BUREAU OF PRISONS OFFICE OF INTERNAL AFFAIRS WASHINGTON, D.C. AND BUREAU OF PRISONS OFFICE OF INTERNAL AFFAIRS PHOENIX, ARIZONA AND FEDERAL CORRECTIONAL INSTITUTION EL RENO, OKLAHOMA Respondents	Case No. DA-CA-30570
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 171 Charging Party	

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **FEBRUARY 13, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: January 12, 1995
Washington, DC

MEMORANDUM DATE: January 12, 1995

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: BUREAU OF PRISONS
OFFICE OF INTERNAL AFFAIRS
WASHINGTON, D.C.

AND

BUREAU OF PRISONS
OFFICE OF INTERNAL AFFAIRS
PHOENIX, ARIZONA

AND Case No. DA-CA-30570

FEDERAL CORRECTIONAL INSTITUTION
EL RENO, OKLAHOMA

Respondents

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 171

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

BUREAU OF PRISONS OFFICE OF INTERNAL AFFAIRS WASHINGTON, D.C. AND BUREAU OF PRISONS OFFICE OF INTERNAL AFFAIRS PHOENIX, ARIZONA AND FEDERAL CORRECTIONAL INSTITUTION EL RENO, OKLAHOMA Respondents	Case No. DA-CA-30570
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 171 Charging Party	

Steven R. Simon, Esquire
Mr. John Fox
For the Respondents

Mr. Robert Brantley
For the Charging Party

John M. Bates, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the

United States Code, 5 U.S.C. § 7101, et seq.,[1] and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns, narrowly, whether Respondents violated §§ 16(a)(1) and (8) of the Statute by denying, "active representation by the union representative", when it refused to grant a recess for the representative, "to confer privately", during an examination, although it permitted conferring privately within the room.

This case was initiated by a charge filed on March 25, 1993 (G.C. Exh. 1(a)); an amended charge was filed on July 6, 1993 (G.C. Exh. 1(c)); and the Complaint and Notice of Hearing issued on December 23, 1993 (G.C. Exh. 1(e)), and set the hearing for a date and at a location to be determined in El Reno, Oklahoma. By Order dated March 8, 1994, the hearing was scheduled for May 9, 1994, in Oklahoma City (G.C. Exh. 1 (g)); by Order dated May 3, 1994, the hearing was rescheduled for May 11, 1994 (G.C. Exh. 1(h)); by Order dated May 5, 1994, the hearing was further rescheduled for July 25, 1994 (G.C. Exh. 1(i)); by Order dated June 29, 1994 (G.C. Exh. 1 (j)), the hearing was again rescheduled for October 3, 1994; and, finally by Order dated August 23, 1994 (G.C. Exh. 1(l)), the hearing was further rescheduled for October 4, 1994, pursuant to which a hearing was duly heard on October 4, 1994, in Oklahoma City, Oklahoma, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. At the close of the hearing, November 4, 1994, was fixed as the date for mailing post-hearing briefs. General Counsel and Respondent each timely mailed a brief, received on, or before, November 8, 1994, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. Mr. Rickey H. Miller has been a correctional officer at the Federal Correctional Institution, El Reno, Oklahoma, for fourteen years (Tr. 14); he is now a Senior Officer Specialist; and he is vice president of Local 171, a position he has held for about five and one-half years (Tr. 14).

2. On February 11, 1993, Mr. Miller was placed on home duty (G.C. Exh. 2). He was told that he was going to be

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[1] For convenience of reference, sections of the Statute hereinafter, are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116(a)(8) will be referred to, simply, as, "§ 16(a)(8)."

investigated for intimidating, coercing and harassing both inmate and staff witnesses during an investigation in which he was involved as the representative of a Roger Alexander (Tr. 15).[2]

3. Mr. Miller was called at home and told to come to the Correctional Institution on March 4, 1993, and to bring a Union representative with him (Tr. 17).

4. Mr. Miller called Mr. Robert W. Brantley, his Union representative, and asked him to represent him at the meeting (Tr. 17, 43). Mr. Brantley had been employed at El Reno from 1974 until his retirement in December, 1989 (Tr. 43). He stated that he now is "the advocate for the local." (Tr. 43). Mr. Miller and Mr. Brantley met "at the union house" on March 4, 1993, and proceeded to the Correctional Institution where they were escorted to the interview room in the Office of the Special Investigative Supervisor (Tr. 17-18).[3] Waiting in the interview room were two Internal Affairs investigators: Mr. John R. Pfistner, Supervisory Special Agent from Internal Affairs' Phoenix, Arizona, office and Mr. Richard A. Winn, Special Agent from Internal Affairs' Washington, D.C. office (Tr. 18, 58, 69, 74).

5. The interview room was described as about 20 feet by 20 feet, with file cabinets and a desk at one end (Tr. 19, 44). Mr. Pfistner sat at the desk and Mr. Winn sat at the corner, or side, of the desk (Tr. 44). Mr. Miller and Mr. Brantley sat in chairs in front of the desk, their chairs being located so that there was only about a foot between their knees and the desk (Tr. 19, 44). After introductions, Mr. Pfistner stated that they were there to investigate allegations against Mr. Miller of violations of the Code of Conduct, as Mr. Miller stated (Tr. 19); or, as Mr. Brantley stated, Mr. Pfistner said, ". . . he was there to interview Mr. Miller on several issues and that during the course of the interview, there would be a 15-minute break -- he would give us a 15-minute break at the end of 45 minutes." (Tr. 45). Mr. Miller was given a copy of Form B to sign which stated, inter alia, that, "Neither your answers nor any information or

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Mr. Alexander had been removed; Local 171 took the case to arbitration and Mr. Miller was assigned to handle his arbitration case. The arbitrator cleared Mr. Alexander of all charges and ordered his reinstatement with backpay (Tr. 15, 16).

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Sitting in the outer office, through which they passed, was a Mr. Herman Nichols, an FBI agent out of the Oklahoma City Office assigned to handle matters that may arise at the Institution, who Mr. Miller and Mr. Brantley knew (Tr. 18, 44).

evidence gained by reason of your answers can be used against you in any criminal proceeding, except that if you knowingly and willfully provide false statements . . . The answers you furnish . . . may be used in the course of agency disciplinary proceedings . . .". (G.C. Exh. 3). The form also stated, "This inquiry pertains to: Possible Violations of the Employee Standards of Conduct." (G.C. Exh. 3). Mr. Miller and Mr. Brantley read the form together and both signed it (Tr. 46; G.C. Exh. 3).

6. Mr. Miller stated that Mr. Pfistner, who conducted the interview, "would read through affidavits and ask questions and type them on the computer and ask me and then type in the answer." (Tr. 21). The document entitled "Affidavit" (G.C. Exh. 4) contains the questions and answers, with Mr. Miller's corrections, and about three-fourths of page 7 and all of page 8 (except for the interjection of one question) constitutes Mr. Miller's closing statement; and on the last page (execution page) is a further handwritten comment by Mr. Miller.

Mr. Winn had a yellow pad to take notes (Tr. 21).

7. The Affidavit (G.C. Exh. 4) does not show at what point Mr. Miller and/or Mr. Brantley requested a recess and does not show at what point Mr. Pfistner left the room, although the record shows there was at least one request for a recess and that Mr. Pfistner left the room, Mr. Miller and Mr. Brantley stated, "at least a half-a-dozen times" for two or three minutes, presumably to confer with Mr. Nichols (Tr. 28, 52).

8. The parties were in sharp disagreement as to how many times Mr. Miller and/or Mr. Brantley requested a recess to confer outside the interview room: Messrs. Miller and Brantley stoutly maintained they made two requests: First, when question No. 3 was asked (Mr. Miller said question No. 2 (Tr. 21-22), but from the context of his testimony it is clear that he referred to what in the Affidavit is question 3, i.e., "(the first question he asked me [question No. 1 in the Affidavit is an affirmation of non-medication, etc.] was a total surprise; he asked me about something that had happened over three years prior to the . . . interview" and ". . . the second question, he asked had my teenage son did [sic] that . . . .") (Tr. 22, 46). Second, on question No. 9 (Tr. 23, 50). On the other hand, Messrs. Pfistner and Winn were equally adamant that there had been a single request for a recess to confer outside the interview room, namely, after question 9 was asked (Tr. 67, 76). Mr. Winn stated that the interview began at about 8:10 a.m.; that the first break was at about 8:54; that before the break Mr. Pfistner had asked questions in regard to Mr. Miller's family; that when they

resumed after the break, Mr. Pfistner asked question No. 9 ("To your knowledge did [your son -- any member of your family -- or acquaintance] . . . ever start a fire behind the . . . residence. . . ."); that Mr. Pfistner denied them a recess to go outside but said, "You can confer inside the room." (Tr. 59); that Mr. Brantley whispered in Mr. Miller's ear and immediately thereafter, Mr. Miller responded that he was ". . . answering this question under duress. And then he would respond to what we asked him." (Tr. 59-60). Mr. Pfistner confirmed Mr. Winn's account (Tr. 76-77) and emphasized that, ". . . Mr. Brantley and Mr. Miller whispered back and forth. I did not interrupt that. It was not disruptive. And ultimately, Mr. Miller responded to the question." (Tr. 77).

9. Whether a recess was sought after this third question, there is no dispute that when the third question was asked, or, even more likely, when the second question was asked, Mr. Miller asked for clarification as to how events that had occurred as long in the past as 1990 tied in with the stated purpose of the interview;[4] (Tr. 21-22, 46, 72) and Mr. Winn stated that Mr. Pfistner, ". . . explained . . . why his family [sic] was being asked these questions: because we had information that we believed that his family was involved in the misconduct of which he was under investigation." (Tr. 72). Mr. Miller said, when asked if Messrs. Pfistner and Winn had specifically told him what he was to be questioned about, replied, "No. They were vague. They said it was for allegations for violating the code of conduct." (Tr. 21). Mr. Miller had earlier said that in connection with the Alexander case, ". . . I went through the disciplinary packet and wanted to talk [sic] the people that had written the affidavits and memoranda. And a couple of these guys said that I had made threatening statements, and they felt like I was harassing them by doing my part of the investigation getting ready for the arbitration hearing." (Tr. 16). His surprise, when Mr. Pfistner began the interview with events long pre-dating the Alexander case, certainly is undeniable and persuades me that, as he and Mr. Brantley testified, he and/or Mr. Brantley did, indeed, request a recess to confer when question 2 or 3 was asked.

10. Although twice denied a recess to confer outside the interview room, the record is clear that they were told they could confer in the interview room (Tr. 22, 59) and that they, in fact, did so (Tr. 22, 47, 53, 60, 77), although Mr. Miller said that Mr. Pfistner, when they tried to confer in the room, would say, ". . . Gentlemen, excuse me; Are you refusing to

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Nothing in question 2, et seq. (G.C. Exh. 4) indicated such a time frame; but, obviously, Mr. Miller well appreciated the time of the incidents inquired about.

cooperate; If you are not, answer the question." (Tr. 22) and Mr. Brantley said, "There was no privacy there, and the -- there were a lot of restrictions placed on our even leaning over and conversing in a very low tone." (Tr. 47-48).

Mr. Pfistner stated he "did not interrupt" Mr. Miller and Mr. Brantley (Tr. 77) and Mr. Winn said they did whisper (Tr. 60).

Both Mr. Miller and Mr. Brantley testified that Mr. Pfistner left the interview room at least six times but neither indicated at what point (question) of the interview he was absent and, accepting their unchallenged testimony that on each occasion he was gone for two to three minutes, neither commented on their failure to repair to the far end of the room to confer privately. Nor did they indicate they made any request to confer outside the room while Mr. Pfistner was conferring outside the room.

11. In view of the fact that all witnesses agree that a recess to "confer" was requested at question 9 and in view of the further facts which are undisputed, namely, that there had been a ten-minute break after question 8 and that both before the break and after, Mr. Pfistner had asked questions concerning conduct of Mr. Miller's family, Mr. Brantley's admission, on cross-examination, that he and Mr. Miller did not confer on the breaks -- that,

> "Well, we had nothing to confer about other than to discuss the -- what had already transpired in the meeting." (Tr. 49)

renders dubious the sincerity of their request to confer.

Conclusions

Respondents did not question Mr. Miller's right to representation at the investigative interview, indeed, instructed him to bring his representative which he did. Mr. Brantley, Mr. Miller's representative, was present at the interview and actively participated, but, he was denied the right to a recess to confer with Mr. Miller outside the interview room although he was permitted to confer with Mr. Miller in the interview room.

The Authority has stated,

> " . . . The purpose of section 7114(a)(2)(B) is to create representational rights for Federal employees similar to the rights provided by the National Labor Relations Board (NLRB) in interpreting the National Labor Relations Act (NLRA). See 124 Cong. Rec.

29184 (1978), reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, H.R. Comm. Print No. 7, 96th Cong., 1st Sess. 926 (1979) (Legislative History), where Congressman Udall explained that the purpose of the House bill provisions which led to enactment of section 7114(a)(2)(B) was to reflect the Supreme Court's decision in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975) (Weingarten).

Under Weingarten, the right to representation at an examination is intended to benefit an employee who is called into a meeting with his or her employer in connection with an investigation as well as to benefit the employer and the union. . . .

. . .

"In view of the legislative history underlying section 7114(a)(2)(B), cited above, we conclude that the purposes underlying the Weingarten right in the private sector--promoting a more equitable balance of power and preventing unjust disciplinary actions and unwarranted grievances--also apply to the right to representation created by section 7114(a)(2)(B). These purposes are consistent with the overall purposes and policies of the Statute set forth in section 7101. That is, they effectuate 'the right of employees to organize, . . . and participate through labor organizations . . . in decisions which affect them . . . [which] safeguards the public interest, . . . contributes to the effective conduct of public business, and . . . facilitates and encourages the amicable settlements of disputes[.]' Insofar as representation at examinations promotes a more equitable balance of power between management and labor, we believe that this is consistent with the intent of Congress in passing the Civil Service Reform Act (CSRA), Pub. L. 95-454, of which the Statute constitutes title VII. See Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 107 (1983) in which the Court noted, '[i]n passing the Civil Service Reform Act, Congress unquestionably intended to strengthen the position of federal unions and to make the collective-bargaining process a more effective instrument of the public interest [.]'

"The purpose underlying section 7114(a)(2)(B) and the benefits intended for the various parties cannot be achieved if the union representative is prohibited from taking an active role in assisting

> an employee in presenting facts at an examination. Consequently, under section 7114(a)(2)(B) representation includes the right of the union representative to take an 'active part' in the defense of the employee. Federal Aviation Administration, St. Louis Tower, Bridgeton, Missouri, 6 FLRA 678, 678-79, n.2 (1981); NLRB v. Texaco, Inc., 659 F.2d 124 (9th Cir. 1981)." United States Department of Justice, Bureau of Prisons, Safford, Arizona, 35 FLRA 431, 439-440 (1990) (hereinafter, " Bureau of Prisons, Safford, Arizona").

In Federal Aviation Administration, New England Region, Burlington, Massachusetts, 35 FLRA 645 (1990) (hereinafter, "FAA, Burlington"), decided shortly after Bureau of Prisons, Safford, Arizona, supra, the Authority again stated that,

> "The representational rights of the union under section 7114(a)(2)(B) include the right to take an 'active part' in the defense of the employee. Federal Aviation Administration, St. Louis Tower, Bridgeton, Missouri, 6 FLRA 678, 678-79 n.2 (1981). The union representative must be granted a full opportunity to assist the examined employees and to fully participate in the investigatory examination. See U.S. Customs Service, Region VII, Los Angeles, California, 5 FLRA 297 (1981)." (35 FLRA at 651).

The Authority cautioned, however, that the right of the union to participate in the examination was limited, stating, in part, that,

> "In Weingarten, the Court outlined the 'contours and limits' of the right to union representation and noted, among other things, that the 'exercise of the right may not interfere with legitimate employer prerogatives.' 420 U.S. at 256, 258. Thus, under Weingarten, an employer has a legitimate interest and prerogative in achieving the objective of the examination and preserving the integrity of the investigation. See Weingarten, 420 U.S. at 258. Accordingly, a union's representational rights under section 7114(a)(2)(B) may not compromise that integrity. Federal Prison System, Federal Correctional Institution, Petersburg, Virginia, 25 FLRA 210 (1987)(adopting the Judge's finding that a representative designated for an investigatory examination may be rejected by management in order to preserve the integrity of the investigation).

. . .

"The NLRB has stated that the construction of the NLRA affirmed by the Supreme Court in Weingarten represents a balance between employer prerogatives in investigating and disciplining misconduct and the right of employees to a union representative when their terms and conditions of employment are threatened by those prerogatives. The proper balance must be struck 'in light of the mischief to be corrected and the end to be attained.' Pacific Telephone & Telegraph, 262 NLRB at 1049 (quoting Weingarten, 420 U.S. at 262).

"We agree with the NLRB's approach and adopt it for the Federal sector as an analytical tool . . ." (35 FLRA at 652-653).

In U.S. Customs Service, Region VII, Los Angeles, California, 5 FLRA 297 (1981), the Authority held that an activity violated §§ 16(a)(1) and (8) of the Statute by precluding the representative from speaking out or making any statement during a taped interview; in Federal Aviation Administration, St. Louis Tower, Bridgeton, Missouri, 6 FLRA 682 (1981), the Authority held that the activity violated §§ 16(a)(1), (2) and (8) of the Statute by, inter alia, issuing an oral reprimand to a representative because he sought to take an active part in the employee's defense and refused "to take" an order to be quiet. However, in Norfolk Naval Shipyard, 9 FLRA 458 (1982), the Authority, although it affirmed the Administrative Law Judge's finding that the activity violated §§ 16(a)(1) and (8) because ". . . employees were unnecessarily intimidated. It follows that the Respondent's conduct went beyond what was reasonably necessary under the specific circumstances of this case" (9 FLRA at 459), stated that,

"In so doing, the Authority recognizes management's need, under certain circumstances, to place reason-able limitations on the exclusive representative's participation pursuant to section 7114(a)(2)(B) of the Statute during an examination of an employee, in order to prevent an adversary confrontation with that representative and to achieve the objective of the examination." (9 FLRA at 458-459).

In U.S. Department of Justice, Washington, D.C. and U.S. Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota and Office of Inspector General, Washington, D.C. and Office of Professional Responsibilities, Washington, D.C., 46 FLRA 1526 (1993)

(hereinafter, "INS-OIG"), vacated and remanded, ___ F.3d ___, No. 93-1284, United States Court of Appeals for the District of Columbus Circuit, November 4, 1994, the Authority had adopted the Judge's Decision, as material here, with respect to violations of § 16(a)(1) and (8) of the Statute by failing to comply with § 14(a)(2)(B) of the Statute. Judge Oliver stated, in part, as follows,

> "The statement of OIG/OPR Investigator Nelson to Union representative Hagen that other than asking for clarification of a question, or pointing out a procedural error, he could not advise the employee at all, clearly interfered with the Union repre-sentative's ability to take an active part in assisting the employee to elicit and present facts as contemplated by the Statute. The Union repre-sentative obviously could not 'assist the employer by eliciting favorable facts' and render the other assistance to the employer and employee as envisioned by the Supreme Court in Weingarten. . . .
>
> "With regard to determining whether the Statute was separately violated when OIG/OPR Investigator Nelson prohibited the Union representative and the employee from having a private conference during the examination, the Supreme Court declared in Weingarten that the presence of the Union represen-tative 'need not transform the interview into an adversary contest,' 420 U.S. at 263, and the Authority has held that a union's representational rights under section 7114(a)(2)(B) may not interfere with an employer's legitimate interest and prerog-ative in achieving the objective of the examination or compromise the integrity of the employer's investigation. Federal Aviation Administration, New England Region, Burlington, Massachusetts, 35 FLRA 645, 652 (1990).
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> "There is no indication in the record that a brief conference between the Union representative and the employee outside the hearing of the investigator would have been unduly disruptive, would have interfered with the objective of the examination, or would have compromised the integrity of the investigation. Indeed, based on the Union representative's purpose in wanting two brief conferences, the knowledgeable union representative could have assisted the investigator 'by eliciting favorable facts.' Therefore, I conclude that the full rights of

representation under the Statute were not granted in this respect.

"By the conduct of OIG/OPR Investigator Nelson described above, Respondents OIG and OPR failed to comply with section 7114(a)(2)(B) of the Statute and thereby committed an unfair labor practice in violation of section 7116(a)(1) and (8) of the Statute, as alleged." (46 FLRA at 1568-1569).

On appeal, the Court stated that, "The first issue is whether the Office of Inspector General (and OPR) committed an unfair labor practice when its investigator, Nelson, refused to allow the union representative to confer privately with Wood during the interrogation. [footnote omitted]." (Slip opinion p. 6). The Court vacated the Authority's findings because it concluded, inter alia, that, ". . . the Authority erred in considering the Office of Inspector General to be the 'agency' subject to that provision. Because section 7114(a)(2)(B) did not govern the investigatory interview of union member Wood [which was pursuant to the Inspector General Act], neither the Office of Inspector General nor OPR committed unfair labor practices when the investigator restricted the role of Wood's representative." (Slip opinion, p. 14).5

In this case, I have found that Mr. Miller and/or his representative, Mr. Brantley, requested a recess to confer outside the interview room after the second or third question and the request was denied; but, as Mr. Brantley, testified, Mr. Miller at this point asked for clarification as to how these questions tied in with the "stated" propose of the interview; Mr. Pfistner "explained"; and the discussion, having segued from the request for a recess to a discussion of the scope of the interview, does not show that the Union Representative was prevented from taking the

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The Court did not have to decide, and did not decide, whether the § 14(a)(2)(B) right prevents an agency from barring private conferences during an examination; nevertheless, the Court stated,

". . . We shall assume arguendo that the section 7114(a)(2)(B) right to union 'representation' prevents an 'agency' from barring private conferences between its employee and the attending union member during an examination. [footnote omitted]. Still, the Authority's conclusion that the Office of Inspector General committed an unfair labor practice does not necessarily follow. . . ." (Slip opinion, p. 7).

"active role" as the Authority has stated is envisioned by § 14(a)(2)(B) of the Statute. Not only did the discussion almost immediately shift, but Messrs. Miller and Brantley were told they could confer in the interview room and they did so. As a result, the questions resumed without any renewal of the request for a recess to confer at that point. The questions followed the pattern of asking Miller if he had done so and so, e.g. questions 2, 4, 6, 8 (G.C. Exh. 4), followed by a question asking Mr. Miller if he had any knowledge of his son or his wife having done so and so, e.g. questions 3, 5, 7, 9 (G.C. Exh. 4). After question 8, there was a ten minute recess, following which, Mr. Pfistner asked question 9. All parties agree that at this point, i.e., when question 9 was asked, a further request for a recess was made by Mr. Brantley, and/or Mr. Miller, to confer outside the interview room, which request was denied. Mr. Pfistner told them they could confer in the room; they did so -- whispering back and forth, which Mr. Pfistner did not interrupt (Tr. 77) and when Mr. Miller answered, he prefaced his answer to question 9 with the statement, "I am answering this question under duress. . . ." (G.C. Exh. 4), a phase he had not previously employed but which he also used in response to question 11 (G.C. Exh. 4).

Read literally, INS-OIG, supra, might indicate that the mere refusal to permit a private conference outside the interview room constituted a failure to comply with § 14(a)(2)(B) and violates §§ 16(a)(1) and (8) where, as here, there is no indication that such a brief conference outside the hearing of the investigator would have been unduly disruptive or would have interfered with the objective or integrity of the investigation. But I believe, as the Authority explained in FAA, Burlington, supra, that a ". . . proper balance must be stuck 'in light of the mischief to be corrected and the end to be attained.'" (35 FLRA at 653). The parties had just had a ten minute break and, upon reconvening, question 9, continuing the pattern, having asked by question 8 if Mr. Miller had started a fire behind the Beeley residence, Mr. Pfistner asked Mr. Miller if he had any knowledge that his son, any member of his family or an acquaintance had started a fire behind the Beeley residence. Forewarned by question 8, Mr. Brantley and Mr. Miller well "knew" that Mr. Pfistner's next question would be whether Mr. Miller had any knowledge that his son or his wife had started a fire behind the Beeley's residence; but Mr. Brantley testified that he and Mr. Miller did not confer on the breaks because, ". . . we had noting to confer about . . .". (Tr. 49). Accordingly, the request for a recess to confer, after question 9 was asked, was not shown to have had any relation to assisting Mr. Miller and, having just had ample opportunity to confer outside the examination room, assuredly did not interfere with Mr. Brantley's right,

". . . to take an 'active part' in the defense of the employee." Bureau of Prisons, Safford, Arizona, supra, 35 FLRA at 440. Mr. Pfistner's denial of the recess was a reasonable limitation on the exclusive representative's participation. Norfolk Naval Shipyard, supra, 9 FLRA at 458. Moreover, the record shows that Mr. Brantley and Mr. Miller had, and exercised, the right to confer in the examination room. Even though, when sitting at the front of the desk, they may have felt their privacy compromised, despite Messrs. Pfistner's and Winn's assertion that they heard nothing whispered between Mr. Brantley and Mr. Miller (Tr. 60, 77), they never moved to the rear of the room to confer even when the inquisitor (Mr. Pfistner) had left the interview room.

Having found that Respondents did not under the circumstances of this case interfere with the § 14(a)(2)(B) right of the Union representative by denying a request for a recess to confer privately, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. DA-CA-30570 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: January 12, 1995
Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. DA-CA-30570, were sent to the following parties in the manner indicated:

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Dated: January 12, 1995
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