannock, I called her in at 7:00am from her assigned post to get the following information. I asked what she could or could not do in a work capacity. Officer Brannock stated that walking or driving

aggravated her injury. I asked her to return to her assigned post to allow me a little time to locate a post that would allow her to work without aggravating her (sic) injury.

At 7:45am, January 29, 1987, I had Officer Brannock return (sic) to my office. Upon entry Brannock stated "Whats (sic) this investigation about". I informed the officer that I had made an effort to find a post that she could work and I wanted to know if she had a post in mind that she felt she would be able to perform with the limitation that she had made me aware of earlier. She replied NO. As a result of this conversation, I gave Brannock four (4) options that I could make to accommodate her request. 1. LWOP, 2. Sick Leave, 3. Annual Leave or 4. I would give her an Administrative Assignment for the next two days 1-30-87 & 1-31-87. Officer Brannock chose to take sick leave.

I also informed the officer that I had made arrangements for her to participate in annual training the week of 2-2-87 thru 2-6-87. This would allow her injury additional time to heal. I told Officer Brannock that this was the best we could do for her and that she would not be moving around during training. She stated that she had a Doctors appointment on [T]uesday 2-3-87. I informed her that I would excuse her from firearms and we would make that up at a later date, I also informed her that she would need a doctors slip excusing her from self defence (sic) training that would be taking place the afternoon of 2-3-87.

On Monday, February 2, pursuant to Johnson's request, it is uncontroverted that Brannock provided Respondent's duty lieutenant, Lt. Eaton with a note from Dr. Forgach dated January 30, the day after her conversation with Johnson, excusing her from firearms and self-defense training. It read:

Patient should not participate in firearms and self defense until new notice.

While Johnson apparently was in charge of this investigation he does not recall seeing this particular note. Furthermore, Johnson stated that he was unaware of such a doctor's note relating to use of firearms eventhough both Lt. Soto and Brannock's Union representative mentioned the note to him.

Shortly, thereafter on February 5, Brannock gave Respondent another doctor's note signed by physician assistant Donnelly stating that she would need to remain on light duty status for 10 more days. On February 20, as we later see, Donnelly qualified the above statement by saying in a report to Johnson the following:

It is imperative under the present conditions of costrochondritis and tendinitis, that the patient remain on lite duty in order for these injuries to heal without strenuous stress or exercise to these areas.

Based on all of the aforementioned notes and conversations it is clear that Brannock's status was confusing and it was or could not have been clear to her what indeed her status was.

Brannock went ahead and finished her annual training and remained in light duty status, assigned to the patrol morning watch, until February 14.

On February 15, Lieutenant Charles B. Neff conducted what he considered to be an interview with Brannock. Neff reported this meeting as follows:

On February 15, 1987 and after the Midnight count was complete, Officer Brannock was interviewed in reference to her ability to work the Out Side Patrol Post. Her reply was: Her request for lite duty was over as of 02/14/87 and that she could perform that duty, however, she did not qualifiy (sic) in firearms and could not work that post.

Once again her assignment was changed to accommodate her needs and other officers were required to work her assignment.

Neff testified that Brannock, during this time, was hostile and hateful toward supervisors. This note however, shows no such hostility on her part but rather, to me, indicates Neff attempting to build such a case against Brannock.

Later on February 19, Respondent's Lieutenant Juan Soto held a conversation with Brannock which he reduced to memorandum and forwarded to Johnson. Soto had the following to say:

On Thursday 02-19-87, at approximately 4:26 A.M., I instructed Officer Brannock to releived (sic) Officer Byrne, Outside Patrol around 5:15 A.M.. She told me that she was not qualified in Firearms and that her Doctor has not released her to full duty status. Ms. Brannock told me that Captain Johnson had the Doctor slip and that she did not qualified (sic) during Annual Refresher Training.

At this time, I advised her to releived (sic) Officer Bryne around 5:15 A.M.. She said, "OK whatever you say" and then told me she wanted to see her EEO Counselor in the Morning.

I told her that I did not know anything about her seeing the EEO Counselor and that I only take orders from my supervisors. I advised her that she can see her EEO Counselor after 8:00 A.M.^{1/}

Soto apparently prepared this memorandum and hurried it to Johnson before the end of the shift. Although Respondent chose not to call Soto as a witness, Johnson testified that Soto informed him that Brannock had referenced her January 30 doctor's note excusing her from the use of firearms until further notice, during her February 19 discussion with Soto. Thus, I find that Soto's memorandum does not accurately reflect their entire conversation.

^{1/} Brannock specifically denied Soto's assertion, as contained in his February 19 memorandum, that she had told him that she had not been released to full duty status. I credit Brannock.

As a result, at the end of her shift, Johnson summoned her to a meeting at which Personnel Officer John Pfistner was also present. Brannock brought her union representative, Jackie White. Brannock again informed Johnson that according to her doctor she could not use firearms. Johnson then gave Brannock the option of signing a medical release, or of having her physician answer a set of questions for her. Brannock chose the latter and the meeting ended.

A memorandum to file from Personnel Officer Pfistner indicates that the meeting was called to resolve the light duty status of Brannock; that it was believed Brannock was no longer required to be on light duty status because of a medical request indicating she would need to be on light duty for 10 days had expired; that it was necessary to make a determination as to what the physical limitations were.

When Brannock would not provide a release of information from her physician, Johnson prepared a letter which gave her the option of either being examined by the facility's physician or having her own doctor answer a set of questions. Brannock chose the latter and on February 20 as called for in Johnson's letter provided the information from physician assistant Donnelly, who had been treating her all along. That letter, as already noted confirmed that Brannock should remain on light duty.^{2/} Brannock, however, was given the list of questions for her doctor to answer only on February 20. With the deadlines the letter established the answers had to be returned by the physician by 2:00 p.m. on that day or she would face disciplinary action.

Brannock, proceeded to Captain Johnson's office, with White, assuming that he would take the letter from her doctor and that she could return home. However, when she got to Johnson's office, she was met by Johnson, a Captain Lee Greninger, and another correctional officer, Monica Yerbich, who was to be a recorder at an investigation where she was accused of making false statements to Respondent's supervisors.

^{2/} The letter also indicated that, "On February 3, 1987, patient was given a note to return to light duty. . . ." There is never any indication that Brannock's physician thought she could return to the full range of correctional officer duties.

The official transcript of the February 20 investigation, reads as follows:

Captain Johnson stated that Ms. Brannock was on overtime status for this interview. He stated that this was an investigation concerning making false statements to supervisors, and read part of a form which he asked Ms. Brannock to sign. He stated that any time during this interview Ms. White and Ms. Brannock may take a break for their own discussion. Ms. White asked Captain Johnson if the interview was being taped, or if just notes would be taken. Ms. Brannock signed the form.

Capt. Johnson: On February 19, 1987 on the morning watch you came to work. You were called at 4:30 A.M. by Lt. Soto; can you explain to us what the call was about.

Ms. Brannock: I went in and was under the assumption that I couldn't drive perimeter because of a doctor's note that I couldn't use firearms.

Capt. Johnson: Did you tell him that the doctor had not released you from light duty status?

Ms. Brannock: No. I told him about not being able to use firearms.

Capt. Johnson: What developed?

Ms. Brannock: I went out and drove perimeter.

Capt. Johnson: On February 15th, you had a conversation with Lt. Neff. Can you tell us the context of that?

Ms. Brannock: I don't remember. I was under the assumption that I couldn't use firearms or drive perimeter.

Capt. Johnson: Did you make reference to him concerning the situation with the doctor?

Ms. Brannock: I don't remember.

Capt. Johnson: (Asked Ms. Brannock to read a memo from Lt. Soto.) Did you make a statement to Lt. Soto about not qualifying for firearms?

Ms. Brannock: Yes, and that the doctor didn't release me and referred to the doctor's slip.

Capt. Johnson: What reference did you make?

Ms. Brannock: That I couldn't qualify for firearms.

Capt. Johnson: That pertains to training?

Ms. Brannock: That note said I couldn't qualify in annual refresher training. I thought I couldn't fire at all. That's what it meant to me.

Capt. Johnson: Do you remember making a specific statement to Lt. Neff that your light duty status was over on 2-14-87?

Ms. Brannock: I don't remember.

Capt. Johnson: Lee, do you have any questions?

Mr. Greninger: The light duty was from a car accident; when did you come back to work.

Ms. Brannock: On January 29th I tried but my chest started hurting.

Mr. Greninger: Were there any restrictions on the light duty status?

Ms. Brannock: The movement of my arms.

Mr. Greninger: How did the doctor specify? Did he say anything about driving and firearms?

Ms. Brannock: No, he didn't say.

Mr. Greninger: What was your interpretation?

Ms. Brannock: Light duty, what ever that is.

Mr. Greninger: (Asked Ms. Brannock to look at the date on Lt. Neff's memo.) When the doctor gave you the slip did he explain what he meant?

Ms. Brannock: I asked him about firing a gun and he said it wouldn't be a very good idea. And I wasn't allowed to drive my own vehicle except to work.

Mr. Greninger: I don't have any more questions.

There was a break in the interview at 11:51 for approximately 2 minutes.

Capt. Johnson: Where would Lt. Soto come up with the statement that the doctor had not

released you to full duty status?

Ms. Brannock: I don't know. Maybe he misunderstood me.

Capt. Johnson: What did you say to Lt. Soto in reference to the captain?

Ms. Brannock: I told him you had the doctor slips.

Capt. Johnson: Was it a slip or slips; plural?

Ms. Brannock: A doctor's slip that referred to firearms training, I believe it was you I gave it to.

There were some phone call interruptions, approximately 3-4 minutes.

Capt. Johnson: On the morning of February 15th you had a conversation with Lt. Neff regarding perimeter patrol. You made reference to qualification with weapons and medical references, and began specifically with medical reference. What did he ask you?

Ms. Brannock: I don't remember.

Capt. Johnson: You were called yesterday at 1:15 by Lt. Eaton. What was that conversation about?

Ms. Brannock: He said I was called in on overtime to see the captain at 2:00. I said I just got to bed and don't have a car; my boyfriend's car was broke down.

Capt. Johnson: What time did you return from fixing the car?

Ms. Brannock: Quarter to one. Its out in the parking lot now broke down.

Capt. Johnson: Did you have the car repaired yesterday?

Ms. Brannock: After noon some time.

Capt. Johnson: Did you make the arrangements for the car repair?

Ms. Brannock: No, its not my car. Its my boyfriend's car.

Capt. Johnson: You said you got home at 1:00; and within 10 minutes you were asleep?

Ms. Brannock: I took a pain pill.

Capt. Johnson: What is the name of the medication?

Ms. Brannock: I'm not sure of the name.

Ms. White: Was she called in on a emergency?

Capt. Johnson: To come into my office. Was the pain pill prescribed after the car accident?

Ms. Brannock: About 2 weeks ago for a migraine.

Capt. Johnson: Did you have a headache at 1:00?

Ms. Brannock: Yes.

Capt. Johnson: (Asked her to spell the name of the medication.)

Ms. Brannock: Easprin.

Mr. Greninger: Is it a prescription drug?

Ms. Brannock: Yes.

Capt. Johnson: When Lt. Eaton called what did he say?

Ms. Brannock: He said his name and that I was to come in at 2:00 on overtime to talk to the captain.

Capt. Johnson: What did you tell him?

Ms. Brannock: That I just got to sleep and that I had no car.

Capt. Johnson: When you called at 1:50 what did you say?

Ms. Brannock: I re-explained, I wasn't sure he had called because of my unconscious state and that my boyfriend's car was broken down and I didn't know if it was fixed or not.

Capt. Johnson: Did you question him about your assignment that evening?

Ms. Brannock: I asked if I should come in at midnight.

Capt. Johnson: How can a pain pill put you out in 10 minutes, and then stay awake 45 minutes afterwards?

Ms. Brannock: I took it 35 minutes before I left work.

Ms. White: Are you saying that she lied to Lt. Eaton.

Capt. Johnson: I explained that you are here as a union representative and Ms. Brannock has to answer the questions asked her. You are not at

liberty to ask questions,
just to be present during
this interview.^{3/}

Ms. White: I'm confused with the
charge.

Ms. Brannock: I didn't lie to him.

Capt. Johnson: Do you have anything else,
Lee?

Ms. Greninger: No.

Capt. Johnson: Let's take a break.

There was a break at 12:00 noon and resumed at 12:08.

Capt. Johnson: In going over Lt. Neff's
Memo, did he on February
15th interview you in
reference to your ability
to work?

Ms. Brannock: He didn't interview me, he
asked me.

Capt. Johnson: Did he ask you about your
medical condition?

Ms. Brannock: I don't remember.

Capt. Johnson: Did you tell him that your
request for light duty
status end on 2-14-87?

Ms. Brannock: I don't know.

Capt. Johnson: Did you say that you
couldn't use firearms so
you could not work that
post?

^{3/} Johnson testified that it is currently Respondent's
policy to allow union representatives to ask questions
during investigatory examinations.

Ms. Brannock: I guess so.

Capt. Johnson: Did Lt. Soto instruct you to relieve Officer Byrne at about 5:00 A.M.?

Ms. Brannock: Yes, but it was at 5:15.

Capt. Johnson: Did you make a statement to Lt. Soto that you were not qualified on firearms?

Ms. Brannock: Yes.

Capt. Johnson: Did you make a statement to Mr. Soto that you had not been released to full duty status?

Ms. Brannock: I don't remember saying that.

Capt. Johnson: Did you make a statement to Lt. Soto that the Captain had a doctor's slip, and that you had not qualified during annual refresher training?

Ms. Brannock: Yes I did.

Capt. Johnson: When Mr. Eaton contacted you at 1:10 p.m. on the 19th, he advised you to report to the institution for overtime, and that you were to see the Captain for this overtime.

Ms. Brannock: When I called him back, I asked him if I was excused from this overtime.

Capt. Johnson: Did you tell him that the car broke down?

Ms. Brannock: Yes.

Capt. Johnson: Did you make a statement that the car was presently on the shop?

Ms. Brannock: No.

Capt. Johnson: The car was repaired?

Ms. Brannock: Being repaired.

Capt. Johnson: Where?

Ms. Brannock: I don't know.

Capt. Johnson: A minute ago you said it was in the parking lot.

Ms. Brannock: It was but he may have moved it by now.

Capt. Johnson: Was it broke down when you left work?

Ms. Brannock: Yes.

Capt. Johnson: Who took you home?

Ms. Brannock: Danny Talavera. He didn't take me home, he took me to the doctor.

Capt. Johnson: The prescription drug, Easprin, how long have you been taking it?

Ms. Brannock: A week or two.

Capt. Johnson: On a regular basis?

Ms. Brannock: When I get a headache.

Capt. Johnson: Were there any side effects identified by the doctor?

Ms. Brannock: No.

Capt. Johnson: Would you bring in the prescription bottle so we can get the correct spelling.

Ms. Brannock: Why.

Capt. Johnson: We'd like to see it.

Ms. Brannock: I guess I can.

Mr. Greninger: You signed a statement that when you are asked a specific question to give a specific answer. You say that you don't remember. Is it because you don't remember, or because you don't want to answer. That can be held against you.

Ms. Brannock: I don't remember.

Mr. Greninger: Its hard for me to understand that there are things that happened yesterday that you can't remember. I'm not trying to make you say anything, but you need to be sure and answer truthfully because it can be held against you.

Capt. Johnson: I don't think there are any more questions.

The interview ended at 12:20
(#764286)

According to Brannock, she was shaken up by Respondent's refusal to allow White to participate during the investigation as she assumed that White, as her union representative, would have been permitted to ask questions and to clarify items which she did not understand during the meeting. Brannock continued that due to her confused state of mind, if White had been permitted to participate, perhaps Brannock

could have understood more clearly what was going on. According to Brannock, to this day, she has never been told and does not know to whom she had allegedly made false statements.

White testified that as the meeting progressed she was still at a loss to understand the charge of lying. She did not understand what the lie was, what was the false statement, or who Brannock had lied to. And, it was at the point where she first attempted to discern who Brannock had lied to, that she was told that she could not ask questions, but that her only rights as a union representative was to be present. According to White, upon hearing this, Brannock became visibly distressed. Not surprisingly White testified that had she been allowed to participate during the examination of Brannock, she would have asked what was the false statement and to whom was it made. Like Brannock, White does not know who Respondent thinks Brannock lied to, or what the lie actually was.

By letter dated February 27, 1987, Johnson issued Brannock a proposed ten day suspension for allegedly making false statements to supervisors and falsification, misstatement or concealment of material fact in connection with an official investigation. The basis for the suspension were: (1) the discrepancies between Neff's February 15 memo and Soto's February 19 memo and (2) Brannock's conduct during the February 20 investigation. By letter's dated March 15, 1987, titled oral response and written response, Brannock responded to the proposed suspension and argued to the Warden, inter alia, that she had not made a false statement to any supervisor and that at most, there had been a misunderstanding as to her ability to use firearms. By letter dated March 24, 1987, the Warden, Roger Scott, issued Brannock a 5-day suspension for the reasons stated in Johnson's February 27, proposal.

Warden Scott testified that his decision to suspend Brannock was based entirely on the notice of proposed discipline dated February 27 which Johnson had prepared, and the investigative interview which he conducted on February 20. In fact, Scott also admitted that the sole effect of Brannock's March 15, written and oral responses was to mitigate the harshness of the discipline from a 10-day to a 5-day suspension.

Specifically, according to Scott he decided to suspend Brannock because she had allegedly made two conflicting statements to her supervisors indicating to one that she was

released to full duty status and to the other that she had not been released to full duty. Scott then compared the Neff and Soto memos with the questioning of Brannock during the February 20 examination and decided to suspend her.

Yet, Scott admitted during the hearing that he decided to suspend Brannock without considering the fact that White had been denied her right to assist Brannock during the investigation, as he had been unaware of such a limitation. And, it is quite likely that Scott's decision to suspend Brannock would have been different given his testimony that a union representative at an administrative inquiry would be helpful in assisting an employee as to what is being asked of the employee.

For his part, Johnson testified that item one of the proposals to suspend Brannock was based entirely on the Neff and Soto memos and the February 20 examination while the second allegation in the February 27 proposal is clearly based on the interview itself.

Yet, Johnson was never able to explain why his independent investigation failed to address Brannock's defense that she had informed management via her January 30, 1987, doctor's note that she was unable to shoot firearms until further notice, despite the fact that Johnson had been told by Soto, White and Brannock herself of the previously furnished doctor's note. Sadly, however for Brannock, according to Johnson's own words, had he simply been aware of this defense, no action would ever have been taken against her.

As to the allegation arising out of Brannock's conduct during the investigative interview, according to Johnson, when an employee states that he or she does not remember a specific incident, then the employee is making false statements, is misstating and is providing inconsistent answers to the facts. Yet, even Warden Scott admitted that a response by an employee such as "I don't remember" is not a false statement under Respondent's code of conduct. In addition, Scott also admitted that an employee cannot be penalized or suspended merely because they cannot remember certain items upon which they are questioned during an investigative inquiry. More fundamentally, however, is the recognition that Brannock was, in light of her January 30 doctor's note, answering Respondent's questions. Respondent chose not to, or just didn't understand her answers.

Conclusions

WHETHER RESPONDENT VIOLATED SECTION 7116(a)(1) AND (8) OF THE STATUTE WHEN IT REFUSED TO ALLOW UNION REPRESENTATIVE JACKIE WHITE TO ACTIVELY PARTICIPATE DURING AN EXAMINATION WITH THE MEANING OF SECTION 7114(a)(2)(B) OF THE STATUTE.

There is no dispute that the February 20, 1987 administrative inquiry was an examination within the meaning of section 7114(a)(2)(B) of the Statute and that Brannock requested that her union representative, Jackie White, be present. Further, there is no question that Brannock had a reasonable belief that disciplinary action could result from the investigation since she was informed at the outset about accusations of false statements. Consequently, the only issue left unresolved in the case is whether Respondent's conduct in refusing to allow White to participate during the course of the questioning of Brannock sets forth a violation of the Statute.

Respondent contends, in essence, that where there is disrespect and disruption during the course of such investigatory interviews that it has the right to muzzle a union representative. I conjecture that such muzzling is at the peril of Respondent.

Section 7114(a)(2)(B) of the Statute provides that in any examination of a unit employee by an agency representative in connection with an investigation, the employee shall have the right to have a union representative present if the employee reasonably believes that the examination may result in disciplinary action and the employee requests representation. United States Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, New York, 27 FLRA No. 97 (1987). In addition, it has been determined by the Authority that a union representative's rights at such an investigatory examination encompass more than just the right to be present, but includes the right to participate and to assist the employee involved. U.S. Customs Service, Region VII, Los Angeles, California, 5 FLRA 297 (1981). However, an employer has a legitimate interest in seeing that an investigatory interview does not become an adversarial contest of wills between the investigator and the union representative, and as such, is entitled to place reasonable limitations on the exclusive representative's participation during the examination. Norfolk Naval Shipyard, 9 FLRA 458 (1982).

Although the record indicates that Respondent now allows union representatives to ask questions and participate to

the extent they are not disruptive, confrontational or argumentative, Respondent argues that in such cases the union representative has not under existing case law been given an absolute right to ask questions. This issue seemingly was long ago resolved by the Authority in U.S. Customs Service, supra. Therefore, at this stage, it is clear that the representative is not required to just, as the General Counsel so aptly states, be a "potted plant" and participation "could assist the employer by eliciting favorable facts . . . by getting to the bottom of the incident occasioning the interview." N.L.R.B. v. J. Weingarten, Inc., 420 U.S. 251, 95 S. CT. 959 (1975).

In reviewing the record of the investigative proceeding and after hearing the testimony of three of the individuals involved in the February 20, 1987 investigatory meeting, I am unable to find any disruptive, confrontational or argumentative conduct by either White or Brannock which would require Respondent to place any limitation on White's participation during the interview. The record disclosed only that both White and Brannock were totally confused and rightly so, as to what was the subject of the investigatory interview. Furthermore, only one day earlier White and Brannock had met with Johnson concerning Brannock's light duty status and there was no suggestion at the time that there was any issue other than the light duty status. Personnel Officer Pfistners' February 19, 1987 memorandum indicates the meeting ended with Johnson determining that "he would also have to change her post assignments and retain her in a light duty status until such time that he can make a determination on exactly what her physical status is and types of duty she could perform." Clearly there was no other issue involved.

The next meeting between the two was the investigatory proceeding about issues that neither White nor Brannock had reason to be aware of. White asked one question and told Johnson very clearly that she was confused about what was going on. Confused she should have been since the questioning to this point concerned something that had never been raised with Brannock or White during any earlier meeting with Johnson. I find nothing disruptive about what White said, even if carried on as Respondent suggests in a quasi-military type situation. Furthermore, I find nothing disruptive or argumentative about White's gestures during the interview as she explained those gestures to Johnson, when she stated that she was confused. Her single question was clearly in line with wanting to know what the inquiry was about and indicated that she was concerned with getting

to the bottom of this matter. Furthermore, the question was well within her obligation to participate and assist Brannock. I, therefore, find Respondent's contention that White was disruptive during this meeting is meritless.^{4/} Thus, I find no disruptive behavior which would cause, as Respondent suggests, an "adversary confrontation." In fact had White been allowed to assist it is totally possible that no discipline would have resulted from this meeting or otherwise. In sum, I find no disruptive behavior by the union representative during the February 20, 1987 investigatory interview and therefore, no reason for Johnson to preclude participation by White as Brannock's union representative. Furthermore, it is found that Brannock's right to representation under section 7114(a)(2)(B) was triggered since she had a union representative with her and, she also had a reasonable belief that disciplinary action might result from the investigation. Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina, 32 FLRA No. 37 (1988). Thus, it is found that the limitation placed on White's participation was not a reasonable one.

Accordingly, Johnson's action in precluding participation denied or prevented assistance by the union representative in this matter and constituted a failure to comply with the provisions of section 7114(a)(2)(B) of the Statute and thereby, constituted a violation of section 7116(a)(1) and (8) of the Statute.

The Remedy

In Charleston Naval Shipyard, supra, decided after the hearing in the instant matter, the Authority stated that in Weingarten situations "a make whole remedy will not be ordered where the disciplinary action taken relates solely to employee misconduct independent of the examination itself." The Authority, however, noted exceptions such as United States Immigration and Naturalization Service, San Diego, California, 13 FLRA 591 (1984), enforced sub nom. United States Immigration and Naturalization Service v. FLRA, 760 F.2d 278 (9th Cir. 1985) where a suspension given

^{4/} Since dicta is never the law of the case, Respondent's view that erroneous dicta regarding the degree of misconduct which "an employer must countenance in grievance and negotiation sessions," should be overruled, need not be addressed.

to an employee because of the conduct of the employee's representative at the examination was ordered rescinded and other make whole steps were directed to be taken. At least a portion of the suspension herein is based solely on Brannock's conduct at the investigatory interview. An interview in which she seemingly was reluctant to participate after Respondent prevented participation, without reason, of her union representative. Since it is impossible to determine how much of the suspension was based on alleged false information, misstatements and concealment of facts by Brannock during the investigatory interview this case appears to fall within those situations where the Authority considers revocation of the disciplinary action which flowed from the examination itself, or other make whole remedy as appropriate. In fact, had White been allowed to participate and assist in this investigation, it is entirely possible that no action would have been taken against Brannock. Accordingly, it is recommended that Respondent be required to rescind the March 24, 1987, 5-day suspension of Susan Brannock, expunge any reference to such suspension from her personnel records, reimburse her for the loss of pay she suffered by reason of the suspension, and restore to her any right or privileges she may have lost by such disciplinary action. If the Respondent decides that disciplinary action against Brannock is warranted for the charge of providing false statements, a new proceeding must be instituted in which no consideration is given to the employee's conduct at the February 20 meeting.

In light of the foregoing, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the United States Department of Justice, Bureau of Prisons, Safford, Arizona, shall:

1. Cease and desist from:

(a) Requiring any bargaining unit employee of the Bureau of Prisons, Safford, Arizona, to take part in an examination in connection with an investigation without the assistance of his or her union representative where such representation has been requested by the employee, and if the employee reasonably believes that the examination may result in disciplinary action against him or her.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at the Bureau of Prisons, Safford, Arizona copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden of the Safford, Arizona Prison and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Rescind the March 24, 1987, five-day suspension of Susan Brannock, expunge any reference to such suspension from her personnel records, reimburse her for the loss of pay she suffered by reason of the suspension, and restore to her any right or privilege she may have lost by such disciplinary action.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region 8, Federal Labor Relations Authority, Federal Labor Relations Authority, 350 S. Figueroa Street, Room 370, Los Angeles, CA 90071, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., October 12, 1988.



ELI NASH, JR.
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE
WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT require any bargaining unit employee of the Bureau of Prisons, Safford, Arizona, to take part in an examination in connection with an investigation without the assistance of his or her union representative where such representation has been requested by the employee, and if the employee reasonably believes that the examination may result in disciplinary action against him or her.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the March 24, 1987, five-day suspension of Susan Brannock, expunge any reference to such suspension from her personnel records, reimburse her for the loss of pay she suffered by reason of the suspension, and restore to her any right or privilege she may have lost by such disciplinary action.

(Activity)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VIII, whose address is: 350 S. Figueroa Street, Room 370, Los Angeles, CA 90071, and whose telephone number is: (213) 894-3805.