

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

.

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

Respondent

and

Case Nos. 6-CA-00799
6-CA-01078

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

Charging Party

.

Scott D. Cooper, Esq.
For the Respondent

Robert J. Marren
For the Charging Party

Janis E. Baldwin, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This matter arose under the Federal Service Labor-
Management Relations Statute, Chapter 71 of Title 5 of the
U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon unfair labor practice charges having been filed by
the captioned Charging Party (herein the Union) against the
captioned Respondent, the General Counsel of the Federal
Labor Relations Authority (herein the Authority), by the
Regional Director for the Dallas Regional Office, issued a
Complaint and Notice of Hearing alleging Respondent

violated the Statute by denying the Union the opportunity to be represented at the taking of two depositions in preparation for Merit Systems Protection Board (MSPB) hearings, which depositions are alleged to constitute formal discussions within the meaning of the Statute.

A hearing on the Complaint was conducted in El Paso, Texas, at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally.^{1/} Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the Union has been the exclusive collective bargaining representative of various of Respondent's employees.

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On April 23, 1990 unit employee Robert Marren was suspended without pay for 33 days for alleged unacceptable conduct. On April 24 Marren appealed the suspension denying the allegations and raising various affirmative defenses contending his suspension was a reprisal for his having engaged in protected conduct. On May 9 Daniel Vara, an Assistant Regional Counsel, Southern Region, representing Respondent, issued a Notice of Deposition pursuant to regulations concerning discovery procedures used in MSPB proceedings (5 C.F.R. Sec. 1201.73 et seq.) notifying Marren of the Agency's intent to depose him on May 17 regarding Marren's appeal. At this juncture compliance with a discovery request is voluntary between the parties. However, the regulations provide a party must answer a discovery request by complying with or objecting to the request.^{2/} The regulations further provide that failure

^{1/} Respondent's unopposed Motion to Add Supplemental Citation to the Record filed after the close of the record is hereby granted.

^{2/} Marren testified he thought the agency could discipline an employee for refusal to cooperate in such a discovery request. Vara testified he had no authority to discipline an employee for refusal to cooperate with a request for discovery.

to cooperate with discovery by a party enables the requesting party to file with the MSPB a motion to compel discovery. Marren raised objections to the deposition and informed Vara that he would not attend the deposition. Thereupon Respondent filed with the MSPB a motion to compel discovery pursuant to MSPB regulations. The matter was considered by an MSPB Administrative Judge who rejected Marren's opposition and ordered Marren to submit to a deposition by Respondent on June 4. If Marren failed to obey the order the Administrative Judge had authority to impose a variety of sanctions against Marren, including precluding Marren from introducing testimony or other evidence in support of his case or dismissing his appeal.

By letter dated May 30, 1990 Assistant Regional Counsel Vara notified Marren that "for purposes of clarification and in an overabundance of caution" Marren was given the right to be represented by the Union or a representative of his choice at the scheduled deposition.^{3/}

Marren's deposition was taken on June 4, 1990 in a conference room at the El Paso Border Patrol Sector Headquarters. Marren appeared "Pro Se" although he also appeared with Larry Augustine, a personal representative authorized under the parties' collective bargaining agreement. The Union was represented by Augustine Hernandez and Respondent was represented by Vara and another Assistant Regional Counsel, Reid Tilson. After the parties stated their appearances on the record, Vara announced to Marren's personal representative and Union representative Hernandez that their participation in the matter would be that of an observer.

Hernandez considered himself "barred" from making statements or comments and remained completely silent during the deposition which took approximately two hours. The deposition was conducted by Vara asking questions and Marren responding to them under oath and a verbatim transcription made by a court reporting service. Vara questioned Marren using notes of general and specific matters he wished to raise, occasionally making a notation after a Marren response. Vara also questioned Marren using various documents Vara brought to the deposition and had marked for identification as Agency deposition exhibits.

^{3/} Vara testified that he did not wish to "clutter up the record" with additional issues so he invited the Union to attend the deposition.

At one point during the deposition Marren requested an opportunity to talk to his representatives. The transcript reveals the following colloquy:

Q. Okay. If you didn't have outstanding complaints, EEO complaints, against the agency, could the agency have disciplined you for washing out the vehicles, committing AWOL or insubordination?

Mr. Augustine: Do you want to take a break and get some water?

Mr. Marren: Yeah. I want to take a break.

Mr. Vara: Well, why don't you answer that question and we'll take a break?

Mr. Marren: I'd like discuss it with my representatives.

Mr. Vara: Sir, answer the question.

Mr. Marren: Are you denying me the right to discuss the matter with my representatives?

Mr. Vara: Sir, you don't walk outside in the middle of a question in a deposition. We will take a break in an orderly manner. You don't get to get up and walk out when we're doing a deposition. You want to get up? We'll play Federal Rule 30 and we'll get a motion to compel. Why don't we just answer the question?

Mr. Marren: For the record, I would like to state an objection, that the agency's representative has denied me the opportunity to discuss a question with both my personal representative and the union representative.

Mr. Vara: And for the record, I want Mr. Marren only to answers the question that I gave him truthfully and to the best of his ability at this time. He can come back and answer it again if he wants after he talks to his representative.

Mr. Marren: What was the Question?

Q. (By Mr. Vara) The question is, frankly, if you didn't have these outstanding EEO complaints, could the agency have disciplined you for washing out the vehicles, for your AWOL and for your insubordination?

A. Based on the facts as they are?

Q. As they are.

A. Well, I feel the discipline was improper, so I would say no.

Mr. Vara: Okay. Now, we can take a break. Thank you.

The parties took a break after which the deposition continued.

Subsequent to the taking of the deposition Marren filed with the MSPB an objection to the conduct of the deposition regarding Vara's treatment of Union representative Hernandez. The MSPB ruled that no harmful error had occurred.

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In late July 1990 Respondent, through its representative Elizabeth Younkin, an Assistant Regional Counsel in Respondents Southern Region, sent Marren a Request for Deposition under MSPB regulations, supra, notifying him that an oral deposition would be taken from him on August 3. A copy of the request was also sent to the Union.^{4/} Marren was appealing a performance rating contending that he had been discriminated against by Respondent because of his whistleblowing, union activities and a condition constituting a handicap. Marren appeared for the deposition at a conference room at the El Paso Border Patrol Headquarters on August 3. Although he appeared "Pro Se", he was accompanied by his designated personal representative Larry Augustine. The Union was represented by Augustine Hernandez and Respondent was represented by Elizabeth Younkin and was accompanied by one of Respondent's Labor Relations Specialists.

^{4/} Younkin testified she sent the Union a copy because she wished to avoid having to litigate an issue of notice to the Union while litigating the MSPB appeal.

At the onset of the meeting Marren asked Younkin whether his representatives were going to be permitted to participate in the proceeding. Younkin replied that it was her understanding that the two representatives with Marren were there strictly as observers and would not be participating. Marren objected to Younkin's position claiming it was a denial of his right to representation. Marren asked if he would be able to confer with Hernandez and Younkin said he could not. Thereafter Hernandez remained silent again considering himself "barred" from participation during the deposition which took approximately 55 minutes.

As with the prior deposition of June 4, supra, the deposition was conducted by question and answer and a verbatim transcription made by a court reporting service. Younkin came to the deposition with documents and notes which she referred to while questioning Marren, occasionally making a notation after a Marren response.

Additional Findings, Discussion and Conclusions

Counsel for the General Counsel contends that the depositions of unit employee Marren taken by Respondent's representatives were formal discussions within the meaning of section 7114(a)(2)(A) of the Statute and Respondent's conduct of excluding the Union representative from participating in the June 4 and August 3 depositions and denying Marren's request on June 4 that he be permitted to confer with his Union representative violated section 7116(a)(1) and (8) of the Statute.^{5/}

Counsel for Respondent essentially takes the position that the Union's right of representation is not applicable

^{5/} Section 7114(c)(2)(A) of the Statute provides:

"(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at --

"(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment
. . ."

Section 7116(a)(8) makes it an unfair labor practice to "fail or refuse to comply with any provisions of this chapter."

in the situation herein and, in any event, the Union was not entitled to be present at the deposition under the provisions of section 7114(a)(2)(A) of the Statute. Respondent also argues that Respondent's attorney Vara nevertheless complied with the requirements of the Statute.

In Veterans Administration Medical Center, Long Beach, California, 41 FLRA 1370 (1991) (VA Long Beach), the Authority had occasion to consider the issue of whether a union need to be afforded the opportunity to be present during an interview of a bargaining unit employee conducted by an agency's attorney in preparation for an MSPB hearing. In that case the Authority indicated it previously followed the U.S. Court of Appeals for the District of Columbia Circuit in National Treasury Employees Union v. FLRA, 774 F.2d 1181 (D.C. Cir. 1985) (NTEU-Treasury), in cases where it held interviews by agency representatives with bargaining unit employees in preparation for third-party proceedings in which the union had an adversary role were formal discussions, citing, for example, Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 29 FLRA 594 (1987) and 35 FLRA 594 (1990) (McClellan I and II respectively), (interviews in preparation for an arbitration proceeding) and F.E. Warren Air Force Base, Cheyenne, Wyoming, 31 FLRA 541 (1988) (F.E. Warren), (interviews in preparation for an unfair labor practice hearing). The Court in NTEU-Treasury found that under the Statute a union has the right to be represented when an agency interviews a bargaining unit employee scheduled to testify on behalf of another employee at a hearing before the MSPB. The Court held that the MSPB appeal was a "grievance" within the meaning of the Statute and the union had an interest in the proceeding on its own behalf, apart from the employee's interest in being represented, which is recognized under the Statute. The Court concluded that a union is assured a role in statutory appeals procedures where the criteria of section 7114(a)(2)(A) of the Statute are met, as long as no conflict exists between the rights of the exclusive representative and the rights of the aggrieved employee.^{6/}

^{6/} I find and conclude no conflict has been shown to exist in the case herein between the Union exercising its representational rights to participate in Marren's deposition and Marren's individual rights.

Under section 7114(a)(2)(A) of the Statute the exclusive representative must be given (1) the opportunity to be represented; (2) at any discussion; (3) which is formal; (4) between a unit employee and a representative of an agency; and (5) concerning a grievance or personnel policy or practice or other general condition of employment. See U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution (Ray Brook, New York), 29 FLRA 584, 588-589 (1987) (Ray Brook), aff'd sub nom. American Federation of Government Employees, Local 3882 v. FLRA, 865 F.2d 1283 (D.C. Cir. 1989). I find and conclude Marren's depositions of June 4, 1990 and August 3, 1990 contained all the requisite elements set forth in section 7114(a)(2)(A) and Respondent's conduct in failing to permit the Union representative to participate in those meetings violated the Statute. Thus, the record clearly establishes and I find and conclude that Hernandez was recognized as the Union's representative and;

(1) The Union was not given the opportunity to be represented at the depositions. While the Union was permitted to have a representative present at the depositions, the representative was not allowed to participate. The Authority has held that the "opportunity to be represented" at a formal discussion means more than merely the right to be present. The right to be represented also means the right of the union representative to "comment, speak and make statements." U.S. Nuclear Regulatory Commission, 21 FLRA 765, 767-768 (1986). However, Union representative Hernandez was told by Respondent's attorneys at both depositions that his participation was limited to that of "observer" only and the opportunity to confer was precluded except with regard to Respondent permitting a post-answer conference on one occasion.

(2) The taking of Marren's depositions by Respondent's attorneys on June 4, 1990 and August 3, 1990 in preparation for MSPB hearings by questioning him and having his answers recorded constituted discussions within the meaning of section 7114(a)(2)(A) of the Statute. See VA Long Beach; McClellan I and II; and F.E. Warren.^{7/}

^{7/} I reject Counsel for Respondent's contention raised in Respondent's Motion to Add Supplemental Citation to the Record regarding the applicability of the Authority's

(Footnote continued on next page.)

(3) The taking of the depositions were formal meetings within the meaning of section 7114(a)(2)(A) of the Statute. The Authority has noted a number of factors it considers relevant to a determination of whether meetings are "formal" in nature. See, for example, U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Chicago, Illinois, 32 FLRA 465, 470 (1988); Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 14 FLRA 475, 477 (1984); and Department of Health and Human Services, Social Security Administration, Bureau of Field Operations, San Francisco, California, 10 FLRA 115, 118 (1982). However, the factors stated by the Authority in the above cases are not meant to be exhaustive and the Authority will consider other appropriate matters when evaluating the totality of the facts and circumstances of a particular case. Id. In the case herein, in one meeting management was represented by two attorneys and in the second meeting management was represented by an attorney and a member of its labor relations staff. The depositions were conducted at Respondent's El Paso Sector Headquarters offices, away from Marren's work site, one lasting approximately two hours, the other about an hour. The depositions were scheduled in advance with written notice to Marren, the Union receiving written notice of one session and an invitation, through Marren, of the second. Clearly the taking of a deposition of an adverse party by an attorney in preparation for a hearing by its very nature establishes the existence of a "formal agenda"^{8/}. Further, Marren was compelled to ultimately present himself for the depositions by the nature of the sanctions which could have been imposed upon him for his failure to comply with the requests for depositions. True, discovery under MSPB is nominally "voluntary." However, the possible sanctions,

(Footnote continued from previous page.)

discussion regarding circumstances wherein employee interviews can be inherently coercive. The language cited by counsel in Patent Office Professional Association and U.S. Department of Commerce, Patent and Trademark Office, 41 FLRA 795, 828-829 (1991) clearly concerns employees' section 7102 rights, not the 7114 rights of representatives which is the issue in this case.

^{8/} In any event, testimony establishes that notes and documents were used by the questioning attorneys which indicates preparation for the meeting by the Agency's lawyers.

preventing Marren from introducing evidence and dismissing his appeals constitute a form of coercion leaving Marren with no choice but to submit to the depositions if he wished to have any hope of succeeding in his appeals. Lastly, the discussions which occurred at the depositions, questions and answers and comments, were recorded and transcribed by a court reporting service. These circumstances clearly establish that Marren's depositions given on June 4 and August 3, 1990 were formal discussions within the meaning of section 7114(a)(2)(A) of the Statute.^{9/}

(4) The two attorney's at the June 4 deposition and the attorney and labor-relation employer at the August 3 deposition were representatives of management pursuing the depositions on behalf of Respondent's position in resisting the allegations Marren made to support his appeals.

(5) Marren's appeals from a suspension from employment and a performance rating were complaints related to his employment and accordingly constituted grievancies with the meaning of section 7114(a)(2)(A) of the Statute. See VA Long Beach, at 1380, and cases cited therein.

Respondent also contends that attorney Vara complied with the proscriptions of the Statute regarding formal discussions when Vara provided Marren and Union representative Hernandez with an opportunity to confer after he denied them the opportunity before Marren answered a question Vara had put to him. I conclude in all circumstances Vara's refusal to allow Marren and Hernandez to confer before Marren responded to Vara's question failed to comply with the requirements of section 7114(a)(2)(A) of the Statute. While the request for a break was initiated by Marren's personal representative, Marren clearly indicated a desire to talk to Union representative Hernandez as well. Hernandez made no reply. The question put to Marren concerned Agency conduct for administering discipline to an employee and the circumstances of such discipline, matters which could possibly potentially impact upon other bargaining unit employees. However, Hernandez had been initially cautioned that he was present at the deposition merely as an observer. At no time did Union representative

^{9/} In my view the taking of a deposition of an adverse party by an attorney in preparation for litigation present such circumstances in itself to establish the existence of a formal discussion within the meaning of section 7114(a)(2)(A).

Hernandez attempt to take charge, usurp, or disrupt the meeting. Nor does the evidence disclose that Marren engaged in such conduct. It is before an answer is given that a conference to evaluate the ramifications of the question and answer or unit considerations would be most beneficial. In these circumstances I assume that but for Respondent attorney Vara's admonition, Hernandez would have indicated his desire to confer with Marren prior to Marren's responding to Vara's question and I conclude that Vara's refusal to allow Marren and Hernandez to confer at that time ran afoul of section 7114(a)(2)(A) of the Statute. Cf. U.S. Nuclear Regulatory Commission at 767-768.

Accordingly, in view of the entire foregoing I conclude Respondent violated section 7116(a)(1) and (8) of the Statute and I recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the United States Immigration and Naturalization Service, United States Border Patrol, El Paso, Texas, Shall:

1. Cease and desist from:

(a) Conducting formal discussions with its employees in the bargaining unit exclusively represented by the National Border Patrol Council, American Federation of Government Employees, AFL-CIO, concerning grievances or any personnel policies or practices or other general conditions of employment, including depositions in connection with or in preparation for Merit Systems Protection Board proceedings, without affording the National Border Patrol Council an opportunity to be represented at such formal discussions.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities throughout United States Immigration and Naturalization Service, Southern Region, copies of the attached Notice to all Employees on forms furnished by the Federal Labor Relations Authority.

Upon receipt of these forms, they shall be signed by the Regional Commissioner for the Southern Region, and shall be posted and maintained for 60 consecutive days in conspicuous places where notices to employees are customarily posted. Reasonable steps will be taken to ensure that these Notices are not altered, defaced, or covered by other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

Issued, Washington, DC, March 4, 1992



SALVATORE J. ARRIGO
Administrative Law Judge

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 HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT conduct formal discussions with employees in the bargaining unit exclusively represented by the National Border Patrol Council, American Federation of Government Employees, AFL-CIO, concerning grievances or any personnel policies or practices or other general conditions of employment, including depositions in connection with or in preparation for Merit Systems Protection Board proceedings, without affording the National Border Patrol Council an opportunity to be represented at such formal discussions.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured 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, Dallas Regional Office, whose address is: Federal Office Building, 525 Griffin Street, Suite 926, LB 107, and whose telephone number is: (214) 767-4996.