

Office of Administrative Law Judges

WASHINGTON, D.C.

DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION
SERVICE U.S. BORDER PATROLL AREDO, TEXAS Respondent and
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2455,
AFL-CIO Charging Party

Case No.
DA-CA-00878

Tiffany A. Former For the General Counsel Before: GARVIN LEE OLIVER Administrative Law
Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

On November 30, 2000, the Regional Director of the Dallas Region of the Federal Labor Relations Authority issued a Complaint and Notice of Hearing which was duly served by certified mail on a designated representative of the Respondent. The Complaint alleged that the Respondent violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1) and (8), by failing to comply with 5 U.S.C. § 7114(a)(2)(B)⁽¹⁾, when bargaining unit employee Aynee Garcia requested representation during an investigatory examination and Respondent denied the request by placing unwarranted restrictions on his Union representative during the examination. A hearing was scheduled for February 9, 2001.

The Complaint specifically advised the Respondent that an answer must be filed with this office by December 26, 2000 and that "[i]f Respondent does not file an answer, the Authority will find that Respondent has admitted each allegation. See 5 C.F.R. § 2423.60(b)." The Respondent did not file an answer, either in person or by mail, within the required period or at any time thereafter. Accordingly, the Respondent has admitted all allegations of the complaint. *Department of Veterans Affairs Medical Center, Asheville, North Carolina*, 51 FLRA 1572, 1594 (1996).

On January 5, 2001 Counsel for the General Counsel filed a Motion for Summary Judgment and requested an appropriate remedy requiring the Respondent to post a Notice of All Employees. Respondent failed to file a response to the motion for summary judgement within the time period provided for in the Regulations, 5 C.F.R. § 2423.27(b) and 2429.22, or at any time to date.

Based on the allegations of the Complaint, the admissions by operation of section 2423.20(b) of the Authority's Rules and Regulations, and all the pleadings, it appears that there are no genuine issues of material fact and that the General Counsel is entitled to Summary Judgment as a matter of law. Accordingly, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Respondent, Department of Justice, Immigration and Naturalization Service, U.S. Border Patrol, Laredo, Texas, is an agency under 5 U.S.C. § 7103(a)(3).

The American Federation of Government Employees, AFL-CIO (AFGE), is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at the U.S. Border Patrol. The American Federation of Government Employees, Local 2455 (the Union), is an agent of AFGE for the purpose of representing employees of Respondent within the unit.

On or about September 8, 2000, the Respondent, by Mike Douglas, a Supervisory Border Patrol Agent, and a supervisor or management official under 5 U.S.C. § 7103(a)(10) and (11) acting on behalf of Respondent, conducted an examination of bargaining unit employee Aynee Garcia for the purpose of gathering information regarding an allegation of misuse of government property.

The examination was in connection with an investigation. Garcia reasonably believed that the examination could result in disciplinary action and requested Union representation.

The Respondent denied Garcia's request for representation at the examination by placing unwarranted restrictions on the representative during the examination.

By the conduct described, the Respondent failed to comply with 5 U.S.C. § 7114(a)(2)(B).

Discussion and Conclusions

Based on the admitted material facts by operation of section 2423.20(b) of the Authority's Rules and Regulations, it is concluded that the Respondent violated section 7116(a)(1) and (8) of the Statute, as alleged, by failing to comply with 5 U.S.C. § 7114(a)(2)(B). The Authority has consistently held that a union representative must be given the opportunity to actively participate in an examination of a unit employee conducted pursuant to section 7114(a)(2)(B). See *National Aeronautics and Space Administration v. FLRA*, 119 S. Ct. 1979 (1999); *United States Department of Justice, Bureau of Prisons, Safford, Arizona*, 35 FLRA 431, 440 (1990).

Among other things, Counsel for the General Counsel requests that the Respondent be ordered to repeat the examination of Aynee Garcia with the statutory participation of his Union representative. The proposed remedy would effectuate the purposes and policies of the Statute.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Department of Justice, Immigration and Naturalization Service, U.S. Border Patrol, Laredo, Texas, shall:

1. Cease and desist from:

(a) Placing unwarranted restrictions on a Union representative during an examination of a bargaining unit employee in connection with an investigation where such representative has been requested by the employee and 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 their 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) Upon request of the American Federation of Government Employees, Local 2455, AFL-CIO, and Aynee Garcia, repeat the examination of Anyee Garcia that occurred on about September 8, 2000. In repeating the examination, afford Aynee Garcia the statutory right to union representation.

(b) Ensure that no disciplinary action is taken against Anyee Garcia as a result of any information obtained as a result of the examination on or about September 8, 2000 when Garcia requested and was denied the active participation of a Union representative.

(c) Post at its facilities in the Laredo, Texas Sector, where bargaining unit employees represented by the American Federation of Government Employees, Local 2455, AFL-CIO, are located, 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 Chief Border Patrol Agent, 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.

(d) Pursuant to section 2423.41(e) 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 herewith.

Issued, Washington, DC, January 25, 2001.

GARVIN LEE OLIVER

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Justice, Immigration and Naturalization Service, U.S. Border Patrol, Laredo, Texas, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT place unwarranted restrictions on a Union representative during an examination of a bargaining unit employee in connection with an investigation where such representative has been requested by the employee and 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 our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, allow the Union representative of a bargaining unit employee to actively participate in the investigatory examination of such employee where such representative has been requested by the employee and the employee reasonably believes that the examination may result in disciplinary action against him or her.

(Respondent/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, Dallas Regional Office, Federal Labor Relations Authority, whose address is:

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

1. Section 7114(a)(2)(B) provides that an exclusive representative "shall be given the opportunity to be represented at any examination" of a unit employee by an agency representative in connection with an investigation if the employee reasonably believes that discipline may result from the examination and requests representation.