

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

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DEPARTMENT OF JUSTICE .  
UNITED STATES IMMIGRATION .  
AND NATURALIZATION SERVICE .  
UNITED STATES BORDER PATROL .  
EL PASO, TEXAS .

Respondent .

and .

Case No. 6-CA-70451

AMERICAN FEDERATION OF .  
GOVERNMENT EMPLOYEES, .  
AFL-CIO, NATIONAL BORDER .  
PATROL COUNCIL .

Charging Party .

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Mr. Richard Linnemann  
For the Respondent

Mr. Robert J. Marren  
For the Charging Party

Joseph T. Merli, Esquire  
For the General Counsel

Before: GARVIN LEE OLIVER  
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges, in substance, that Respondent violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), by denying the request of Jose A. Cruz, a bargaining unit employee, for a union representative in connection with an investigatory interview which the employee reasonably believed could result in disciplinary action being taken against him. The complaint alleges that by such acts Respondent failed and refused to comply with section 7114(a)(2)(B) of the Statute.

Respondent's answer admitted the jurisdictional allegations as to Respondent, the Union, and the charge, but denied any violation of the Statute.

A hearing was held in El Paso, Texas. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

#### Findings of Fact

On or about April 12, 1987 a building burned on the Mexican side of the border between the United States and Mexico near El Paso, Texas. Mexican nationals claimed that U.S. Border Patrol agents burned the building. As a result, the Office of Professional Responsibility (OPR) was assigned to investigate the "burning shack case," as it was later called.

The OPR is an organization within the Department of Justice, U.S. Immigration and Naturalization Service (INS), which investigates allegations of misconduct on the part of INS employees, including employees of the United States Border Patrol. When an investigation involves alleged criminal misconduct by INS employees OPR confers with the appropriate U.S. Attorney for guidance and direction regarding the investigation and reports the results of its investigation to the U.S. Attorney for a prosecutive opinion. OPR had such a relationship with the U.S. Attorney in this case.

As part of its investigation, OPR interviewed all Border Patrol agents assigned to the area across the border from the burned building. One of these agents was Jose Cruz, Border Patrol Agent, GS-7, a 26 year old member of the bargaining unit represented by the Charging Party (Union). Cruz was on duty on the night of the incident.

OPR Special Agent (SA) Perry L. Switt telephoned the Border Patrol station and requested that Cruz appear at the OPR office at the start of his shift. Cruz was not due to report until 4 p.m., so Acting Chief Patrol Agent Calvert telephoned Cruz at home at 11 a.m. and told Cruz that "OPR

wants to talk to you. We need you to come in right away." Cruz agreed.

Cruz was aware of the burning shack case, the mission of OPR, and the possible disciplinary action or criminal proceedings which could result from an OPR investigation of employee misconduct. He immediately telephoned the local Union president, Arcadio Neira, a senior Border Patrol agent with 12 years experience who had helped train Cruz in the work of the Border Patrol. Cruz asked Neira to be his Union representative at the OPR interview. Neira agreed.

Thereafter, Cruz and Neira met at Border Patrol headquarters. Acting Chief Patrol Agent Calvert tossed Cruz a set of keys to a government vehicle and said, "Here, go down to the OPR offices." The OPR office was about a 15 minute drive from the station. Neira tried to calm Cruz down by telling him that he (Neira) would be with him during the interview, and Cruz would not be there by himself. They agreed that if Cruz were asked any question he did not understand, he could discuss the question with Neira and seek Neira's advice before answering.

When Cruz and Neira arrived at the OPR office they were eventually met by three OPR agents, namely Lawrence Granelli, Regional Director of OPR, SA Perry Smith, and SA Juan Escobedo. Cruz demanded to know the names of the SAs, what he was going to be questioned about, and whether there were any charges against him.

Granelli raised his voice in reply and told Cruz to "hold it right there . . . we are going to tell you what is going on." Granelli then introduced himself and the other agents. Cruz likewise identified Neira as his Union representative and said Neira would be with him during the questioning.<sup>1/</sup>

Granelli replied that if Neira wanted a representative, he was entitled to one, and they would do the interview with the representative present. He then explained the nature of the investigation; that Cruz was considered a suspect, not a witness, and that it was very important that Cruz understand

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<sup>1/</sup> The parties stipulated that Cruz did initially request that his Union representative be present during the meeting and that Cruz reasonably believed that the interview might possibly result in some sort of discipline against him.

that it was a criminal investigation and not purely an administrative investigation.<sup>2/</sup> Granelli informed Cruz that he and Neira would not have any kind of privileged communication with respect to the criminal proceedings and that "his representative would or could be subject to subpoena and/or interview by OPR, by a grand jury; or subpoenaed at trial." Cruz and Neira were informed that Cruz was not under arrest, would not be arrested at the interview, and was free to depart at any time to seek legal counsel or obtain advice from Neira if he desired. When Cruz and Neira protested that Cruz was entitled to a Union representative, Granelli reiterated the criminal-administrative distinction several times and that Neira and Cruz did not enjoy the attorney-client privilege. Granelli "cautioned" Cruz and Neira that, although Neira could attend the interview, if there were any communication that indicated possible culpability on the part of Cruz, then Neira, instead of being a representative for Cruz, would turn into a witness against Cruz and for the Government. Cruz was informed that as a Federal officer he was expected to cooperate with the investigation, but that without infringing on any of his rights, he was to understand that it was his decision as to whether or not he would submit to interview. Granelli explained that he could pick and choose what he wanted to answer and could terminate the interview at any time.

Neira had never heard of a criminal-administrative distinction before and was confused by this statement since it was coming from what he considered to be a high government official. He and Cruz conferred outside the presence of the SAs. When they reentered the room Cruz agreed to an inter-

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<sup>2/</sup> Cruz and Neira testified that Granelli told them Cruz was not entitled to a Union representative in a criminal investigation and that Neira could not be in the room. I have for the most part credited the contrary testimony of SAs Granelli, Smith, and Escobedo and also relied on Respondent's Exhibit 1, the report of the interview prepared by SA Smith before the unfair labor practice charge was filed. The account which follows is a composite of the credited testimony. Because Granelli repeatedly reiterated "the criminal-administrative distinction," I find that Granelli did convey the impression that Cruz was not entitled to his full statutory right to a Union representative at this examination because it involved a criminal investigation.

view without the presence of Neira and said Neira would wait outside.<sup>3/</sup> Neira and Granelli then left the interview room.

Cruz was then questioned by SAs Smith and Escobedo. Cruz was informed that if he wished to depart the room to consult with Neira, or obtain legal counsel, or terminate the interview he was free to do so.<sup>4/</sup> Cruz was asked to describe the events leading up to the time he first saw the fire. Cruz did so and indicated his locations on a rough map provided by the agents. Toward the end of the interview he was apprised of his rights under Miranda v. State of Arizona, 384 U.S. 436 (1966)<sup>5/</sup> and asked about statements attributed to him by others. Cruz answered several questions in this regard, but then refused to answer any further questions and left the room.

Cruz was subsequently subpoenaed to testify before a grand jury. On November 30, 1987 the U.S. Attorney advised

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<sup>3/</sup> Cruz and Neira claimed that Granelli said Neira was not allowed to be present during the questioning, but could wait outside the room. Cruz testified that they did not have any choice, so Neira waited outside and the questioning proceeded. He claimed that he felt pressured to stay because he had been "ordered" by a higher ranking officer "to talk to them" and did not want to commit an act of insubordination. I do not interpret Cruz's testimony as to Acting Chief Patrol Agent Calvert's actions as an "order to talk to them." At most, the record merely establishes that Calvert ordered Cruz to report to the OPR office because "OPR wants to talk to you."

<sup>4/</sup> Cruz testified that he reiterated his request for the presence of Neira several times; that he left the room three times to confer with Neira but felt compelled to return because the agents said they had more questions; and that the agents, among other things, offered him immunity from prosecution, a promotion, and a job in his home town if he would provide information on other agents. I credit the testimony of SAs Smith and Escobedo that Cruz did not repeat his request for the presence of Neira, did not leave the room thereafter to confer with Neira, and the agents made no such offers to him.

<sup>5/</sup> Cruz acknowledged that, as a law enforcement officer, he was already familiar with his Miranda rights, and was advised, among other things, that he had the right to remain silent.

SA Juan Escobedo that he would not pursue the criminal matter any further, would decline prosecution, and the matter would be handled administratively. (Tr. 106). The results of the investigation could be used for disciplinary action. (Tr. 92).

#### Discussion, Conclusions, and Recommendations

Section 7114(a)(2)(B) of the Statute provides that in any examination of a unit employee by a representative of the agency 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 requests representation.

Respondent contends that the interview was not an "examination", nor was it "by a representative of the agency" as the OPR agents were not acting under the direction of agency management with respect to the criminal investigation, but rather were acting for and pursuant to the directions of the U.S. Attorney who has independent statutory authority for the prosecution of Federal crimes.

The evidence clearly established that the questioning of Cruz was an "examination." Cruz was interviewed by OPR agents and called upon to supply information in connection with their investigation of the alleged involvement of Border Patrol agents in an arson incident. The Authority has held that section 7114(a)(2)(B) is applicable to all examinations in connection with all investigations including examinations of employees in connection with criminal investigations. Department of the Treasury, Internal Revenue Service, Jacksonville District, 23 FLRA 876, 877-879 (1986); Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina, 32 FLRA 222 (1988).

As the court held in enforcing the Authority's order in Defense Criminal Investigative Service v. F.L.R.A., 855 F.2d 93, 100 (1988), the term "representative" should be construed with reference to the objective of the Statute and, in that context, the degree of supervision exercised by agency management is irrelevant where the investigators are employees of the same agency and their purpose when conducting interviews is to solicit information concerning possible misconduct on the part of agency employees in connection with their work. Here, OPR is an organization within the Department of Justice, Immigration and Naturalization Service, the same agency and subdivision as employs the unit employee. The purpose of the interview was to secure

information concerning possible misconduct on the part of the employee in connection with his work. The record establishes that the information secured by OPR may be used for disciplinary action by the lower echelon of the agency and subdivision, the U.S. Border Patrol, where the collective bargaining unit is located. Therefore, it is concluded that the OPR agents were acting as a "representative of the agency" within the meaning of section 7114(a)(2)(B). Although OPR was not the employing entity of Jose Cruz, it was an entity within INS, representing INS, and could not act in such a manner as to unlawfully interfere with Cruz' statutory right to a Union representation during the interview.

There is no dispute that Cruz reasonably believed that the examination might result in disciplinary action against him and initially requested representation. The General Counsel contends, based on Cruz and Neira's testimony, that Cruz's request for Union representation was flatly denied by the OPR agents and that at no time did Cruz clearly and unmistakably waive his right. Respondent contends that Cruz withdrew his request after an exchange with the OPR representatives and voluntarily agreed to proceed with the interview without representation.

I have found that the OPR agents did not expressly deny Cruz Union representation. Cruz was advised that Union representation would be allowed if he desired, and it was his decision whether or not to submit to or terminate the interview.

The record reflects that Cruz withdrew his request for Union representation after the OPR agent repeatedly presented him reasons why Union representation would not be to his or his representative's advantage: that because the interview concerned a criminal, rather than an administrative, investigation there would be no attorney-client privilege between them; the Union representative would be subject to interview by OPR, subpoena by the grand jury, or subpoena at trial regarding their private conversations; and the Union representative would be a witness against Cruz and for the Government if he made any admissions in the Union representative's presence.

The issue posed is whether in light of these statements Cruz knowingly and voluntarily waived his right to Union representation. As the National Labor Relations Board (NLRB) stated in Southwestern Bell Telephone Co., 227 NLRB 1223, 94 LRRM 1305 (1977):

Here, it is particularly important because of the "mischief to be corrected and the end to be attained" [N.L.R.B. v. Hearst Publications, Incorporated, et al., 322 U.S. 111, 14 LRRM 614 (1944)], that we carefully scrutinize any claim that employees have waived their guaranteed right. Put another way, "Before inferring that a waiver has occurred . . . the Board must assure itself that the employee acted knowingly and voluntarily. The right being waived is designed to prevent intimidation by the employer. It would be incongruous to infer a waiver without a clear indication that the very tactics the right is meant to prevent were not used to coerce a surrender of protection." [Comment "Union Presence in Disciplinary Meetings," 41 U. Chi. L. Rev. 329, 350.]

As the Administrative Law Judge noted, the Supreme Court said in Weingarten [N.L.R.B. v. J. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975).] "A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." [Weingarten, supra, 263, 88 LRRM at 2693.] To conclude that an Employer may play upon these fears to dissuade an employee from remaining firm in his request would defeat the right Weingarten protects.

The nature of the interview itself demonstrates the critical need for scrutiny of such a claim. For here and, as the Supreme Court stated in Weingarten, 420 U.S. at 265, fn. 10, often "an investigative interview is conducted by security specialists; the employee does not confront a supervisor who is known or familiar to him, but a stranger trained in interrogation techniques."

Congress' purpose in enacting section 7114(a)(2)(B) was to create representational rights for Federal employees similar to the rights provided employees by the NLRB in

interpreting the National Labor Relations Act. See United States Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, New York, 27 FLRA 874, 878 (1987), decision on reconsideration, 29 FLRA 482 (1987). When the statutory conditions are met, the employee has the absolute right to have a union representative present upon request. Representatives of the agency are not then privileged to proceed to interfere with, restrain, or coerce the employee to secure a waiver of that right.

Once an employee makes such a request, the Authority has held that the employer is permitted one of three options: (1) grant the request; (2) discontinue the examination; or (3) offer the employee the option of (a) continuing the examination without representation or (b) having no examination at all. Bureau of Prisons, 27 FLRA at 880. Where the employee is given such a choice, his continued presence must be viewed as voluntary. Here, the OPR agents did not offer Cruz the option of continuing the interview unaccompanied by a Union representative, or having no interview at all. Instead, SA Granelli proceeded to repeatedly present reasons why Union representation was not to Cruz or his representative's advantage and, thereby, secured Cruz's waiver of the right.

Granelli's statement conveyed the clear impression that Cruz was not entitled to his full statutory right to a Union representative at the examination because the interview was in connection with a criminal investigation. As noted, this is not the law. Granelli's statement that if Neira represented Cruz, Neira would be subject to OPR interview regarding their private communications was within Granelli's own power to put into effect and gave the clear impression that the representative himself would suffer some uncomfortable consequences by his mere representation of Cruz. The Supreme Court has held that an employer may not insist, by threatening to discipline the employee's representative, that the interview be held without his presence. International Ladies Garment Workers' Union v. Quality Manufacturing Co., 420 U.S. 276 (1975). While Granelli's statement was somewhat short of threatened discipline of Neira, it nevertheless would tend to discourage Neira from providing union assistance and Cruz from involving Neira so deeply in the OPR investigation. Except for the fact that Cruz and Neira did not have an attorney-client relationship, Respondent cites no other authority to support Granelli's assertion that the conversations between Cruz and his Union representative would not be privileged and that Neira could be compelled to

be a witness against Cruz as to any admissions which Cruz made. The truth of these assertions are not free from doubt.<sup>6/</sup> They need not be resolved in this case for it is enough to note that Congress has provided the employee the right to the presence of a union representative if the statutory conditions are met, and it is for the employee himself to determine whether to exercise that right and obtain the full measure of protection which Congress envisioned. The options available to the employer when the right is asserted have been outlined by the Authority and do not include the one taken by the agents in this instance, that of discouraging or intimidating the employee into surrendering that protection.<sup>7/</sup> It is concluded that Cruz's waiver was not made knowingly and voluntarily; that he properly invoked his right to union representation and did not waive that right; that Respondent interfered with, restrained or coerced the employee in the exercise by the employee of the right to a Union representative under section 7114(a)(2)(B) in violation of section 7116(a)(1); that Respondent thereby constructively denied Cruz' request for a Union representative to which he was entitled pursuant to section 7114(a)(2)(B); and that by such acts Respondent failed to comply with section 7114(a)(2)(B) of the Statute

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<sup>6/</sup> U.S. Customs Service, Washington, D.C. and National Treasury Employees Union, 8-CA-80171, pending decision before Administrative Law Judge William B. Devaney, involves an alleged unfair labor practice where the agency compelled a union representative, a non-attorney, to provide information concerning his private conversations with an employee after the representative asserted a privilege in the nature of an attorney-client privilege.

<sup>7/</sup> The rights of an employee under section 7114(a)(2)(B) are unaffected by any rights the employee may have possessed or been accorded under Miranda. Cf. U.S. Postal Service, 241 NLRB No. 18, 100 LRRM 1520 (1979). Being free to leave the room is also not the same as being afforded Weingarten rights. Montgomery Ward, 273 NLRB 1226, 118 LRRM 1025 (1984). Moreover, whether or not the employee could have terminated the interview is irrelevant. The violation occurred when the agents interfered with the exercise of that right and continued the examination. United States Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, New York, 27 FLRA 874 at 880, decision on reconsideration, 29 FLRA 482 (1987).

and therefore violated section 7116(a)(1) and (8) of the Statute, as alleged.

Based on the foregoing findings and conclusions, it is recommended that the Authority issued the following Order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is ordered that the Department of Justice, U.S. Immigration and Naturalization Service (INS), shall:

1. Cease and desist from:

(a) Discouraging or intimidating any employee from requesting union representation during an examination if the employee reasonably believes that the examination may result in disciplinary action against the employee and requests such representation.

(b) Failing and refusing to afford the American Federation of Government Employees, AFL-CIO, National Border Patrol Council, an opportunity to be represented at any examination of an employee in its unit in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action against the employee and requests such representation.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights assured them 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 its facilities, 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 District Director 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 ensure that such notices are not altered, defaced, or covered by any other material.

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discourage or intimidate any employee from requesting union representation during an examination if the employee reasonably believes that the examination may result in disciplinary action against the employee and requests such representation.

WE WILL NOT fail or refuse to afford the American Federation of Government Employees, AFL-CIO, National Border Patrol Council, an opportunity to be represented at any examination of an employee in its unit in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action against the employee and requests such representation.

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

\_\_\_\_\_  
(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 VI, whose address is: 525 Griffin Street, Suite 926, Dallas, TX 75202, and whose telephone number is: (214) 767-4996.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VI, Federal Labor Relations Authority, Dallas, Texas, 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., November 30, 1988



GARVIN LEE OLIVER  
Administrative Law Judge