70 FLRA No. 81

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ENGLEWOOD
LITTLETON, COLORADO
(Respondent)

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES
LOCAL 709
(Charging Party)

DE-CA-16-0146

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DECISION AND ORDER

February 6, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members (Member Abbott concurring; Member DuBester dissenting)

I. Statement of the Case

In the attached decision, Federal Labor Relations Authority (FLRA) Administrative Law Judge Richard A. Pearson (the Judge) found that the Respondent violated §§ 7114(a)(2)(B)[1] and 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute)[2] by refusing to allow a Union representative to actively participate in an investigatory interview that involved the potential removal of an employee (the grievant). As relevant here, the Judge directed the Respondent to repeat the interview – if requested by the grievant or the Union – and, after repeating the interview, reconsider the grievant's removal (the interview remedy).

The question before us is whether the interview remedy, which would require the Agency to conduct another interview after the grievant admitted to using marijuana and an arbitrator had already reduced the removal penalty to a fourteen-day suspension, is appropriate in the circumstances of this case. For the reasons discussed below, the answer is no.

[1] 5 U.S.C. § 7114(a)(2)(B).
[2] *Id.* § 7116(a)(1), (8).

II. Background and Judge's Decision

We summarize the relevant facts only briefly here, as they are set out in more detail in the Judge's decision.

A. Background

The grievant was randomly selected for a urinalysis drug test. Several days later, a medical officer informed the grievant that he tested positive for marijuana, and the grievant admitted that he had used marijuana. The Respondent then began an investigation into the grievant's drug use. Upon the advice of the Union, the grievant requested a urinalysis retest, which confirmed the results of the original test.

Then the Respondent set an interview with the grievant to discuss his positive drug test. The grievant requested that a Union representative be present. When the Union representative asked questions during the interview, the Respondent's investigator told the representative to stop. During this interview, the grievant again admitted to having used marijuana.

The Respondent removed the grievant from his position. The Union filed a grievance challenging the removal. The Respondent denied the grievance, and the parties proceeded to arbitration.

Shortly after filing the grievance, the Union filed an unfair-labor-practice (ULP) charge based on the investigator's actions during the interview. The FLRA's General Counsel (GC) then issued a complaint alleging that the Respondent violated §§ 7114(a)(2)(B)[3] and 7116(a)(1) and (8) of the Statute[4] by refusing to allow the Union representative to participate actively in the interview (the *Weingarten* violation). The GC sought the interview remedy and a notice posting.

Subsequently, Arbitrator William E. Riker (the arbitrator) sustained the grievance and mitigated the grievant's removal to a fourteen-day suspension.

B. Judge's Decision

The Judge found that the Respondent violated the Union's *Weingarten* right.[5] Regarding the remedies,

[3] *Id.* § 7114(a)(2)(B).
[4] *Id.* § 7116(a)(1), (8).
[5] Section 7114(a)(2)(B) of the Statute provides that the "exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at . . . any examination of an employee in the unit by a representative of the agency in connection with an investigation if (i) the employee reasonably believes that the examination may result

as relevant here, the Judge stated that, under Authority case law, when a respondent has committed a *Weingarten* violation and imposed discipline, the policies of the Statute are "best effectuated by" ordering an interview remedy.[6] The Judge also explained that the Authority has found that an interview remedy recreates "the conditions and relationships that would have been had there been no ULP," and also deters *Weingarten* violations.[7] Consequently, the Judge found that the interview remedy is appropriate and "does not inherently conflict" with the grievance arbitration.[8] To the extent that any conflict might arise between the ULP remedies and remedies awarded in the grievance arbitration, the Judge found that any conflicts could be resolved in ULP-compliance proceedings.

The Judge also ordered that the Respondent: (1) cease and desist from violating the Statute; and (2) post ULP notices on bulletin boards and distribute them to employees electronically.

The Respondent filed exceptions to the Judge's decision, challenging only the interview remedy. The GC filed an opposition.

III. Analysis and Conclusion: The interview remedy is not appropriate in the circumstances of this case.

The Respondent contends that the interview remedy would require a "duplication of effort and resources"[9] and potentially lead to "conflicting decisions" regarding the appropriateness of the grievant's discipline.[10] In this regard, the Respondent argues that the parties fully litigated the merits of the discipline before the arbitrator, who mitigated the grievant's removal to a fourteen-day suspension.[11] According to the Respondent, *U.S. DOJ, BOP, Safford, Arizona* (*Safford*),[12] on which the Judge relied to determine an appropriate remedy, is distinguishable from this case.[13]

The Authority has broad discretion to frame remedies for ULPs.[14] In determining an appropriate remedy, the Authority considers the totality of the circumstances, rather than a mechanistic formula.[15] As relevant here, the Authority considers whether a remedy "adequately redress[es] the wrong incurred by the [ULP],"[16] specifically whether the requested remedy is "reasonably necessary" and "'recreate[s] the conditions and relationships' with which the [ULP] interfered."[17]

The Authority has permitted an interview remedy where, if the union representative had been permitted to participate in the investigatory interview, it is reasonable to conclude that no discipline would have been imposed.[18] For example, in *Safford*, the denial of representation precluded the disciplined employee from explaining her defense during the interview, and the agency official who proposed the discipline conceded that the agency would not have disciplined the employee if it had been aware of her defense.[19] Conversely, where an agency's actions would have been the same whether or not a statutory violation occurred, and the outcome for the employee would not change, federal courts have held that requiring an agency to repeat an interview is "wasteful and unnecessary."[20]

Here, unlike in *Safford*, there is no dispute that some type of discipline was justified because the grievant admitted to, and tested positive for, marijuana use *prior to* any interview.[21] Thus, the *Weingarten* violation had nothing to do with, and did not lead to, the grievant's

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in disciplinary action against the employee; and (ii) the employee requests representation." 5 U.S.C. § 7114(a)(2)(B). This provision is similar to the private-sector Supreme Court decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), and therefore it is often called the *Weingarten* right. As relevant here, a *Weingarten* violation occurs when an employer prevents a union representative from actively participating in the examination, so long as the union representative is not preventing the employer from conducting the investigation or compromising the integrity of the investigation. *See Headquarters, Nat'l Aeronautics & Space Admin., Wash., D.C.*, 50 FLRA 601, 607 (1995).

[6] Judge's Decision at 15 (citing *U.S. DOJ, BOP, Safford, Ariz.*, 35 FLRA 431, 447-48 (1990) (*Safford*)).

[7] *Id.* (citing *Safford*, 35 FLRA at 448).

[8] *Id.* at 18.

[9] Exceptions at 7.

[10] *Id.* at 8.

[11] *Id.* at 5.

[12] 35 FLRA 431.

[13] Exceptions at 6-7.

[14] *Safford*, 35 FLRA at 444 (citing *Prof'l Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547 (D.C. Cir. 1982)); *see also Dep't of Commerce, Bureau of Census v. FLRA*, 976 F.2d 882, 885 (4th Cir. 1992) (citing 5 U.S.C. § 7105(g)(3)); *NTEU v. FLRA*, 910 F.2d 964, 967 (D.C. Cir. 1990).

[15] *Fed. BOP, Wash., D.C. & Fed. BOP, S. Cent. Region, Dallas, Tex. & Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 55 FLRA 1250, 1259 (2000) (citing *Safford*, 35 FLRA at 447) (discussing make-whole remedies).

[16] *See Safford*, 35 FLRA at 444.

[17] *F.E. Warren Air Force Base, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996) (quoting *Safford*, 35 FLRA at 444-45).

[18] *See Safford*, 35 FLRA at 442-43, 449 n.4; *e.g., U.S. DOJ, Fed. BOP, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 395 (1999).

[19] *Safford*, 35 FLRA at 446-47.

[20] *E.g., AFGE, AFL-CIO, Council of Soc. Sec. Dist. Office Locals, S.F. Region v. FLRA*, 716 F.2d 47, 50 (D.C. Cir. 1983) (*Council*) (finding it unnecessary to rerun selection process because evidence showed that employee would not have been promoted in an unprejudiced proceeding); *see also Safford*, 35 FLRA at 449 n.4.

[21] Judge's Decision at 16.

admission. Furthermore, there is no indication here that the *Weingarten* violation "devalued the Union" or might make employees "less inclined to exercise the[ir statutory] rights," such that a cease-and-desist order is an insufficient remedy.[22] Moreover, there is no reasonable basis for concluding that conducting an interview at this time would reduce the grievant's fourteen-day suspension further. For all of these reasons, we find that the interview remedy mandated by the Judge is "wasteful"[23] and fails to promote "effective and efficient government."[24] Therefore, a cease-and-desist order is a sufficient remedy.

For the above reasons, we find that the Judge erred in ordering the interview remedy, and we set that portion of the decision aside and modify the Judge's order appropriately.[25] Accordingly, we need not resolve the Respondent's remaining arguments concerning that remedy.[26]

IV. Order

Pursuant to § 2423.41(c) of the Authority's Regulations[27] and § 7118 of the Statute,[28] the Respondent shall:

1. Cease and desist from:

(a) Refusing to allow a representative of the American Federation of Government Employees, Local 709, to play an active role in investigative examinations held pursuant to § 7114(a)(2)(B) of the Statute.[29]

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

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

(a) Post at its facilities where unit employees represented by the Union are located, copies of the attached notice on forms to be furnished by the FLRA. Upon receipt of such forms, they shall be signed by the Warden, and shall be posted and maintained for sixty consecutive days thereafter, in conspicuous 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.

(b) In addition to the physical posting of the notice, the Respondent shall distribute the notice electronically, such as by email, posting on an intranet or internet site, or other electronic means, if the Respondent customarily communicates with employees by such means.

(c) Pursuant to § 2423.41(e) of the Authority's Regulations,[30] notify the Regional Director, Denver Region, FLRA, in writing, within thirty days from the date of this order, as to what steps have been taken to comply.

[22] *Safford*, 35 FLRA at 447.
[23] *E.g.*, *Council*, 716 F.2d at 50.
[24] 5 U.S.C. § 7101(b).
[25] Chairman Kiko notes that, while she agrees with the opinions stated by Member Abbott in his concurring opinion, as the Respondent failed to file exceptions to the underlying finding of a violation of the Statute, she finds that those issues are not before us in this case.
[26] Exceptions at 8-11.
[27] 5 C.F.R. § 2423.41(c).
[28] 5 U.S.C. § 7118.
[29] *Id.* § 7114(a)(2)(B).
[30] 5 C.F.R. § 2423.41(e).

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority (FLRA) has found that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution Englewood, Littleton, Colorado, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT require bargaining-unit employees to take part in an examination in connection with an investigation under § 7114(a)(2)(B) of the Statute without allowing a representative of the American Federation of Government Employees, Local 709, to take an active role in such examination where the employee has requested such representation and 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 bargaining-unit employees in the exercise of the rights assured them by the Statute.

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(Agency/Respondent)

Dated: ____________________

By: ________________________________
(Signature) (Title)

This notice must remain posted for sixty 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, Denver Regional Office, FLRA, whose address is: 1244 Speer Boulevard, Suite 446, Denver, Colorado 80204-3581, and whose telephone number is: (303) 844-5224.

Member Abbott, concurring:

I agree that the Administrative Law Judge (Judge) erred when he ordered a remedy that required the Agency to conduct a new interview concerning misconduct (testing positive for marijuana) that the grievant, a federal prison guard, had already admitted to a year and a half before the Judge's decision.

I write separately because this case highlights how parties' strategies and the Authority's own precedent has contributed to the manipulation of Title V in such a manner that does not "facilitate[]" or "encourage[] the amicable settlements of disputes" between employees, unions, and federal agencies.[1] When the Federal Service Labor-Management Relations Statute (Statute) was enacted, Congress led with the mandate that the rights, privileges, and obligations contained in the Statute are to be "interpreted in a manner consistent with the requirement of an effective and efficient Government."[2]

Thus, while I agree that a reasonable argument may be made that the unfair-labor-practice (ULP) charge filed by the Union here is not barred by § 7116(d) (particularly when relying on the tortured interpretations of § 7116(d) by the immediate-past majority of the Authority) because of the earlier grievance (and arbitration request) also filed by the Union on behalf of the guard, the concurrent filings certainly are not "consistent with the requirement of an effective and efficient Government."[3] To the contrary, it is apparent to me that Congress intended for § 7116(d) to preclude the filing of separate statutory charges and contractual complaints when those issues could, and ought, to be consolidated into one.

The grievance here concerned the penalty (removal) imposed by the Agency because of the guard's positive test result for (and admission of) marijuana use. In its ULP charge, filed after the grievance, the Union complained about the manner by which the guard's supervisor conducted the investigatory interview. Whatever the merit (or lack thereof) to the grievance and charge, both *could* have, and *should* have, been consolidated into the grievance. The Authority's General Counsel shares equal responsibility for this wasteful endeavor. Despite knowing about the earlier grievance, the General Counsel issued a formal complaint and pursued the matter before the Judge asking for an ineffectual remedy which could not change the outcome one iota for the guard. In effect, the General Counsel asked the Judge to order the Agency to conduct a new interview on a matter which had been admitted to by the guard, adjudicated, and resolved over a year earlier.

Employees and Unions that are aggrieved deserve to exercise and preserve the rights that are provided for in the Statute. But I am convinced that Congress, and taxpayers who foot the bill for all of these processes, expect those rights be pursued in an effective and efficient manner. Every step of the grievance process (and the resulting arbitration) involved the duty time of managers and Agency representatives as well as duty time (aka official time) by the guard's Union representatives. Meanwhile every step of the ULP charge – from its preparation of the charge and the resulting investigation by attorneys of the Authority's General Counsel – involved the use of duty time of federal employees who are paid out of appropriated funds. Although the Union arguably had the option to file its ULP charge separately from the grievance, exercising that option in this case is not "consistent with the requirement of an effective and efficient government."[4]

Furthermore, our decision today focuses on the appropriateness of the Judge's order. I recognize that the Agency does not challenge the Judge's finding that it violated the Union's *Weingarten* rights. I would note, however, that I am not convinced that a violation occurred under these circumstances.

The guard admitted that he had used marijuana when he tested positive during a routine test. His supervisor and Union representative encouraged him to submit to a retest. He agreed and again tested positive.[5] Then, following established procedures, the supervisor scheduled an interview with the guard and his Union representative. At the interview, however, the Union representative repeatedly interfered with the supervisor's investigation by "suggest[ing]" and "feeding answers" to the guard as to how he should respond to the supervisor's questions.[6] Consequently, the supervisor asked the

[1] *See* 5 U.S.C. § 7101(a)(1)(C).
[2] *Id.* § 7101(b).
[3] *Id.*
[4] *Id.*
[5] Judge's Decision at 4.
[6] *Id.* (quoting Tr. 141, 173-74).

Union representative several times to stop "interfer[ing]" with his investigation and to stop "asking questions . . . that did not pertain to the investigation." [7] As the Judge noted, the Agency has a "legitimate interest . . . [in] preserving the integrity of the investigation"[8] and that an agency may "place reasonable limitations on the . . . representative's participation . . . in order . . . to achieve the objective of the examination."[9]

I would conclude, therefore, that no violation occurred. The investigator, in restricting the extent to which the representative could participate, was acting within his prerogative to ensure that the answers were those of the guard and thereby to preserve the integrity of the investigation.

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[7] *Id.* at 7 (quoting General Counsel Ex. 5).
[8] *Id.* at 12 (citing *FAA, New England Region, Burlington, Mass.*, 35 FLRA 645, 652 (1990)).
[9] *Id.* (quoting *Norfolk Naval Shipyard*, 9 FLRA 458, 458-59 (1982)).

Member DuBester, dissenting:

I disagree with the majority's rejection of the Judge's new-interview remedy. Rather, I agree with the Judge's thoughtful, thorough, and balanced analysis of *U.S. DOJ, BOP, Safford, Arizona* (*Safford*).[1] The Judge properly determined that ordering a new examination might uncover new facts and convince the warden—who has discretion to impose a wide-range of penalties—that a lesser penalty is appropriate.[2] As the Judge correctly identifies, the grievant is entitled to be examined with the benefit of unfettered union representation,[3] a new interview would recreate the conditions and relationships that would have existed had there been no *Weingarten* violation,[4] and even if the grievant's discipline does not change, it is appropriate to require the Agency to conduct a new examination as it will deter future violations of § 7114(a)(2)(B).[5]

Moreover, the Judge's remedies are appropriate and support the purposes of the Federal Service Labor-Management Relations Statute.[6] Balancing a variety of considerations, the Judge ordered the Agency to conduct a new interview (at the request of the Union or the grievant) and to reconsider its disciplinary action, but he denied all of the Union's remaining requests, including requests for legal fees, expenses, and compensatory damages.[7] The Judge's remedies are not, as the majority claims, "wasteful."[8] Rather, they promote an "effective and efficient government."[9]

The case is clear: the grievant is entitled to be examined with the benefit of unfettered union representation, and to have his disciplinary action considered on the basis of the information obtained in the new interview, without reference to or reliance on information obtained during the original—and unlawful—interview.[10] Accordingly, I dissent.

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[1] Judge's Decision at 15-18 (citing *Safford*, 35 FLRA 431 (1990)).
[2] *Id.* at 18.
[3] *Id.* at 16.
[4] *Id.*
[5] *Id.* (citing *Safford*, 35 FLRA at 448).
[6] *Safford*, 35 FLRA at 448.
[7] Judge's Decision at 16-18.
[8] Majority at 5.
[9] 5 U.S.C. § 7101(b).
[10] *Safford*, 35 FLRA at 447-48.

Office of Administrative Law Judges

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ENGLEWOOD
LITTLETON, COLORADO
RESPONDENT

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 709
CHARGINING PARTY

DE-CA-16-0146

Michael S. Farley
For the General Counsel

Steven R. Simon
For the Respondent

Christopher Janssen
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

After testing positive for marijuana use, employee David Thompson was called in for questioning by an investigator. The union vice president was with Thompson to represent him. Early in the questioning, the investigator asked if Thompson "had any issues" with the procedures used to collect his sample. Believing that Thompson was confused by the question, the union representative asked him a series of questions about how the urinalysis was conducted, such as whether the water in the toilet was dyed blue and whether he was told to wash his hands. The investigator believed these questions were intended to get Thompson to deflect suspicion from himself to the person conducting the test, and that they were interfering with the investigation; he therefore told the representative to stop. Feeling that he could be disciplined if he continued his questioning, the representative remained silent for the rest of the examination. Thompson told the investigator that he didn't have any issues with the drug testing procedures, and the examination continued. Subsequently, the investigator submitted a report to the prison warden, concluding that Thompson was guilty of drug abuse, based on the positive urinalysis and his admission that he had used marijuana without medical justification. The warden then decided to terminate Thompson's employment.

The primary issue in this case is whether the investigator went too far in cutting off the union representative's questions. As the Statute is applied by the Authority, a union representative must be allowed to take an active part in eliciting information helpful to an employee, but an agency may prevent a representative from interfering with the purpose of its investigation or compromising its integrity. Because the union official's questions in this case were reasonable and were designed to elicit information that might have helped Thompson, the investigator improperly limited the union's ability to represent him and committed an unfair labor practice.

A secondary question is how this unfair labor practice should be remedied. Normally, conduct such as this is remedied by ordering the agency to conduct a new examination of the employee, at the request of the union and the employee, and to reconsider its disciplinary decision in light of the new examination. Because the Union and the Respondent have failed to justify their requests in this case for greater or lesser penalties, respectively, I conclude that the traditional remedy is appropriate.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On March 9, 2016, the American Federation of Government Employees, Local 709 (the Charging Party or Union) filed an unfair labor practice (ULP) charge against the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution Englewood, Littleton, CO (the Agency, Respondent, or FCI Englewood). GC Ex. 1(a). After investigating the charge, the Regional Director of the FLRA's Denver Region issued a Complaint and Notice of Hearing on June 29, 2016, on behalf of the General Counsel (GC), alleging

that the Agency refused to allow a union representative to actively participate in an examination, in violation of §§ 7114(a)(2)(B) and 7116(a)(1) and (8) of the Statute. GC Ex. 1(b). The Respondent filed its Answer to the Complaint on July 22, 2016, denying that it violated the Statute. GC Ex. 1(c).

A hearing was held in this matter on October 6, 2016, in Denver, Colorado. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC, Charging Party, and Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The American Federation of Government Employees, Council of Prison Locals 33, AFL-CIO (AFGE), a labor organization within the meaning of § 7103(a)(4) of the Statute, is the exclusive representative of a nationwide consolidated unit of employees of the Federal Bureau of Prisons (BOP). The Union is an agent of AFGE for the purpose of representing bargaining unit employees at FCI Englewood. GC Exs. 1(b) & 1(c). The BOP and AFGE are parties to a nationwide collective bargaining agreement (CBA) covering employees at FCI Englewood.

The BOP maintains a Drug Free Workplace Program, which states, among other things, that "[a]ny illegal drug use . . . by Bureau employees . . . will not be tolerated." Resp. Ex. 2 at 1. The policy emphasizes that the use of federally controlled substances is prohibited even in states (such as Colorado) which allow them. *Id.* To enforce this policy, BOP operates a comprehensive employee drug testing program that includes urinalysis, both on a random basis and in a variety of other situations. *Id.* Punishment for employees found to have used illegal drugs "shall depend on the circumstances of each case" and includes "[t]he full range of disciplinary actions, up to and including dismissal . . . ." *Id.* at 7. Employees are made aware of the anti-drug policy when they start working at BOP, and every year during annual refresher training. Tr. 25.

David Thompson started working at FCI Englewood in 1993 as a Recreation Specialist. Tr. 25, 108. On December 10, 2015,[11] Thompson was randomly selected to be tested for illegal drug use, and the urinalysis was conducted that same day. Resp. Ex. 3 at 1-2. Thompson went to the testing room and provided a sample, which was divided into two separate vials, one for an initial test and another to be used if a retest was requested. Tr. 135, 186. The procedure was overseen by Hector Lozano, the Agency's Assistant Health Services Administrator. Resp. Ex. 3 at 1.[12]

On December 15, Dr. Robert Fierro, a Medical Review Officer based in Richmond, Virginia, informed Thompson that he had tested positive for marijuana. *See* Tr. 114. Fierro asked Thompson if he had used marijuana, and Thompson admitted that he had. Tr. 114. Dr. Fierro's office sent Thompson's test results to Tom Ellis, the BOP's Drug Free Workplace Coordinator in Washington, D.C., and Ellis forwarded that information to Deborah Denham, the Warden of FCI Englewood. Resp. Ex. 3 at 9; Tr. 183, 185. Warden Denham referred the matter to the BOP's Office of Internal Affairs (OIA) and had Thompson placed on administrative leave until an investigation into his drug use was completed. *See* Resp. Ex. 3 at 8-9; Tr. 37-38, 131-32. On December 18, OIA assigned Lieutenant Cody Kizzier, a Special Investigative Supervisor at FCI Englewood, to investigate the matter locally. Resp. Ex. 3 at 8, 11; Tr. 134.

Shortly after being assigned the case, Kizzier met with Thompson and Jason Rusovick, a union representative, to discuss Thompson's test result. Tr. 115, 117, 122, 134. Early in the meeting, Kizzier learned that Thompson had not requested a retest, and both Kizzier and Rusovick encouraged Thompson to do so. When Thompson agreed, the meeting was adjourned, pending the results of the retest. Tr. 115, 118.

Upon learning that the retest had confirmed the positive marijuana finding, Kizzier contacted Thompson and set up a new interview for December 24. Tr. 108-09; Resp. Ex. 3 at 2. Thompson requested that a Union representative be present, so on the morning of the interview Kizzier phoned the Union office, spoke to Vice President Chris Janssen, and asked him to send a representative to the meeting. Tr. 59-60. Janssen chose to serve as Thompson's representative, and on his way to Kizzier's office, he saw Joseph Skurkis, who had recently been elected as the Union's Chief Steward. Janssen asked Skurkis to assist him at the interview, because Thompson was a disabled veteran and Skurkis had experience dealing with veterans' issues. Tr. 60.

[11] Hereafter all dates are in 2015, unless otherwise noted.

[12] A year or two earlier, Lozano had administered a drug test for a different employee, in which the proper procedures were not followed, and as a result the tested employee was not disciplined. Tr. 36, 41-43, 83-84, 162-63.

Janssen and Skurkis reached Kizzier's office, where Thompson was already waiting. Kizzier pointedly asked why Skurkis was there, since Kizzier believed Thompson could have only one union representative. Tr. 63, 110, 138. Janssen and Kizzier briefly disputed whether Skurkis should be able to attend the interview, prompting Kizzier to tell Janssen that he was "impeding" the investigation. Tr. 63-65, 125, 139, 147. Janssen viewed this as a "veiled threat" of termination, because impeding an investigation is a violation of the Standards of Employee Conduct, punishable by termination. Tr. 64-65. Consequently, Skurkis left, and the interview began.

There is some dispute as to what happened during the interview, so I will describe it from each witness's perspective.

The Interview According to Thompson

Thompson testified that early in the interview, Kizzier asked him whether he had any questions about the testing procedures. Tr. 113. Janssen asked for "some clarifications on some of the questions," including questions about "the water having to be blue and a non-flushable toilet and stuff like that." Tr. 111-12. Thompson testified that Kizzier responded that Janssen "wasn't allowed to speak, that he would impede the investigation if he continued to clarify questions." Tr. 112. Asked to describe Janssen's response, Thompson stated that Janssen "did exactly what he was told and did not ask any more questions." Tr. 127. Thompson told Kizzier, "I didn't have any problems with the collection process . . . but I don't really know the collection process." Tr. 126. He did not recall whether, in response to Kizzier's question, he expressed any confusion about the testing procedures. *Id.*

During the examination, Kizzier typed notes to record Thompson's statements. Once he was finished asking questions, Kizzier turned the notes into a draft of a statement that would become Thompson's affidavit, and he printed a copy for Thompson to review. After Thompson approved the draft, Kizzier printed a final version, which Thompson signed. Tr. 67, 77-79; GC Ex. 4. At the hearing, Janssen testified that Thompson's affidavit covered topics in the same order that they were discussed during the interview. Tr. 78.

Thompson's affidavit begins with some background information, including his length of service at the Agency, and then states that he was randomly selected for drug testing on December 10. GC Ex. 4. With respect to the testing procedures, Thompson states: "I do not have any issues with the procedures used to collect the sample." *Id.* Thompson admits:

> I am aware that the urine sample I provided tested positive for marijuana. . . . I do not have any legitimate medical reason for the positive test results. . . . I am aware that the reanalysis also resulted in a positive test for marijuana. At the time I provided the sample, I had recently used marijuana. . . . I am aware of the BOP's Drug Free Workplace policy.

Id.

The Interview According to Janssen

Janssen testified that after asking some preliminary background questions, Kizzier asked Thompson if he had any issues with the drug testing procedures. Tr. 67. According to Janssen, Thompson then "looked at me, kind of quizzical or he didn't know what" the procedures should be. Tr. 69. It appeared to Janssen that Thompson was "kind of confused on the question." Tr. 70. So Janssen asked him more specifically, "'Was the water blue; was it a non-flushable toilet?' You know, 'Was there anything abnormal?'" *Id.* Janssen said he did this "just as an entry level, let's start talking about procedures if that's the line of questioning the Agency is going down." *Id.* Janssen testified that he asked about the procedures used, in part because of Lozano's error less than two years earlier. *See* Tr. 103. Janssen believed that the Agency had not properly trained its staff in correct drug testing procedures, and that the earlier incident meant that there was "a likely violation of the testing procedures." *Id.*

Janssen testified that when he attempted to alleviate Thompson's confusion about testing procedures, Kizzier responded "in a gruff manner, 'Stop asking questions. You're not allowed to ask questions.'" Tr. 73. Janssen countered that it was his role to ask questions and to make sure the interviewee was answering truthfully. He testified that the CBA actually specified that "we're allowed to ask and answer questions, clarify, and in general just take an active part in the investigatory meeting." *Id.* But Kizzier then "warned me this time that now I'm interfering with an official investigation and he's not going to allow me to talk during the interview." *Id.* Kizzier told him that "my job was just to sit there." *Id.*

Asked whether he responded further to Kizzier, Janssen testified: "No. Because I knew that, based on the previous warnings I received" when discussing whether Skurkis could attend the examination, "that I was on very thin ice. Now, with this, I may be subject to an investigation for interfering or impeding with an official investigation." Tr. 74. Janssen understood this as a

warning that "I can be fired for participating in the meeting[.]" Tr. 102. As a result, Janssen testified that he refrained from asking further questions at the examination including questions about the test results and the Agency's drug policy, if Kizzier had not told him to stop. Tr. 80-81; *see also* Tr. 102-03.

After Janssen was told to remain quiet, and in response to Kizzier's question whether he had any issues with the testing procedures, Thompson said, "I guess not." Tr. 77. In Janssen's view, Thompson "still wasn't confident in his answer." *Id.* According to Janssen, Thompson answered the way he did, only "because he couldn't articulate any issues that he knew were wrong." *Id.*

The Interview According to Kizzier

Kizzier testified that he began the interview by asking Thompson if he had any issues with the way the sample was collected. Thompson said that he didn't. Tr. 140. Kizzier testified that he did not ask Thompson specific questions about testing procedures because Thompson has been at the Agency for over twenty years, and he, like all other employees, has experienced many drug tests during that time. Tr. 177.

Kizzier testified that Janssen then turned to Thompson and asked, "Was there bluing agent in the toilet? Did you wash your hands? Was the water off?" Tr. 140-41. Kizzier felt that Janssen "asked the questions in a very suggestive nature," which was heightened by the "rapid fire" manner in which he asked them. Tr. 141, 174. Kizzier explained that the "suggestive" nature of Janssen's questions was "why I interdicted and said, 'This isn't your purpose for being here.' I felt that that was impeding the interview." Tr. 141. Kizzier also testified that he felt that Janssen was "feeding answers to Thompson. 'This is some things you could say to get you – possibly take a little heat off or put some pressure back on Lozano.'" Tr. 173.

Kizzier added that while he told Janssen that "that type of thing wasn't appropriate and not to do it because it's interfering with my investigation," He didn't tell Janssen that he couldn't ask any questions, or that he had to sit there quietly. Tr. 173. And he doubted that his words would have suppressed Janssen. "[Janssen] has every right to ask questions of Thompson or me," Kizzier testified, "and he always has. And he has before that, since then. I know I can't restrict him from asking questions. I wouldn't ask that." Tr. 178. Asked whether he referred to Janssen interfering with his investigation, Kizzier replied, "When I told him to not ask the questions, I said, 'I can perceive . . . that that is interfering with my interview.' I said that at the time when I said they were suggestive questions." *Id.* He indicated that if Janssen had "asked them in a different way or if he had directed questions to me, I could have asked them just as easily." Tr. 176.

After Thompson indicated that he did not object to any of the procedures for collecting his sample, he acknowledged to Kizzier that he had used marijuana a few weeks previously, and that he had no medical reasons for doing so. Tr. 153. Based on Thompson's statements at the interview, Kizzier drafted an affidavit, which Thompson signed, and which was incorporated in Kizzier's investigative report. Tr. 141-42, 154-55.

Several months later, Kizzier prepared a memorandum regarding his examination of Thompson. He wrote:

> I am of the opinion that Janssen was attempting to steer my investigation towards the collector of the sample and away from Thompson. It is at that point that I told Janssen something to the effect that his questions to Thompson were interfering with my interview and I asked that Janssen cease from asking questions of Thompson that did not pertain to the investigation at hand. The collector of the sample was not under investigation and Janssen's questioning of the collector's actions were distracting Thompson from my interview and from the subject at hand.

GC Ex. 5.

After the December 24th Interview

On December 28, Kizzier issued a report of his investigation. Resp. Ex. 3 at 1-3. Kizzier noted that Thompson admitted that he had used marijuana, and that Thompson's test and retest both came back positive. Based on those facts, Kizzier concluded that there was sufficient evidence to sustain the allegation that Thompson had used illegal drugs. *Id.* at 2-3. Subsequently, the Agency issued a letter proposing Thompson's removal. *See* Tr. 27, 83.

On February 16, 2016, Thompson and Janssen met with Warden Denham and Tiffany Espinoza, the Human Resources Manager at FCI Englewood, to provide an oral response to his proposed removal. Tr. 27-28, 94; Resp. Ex. 1. At the oral response, Thompson acknowledged that he had used marijuana and apologized for having done so. Tr. 121; Resp. Ex. 1. The Warden stated that she would take that into consideration, but also expressed serious doubts about Thompson's judgment.

Resp. Ex. 1. Upon consideration of the matter, the Warden decided that removal was appropriate, and Thompson was terminated on February 19, 2016. Tr. 51, 108, 114.

Subsequently, the Union filed a grievance on Thompson's behalf challenging his removal. In the grievance, the Union asserted that Thompson's termination was not based on "just and sufficient cause." Tr. 94-95, 121. The grievance went to arbitration and a hearing was held. The arbitrator's decision was pending when this ULP hearing was held. Tr. 95.

Additional Issues Discussed at the Hearing

The witnesses elaborated on a number of issues at the hearing. With respect to testing procedures generally, Janssen testified that that the BOP Collector's Procedure Manual outlines the drug testing procedures that must be followed. Tr. 68; GC Ex. 3.[13] The manual further requires the collector to explain the collection process to the donor, including the fact that the water supply in the testing room will be turned off and any residual water will be dyed blue to prevent anyone from intentionally diluting the sample. Tr. 89; GC Ex. 3 at 5. While Janssen asserted generally that any deviation from these procedures would render the sample unusable (Tr. 68), he tacitly acknowledged that a failure to dye the water blue or turn the water off would not result in a false positive. *See* Tr. 89. Ellis similarly testified that the lack of a bluing agent, an employee's failure to wash his hands, or a failure to shut off water in the bathroom would not create false positives, and that errors in those procedures would not have undermined the accuracy of Thompson's positive test results. Tr. 196-99, 204.

In addition, Kizzier and Ellis indicated that even if there had been problems with Thompson's testing, Thompson still would have faced discipline, based on his admission of drug use. Tr. 168-69, 194.

With respect to the penalty for drug use, Kizzier and Espinoza both indicated that the BOP has a "zero tolerance policy." Tr. 25, 27, 143-44. However, they also acknowledged that under the BOP's Drug Free Workplace Program and Standards of Employee Conduct, there is a range of penalties that the Agency can impose for employee drug use, and that the Agency will determine whether to terminate an employee, or to impose a lesser penalty, on a case-by-case basis. Tr. 53, 160.

[13] For example, the manual states that a collector must instruct the donor to remove his or her jacket; direct the donor to empty his or her pockets; observe the donor wash his or her hands; break the collection kit protective cover in front of the donor; and instruct the donor that he or she may not flush the toilet until the collector has reentered the testing room. GC Ex. 3 at 5.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel asserts that the Agency violated §§ 7114(a)(2)(B) and 7116(a)(1) and (8) of the Statute. Specifically, it argues that Kizzier improperly restricted Janssen's effort to represent Thompson by preventing him from asking questions of Thompson about the drug testing procedures.

The GC notes that the Respondent admitted, in its Answer to the Complaint, that the December 24 examination met all of the statutory criteria for a "Weingarten" interview. GC Br. at 4-5. The GC then cites longstanding precedent under the Statute that the right to union representation under 7114(a)(2)(B) includes the right to actively participate in the examination, such as by asking questions, helping the employee express views, seeking clarifications, and suggesting other avenues of inquiry. *See Headquarters, NASA, Wash., D.C.*, 50 FLRA 601, 607 (1995) (*NASA HQ*), *enforced*, *FLRA v. NASA*, 120 F.3d 1208 (11th Cir. 1997), *aff'd*, 527 U.S. 229 (1999); *U.S. Customs Serv., Region VII, L.A., Cal.*, 5 FLRA 297 (1981) (*Customs*). While the representative is not permitted to compromise the integrity of an agency's investigation, such as by answering for the employee or telling the employee not to answer questions, the GC insists that Janssen's questions did not violate these rules. *See NASA HQ*, 50 FLRA at 607; *Dep't of the Treasury, IRS, Jacksonville Dist.*, 23 FLRA 876, 878-79 (1986).

Applying these principles to the facts of the case, the GC argues that Janssen's questions about the procedures utilized to conduct Thompson's drug test were appropriate and relevant, and that Kizzier had no right to tell him to stop, since those questions did not compromise the integrity of the investigation. The GC further contends that by telling Janssen to stop asking questions, and by instructing Janssen to remain silent for the rest of the examination, Kizzier deprived Thompson of effective union representation. And by telling Janssen that further questions would interfere with his investigation, Kizzier was threatening Janssen with discipline in order to silence him. GC Br. at 6-7.

The General Counsel seeks the traditional remedy for a Weingarten violation: to order the Agency to conduct a new examination, if requested by Thompson and the Union, and then to reconsider the disciplinary action it took against Thompson, in light of the new examination. If the Agency's reconsideration results in lesser discipline, then Thompson should be made whole

for any loss of pay or benefits. *See U.S. Dep't of Justice, Bureau of Prisons, Safford, Ariz.*, 35 FLRA 431, 444-49 (1990) (*FCI Safford*). The GC disputes the Respondent's argument at hearing that a new Weingarten examination could not possibly result in a lesser punishment for Thompson, because the Agency's "zero tolerance policy" dictates that any use of marijuana by an employee is punished by termination. GC Br. at 8-9. But according to the GC, the very policies that the Agency relies on demonstrate that there is no fixed penalty for all drug violations, and that the penalty "depend[s] on the circumstances of each case . . . ." Resp. Ex. 2 at 7. The Agency's witnesses confirmed that the penalty is within the warden's discretion and is not fixed. Tr. 53, 160. Therefore, the GC insists that Janssen may well have been able to elicit information that would have helped Thompson's case, if he had been allowed to question him fully. In order to allow Thompson to have the benefit of such an unfettered examination, the GC urges that the traditional remedy be ordered here. GC Br. at 9-10.

Charging Party

The Union argues that the Agency violated the Statute, for the reasons stated by the GC.[14] CP Br. at 3-4, 6-7.

With respect to the remedy, the Union argues that a make-whole remedy is appropriate, and that I should therefore order the Agency to reinstate Thompson with back pay and to "[r]emove all disciplinary incidents in question regarding Mr. Thompson." *Id.* at 10 (citing *Fed. Bureau of Prisons, Wash., D.C.*, 55 FLRA 1250, 1256-58 (2000) (*BOP*)). In addition, the Union requests that the Agency pay the Union's "legal fees and expenses[,]" as well as compensatory damages one to ten times the backpay paid to Thompson, divided equally between Thompson and Janssen, for the "intentional infliction of emotional distress" caused by the Agency. CP Br. at 10. The Union argues that this non-traditional remedy is necessary to restore the parties to their positions prior to the violations.

Finally, with respect to the standard remedy of ordering a new examination, the Union asserts that it "does not feel a further or additional investigation is warranted." *Id.*

Respondent

The Agency insists that it did not violate the Statute. While it acknowledges that Kizzier "cut off" Janssen's questioning, it argues that Kizzier was entitled to stop Janssen from asking "irrelevant questions." Resp. Br. at 2-3. Relying on the Authority's statement in *Norfolk Naval Shipyard*, 9 FLRA 458, 458-59 (1982) (*Norfolk*) that management may need "to place reasonable limitations" on a union representative's participation at a Weingarten interview, Respondent asserts that Kizzier's limitations on Janssen's irrelevant questions were appropriate and lawful. Respondent also cites a decision of Administrative Law Judge William Devaney, in *U.S. Library of Cong.*, Case No. 3-CA-20698 (1983), ALJDR No. 26, WL 24600 at *5 (*Library of Congress*) (no exceptions filed), in which the judge applied *Norfolk* and held that an agency investigator could prevent a union representative from asking a question "which went far afield from the objective of the examination . . . ."

Even if the restrictions on Janssen's questions violated the Statute, the Respondent argues that it should not be ordered to conduct a new examination of Thompson or to reconsider Thompson's discipline. Resp. Br. at 3. In this regard, it argues that a new examination would not result in a different outcome, since Thompson had admitted to using marijuana even prior to the December 24 examination, and since the Agency has a "well known non-toleration of marijuana . . . ." *Id.*

Respondent also argues that ordering it to reconsider Thompson's termination would "raise a jurisdictional issue under 5 U.S.C. § 7116(d)." *Id.* at 4. Respondent acknowledges that the FLRA has jurisdiction over the underlying ULP allegation against it, but it insists that 7116(d) "deprives the Authority of jurisdiction to issue the *FCI Safford* reconsideration remedy . . . ." *Id.* It relies on *Wildberger v. FLRA* 132 F.3d 784, 795 (D.C. Cir. 1998), which approved the Authority's guidelines for determining when to assert, and when to deny, jurisdiction when an employee has filed both a ULP charge and an MSPB appeal. *See also U.S. Small Business Admin., Wash., D.C.*, 51 FLRA 413 (1995). While the Respondent appears to recognize that the alleged restriction on Janssen's effort to represent Thompson in this case is distinct from Thompson's MSPB appeal, it argues that the GC's requested order to reconsider Thompson's termination "is insufficiently distinct from the merits of the adverse action itself to escape the statutory jurisdiction bar." Resp. Br. at 4.

[14] In addition, the Charging Party argues that the Respondent (1) "harassed and intimidated Mr. Janssen by threatening to charge him with a disciplinary charge . . . in retaliation for his protected activity as a Union official"; and (2) "interfered with, restrained, and coerce[d] Mr. Skurkis to prevent him from carrying out his duties, and exercising his rights, as a Union official." CP Br. at 11; *see also id.* at 1. These claims were not specifically alleged in the complaint, however, so I will not consider them. It is the General Counsel, and not the Charging Party, who determines what allegations to prosecute and controls the theory of a complaint. *See Kimtruss Corp.*, 305 NLRB 710, 711 (1991); in *Turgeon v. FLRA*, 677 F.2d 937, 938-39 (D.C. Cir. 1982), the court cited the broad discretion of the National Labor Relations Board General Counsel in prosecuting unfair labor practices as a basis for a similar role of the FLRA General Counsel.

Such an order would raise "comity issues," including the possibility of conflicting decisions and a duplication of efforts and resources. *Id*.

ANALYSIS AND CONCLUSIONS

Respondent Violated §§ 7114(a)(2)(B) & 7116(a)(1) and (8) of the Statute

Section 7114(a)(2)(B) provides that an exclusive representative of an appropriate unit shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the agency in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action and the employee requests representation. This is a statutory codification of the right enjoyed by private sector employees, based on the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). *See NASA HQ*, 50 FLRA at 606. In *Weingarten*, the Court recognized that an employee who is questioned during an investigatory interview that may result in discipline "may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors[,]" and that a union representative might allay such fears and help to elicit useful information. 420 U.S. at 263. In addition, the Court noted that a union representative protects the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. *Id.* at 260-61.

The General Counsel and the Respondent agree here that Kizzier's examination of Thompson on December 24 met the statutory criteria of § 7114(a)(2)(B), and that the Agency was obligated to allow Janssen to actively participate in the examination as Thompson's representative. They disagree only on one primary factual issue and one legal issue: how broadly did Kizzier restrict Janssen's questions, and did Kizzier's restrictions constitute reasonable regulations necessary to protect the integrity of the investigation?

In accordance with the principles articulated in *Weingarten*, the Authority has consistently held that the purposes underlying § 7114(a)(2)(B) can be achieved only by allowing the union representative to take an "active role" in assisting a unit employee in presenting facts in his or her defense. *U.S. Nuclear Regulatory Comm'n*, 65 FLRA 79, 84 (2010) (*NRC*) (quoting *Bureau of Prisons, Office of Internal Affairs, Wash., D.C. & Phx., Arz.*, 52 FLRA 421, 432 (1996)). The Authority has found a ULP when the union representative was told to remain silent at an examination. *FCI Safford*, 35 FLRA at 440. Similarly, the Authority found a violation when the investigator established unduly restrictive ground rules for the examination that relegated the union representative to the role of a mere witness. *NASA HQ*, 50 FLRA at 609.

However, agencies have a legitimate interest in achieving the objectives of the examination and in preserving the integrity of the investigation, and an employee's right to union representation under 7114(a)(2)(B) must be balanced against those legitimate management interests. *Fed. Aviation Admin., New England Region, Burlington, Mass*., 35 FLRA 645, 652 (1990). As the Authority stated in *Norfolk*, an agency may "need, under certain circumstances, to place reasonable limitations on the exclusive representative's participation . . . in order to prevent an adversary confrontation with that representative and to achieve the objective of the examination." 9 FLRA at 458-59. But as the judge noted in her decision that was affirmed by the Authority in *Norfolk*, "What constitutes reasonableness is the dilemma here." *Id*. at 473.

In *Weingarten*, the Court stated that an employer "is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." 420 U.S. at 260. This has been interpreted as being "directed toward avoiding a bargaining session or a purely adversary confrontation with the union representative and to assure the employer the opportunity to hear the employee's own account of the incident under investigation." *NRC*, 65 FLRA at 84 (quoting *NLRB v. Texaco*, 659 F.2d 124, 126 (9th Cir. 1981)). A union representative who disrupts an examination by engaging in abusive or insulting interruptions may have his participation limited. *NRC*, 65 FLRA at 84. However, the Authority has rejected the notion that an employer is entitled to question an employee without *any* interruptions or intervention by the union representative. As the judge noted and the Authority affirmed in *Customs*, 5 FLRA at 307, "some interruption, by way of comments re the form of questions or statements as to possible infringement of employee rights, should properly be expected from the employee's representative." In this connection, "[t]he employer always retains the option to refrain from conducting the examination in the event it decides that the interview, in the presence of a union representative, is not efficacious." *Id.*

What took place during the interview must be understood in context, so I start by considering the discussion Kizzier and Janssen had with regard to whether Skurkis could attend the meeting. While there are slight discrepancies among the witnesses about what happened, it is clear that Janssen and Kizzier's discussion briefly became heated, and that Kizzier suggested at least once that Janssen was interfering with or impeding his investigation – a serious accusation. *See* Tr. 63-65, 110,

147. This tense exchange occurred even before Kizzier started questioning Thompson, and it is likely that the tension remained as the examination began.

Shortly after Kizzier began the examination, he asked Thompson whether he had any issues with the procedures used to collect the sample. GC Ex. 4; *see also* Tr. 67, 113, 140. Thompson looked (to Janssen, at least) confused by the question, leading Janssen to ask several follow-up questions, in the hope of clarifying things for Thompson.[15] Regardless of whether Thompson verbalized his confusion, I find it quite likely he didn't fully understand the question, as it was quite open-ended and ambiguous in its scope. "Any issues" could refer to any number of things, and thus Janssen's follow-up questions were perfectly logical attempts to make an abstract subject tangible. Even though Thompson told Kizzier that he had no issues with the procedures, he testified at the hearing, "I don't really know the collection process." Tr. 126. I credit Janssen's testimony, therefore, that he asked these questions in order to clarify Kizzier's question for Thompson. Recognizing Thompson's likely ignorance about the technical aspects of the BOP's testing procedures,[16] Janssen asked specific questions ("Was there bluing agent in the toilet? Did you wash your hands? Was the water off?") which were designed to help Thompson understand what Kizzier was asking about. Given that § 7114(a)(2)(B) was designed to help employees benefit from the knowledge and expertise of union representatives, and given that Janssen clearly knew more about the testing procedures than Thompson did, it was entirely appropriate for Janssen to interject as he did. Indeed, by clarifying Kizzier's question, Janssen was helping to achieve the stated goal of the examination, which was to obtain information to determine whether administrative action was warranted. GC Ex. 2.

In asking the clarifying questions, Janssen was also trying to uncover facts that might be used in Thompson's defense. In this regard, Janssen was aware that Lozano, the Agency official who tested Thompson, had committed a testing error in the last two years. It was entirely possible that Lozano could have committed an error again, and it was therefore reasonable for Janssen to explore whether Lozano had in fact committed an error while administering Thompson's test. It is true that the specific questions Janssen asked would not have shown that Thompson's test results were invalid. (These rules are designed to prevent an employee from diluting the urine sample and making a positive sample negative; thus, the failure to take these safeguards would not undermine a sample that tested positive.) But I believe Janssen when he testified that these questions were just an "entry" into a more detailed discussion of the testing procedures. Tr. 70. Such a discussion might have revealed a significant error, which could potentially have invalidated the test results or which might have supported a lesser punishment for Thompson. Thus, Janssen was pursuing a legitimate line of inquiry with his questions, even if the specific questions would not have exculpated Thompson. It is worth noting that Kizzier himself brought up the subject of the collection procedures, and he stated twice in his investigative report that Thompson had no "issues" with the testing procedures. Resp. Ex. 3 at 2, 3. So it rings hollow for him to cut off Janssen's questions, or for the Respondent to dismiss Janssen's questions as irrelevant.

The witnesses dispute whether Kizzier then told Janssen to stop asking questions entirely for the rest of the examination, or whether he told Janssen to stop asking "that type of thing" (i.e. leading questions). Tr. 173. But again, I don't think this really matters, because Kizzier's action was improper, even if I accept his testimony on this point. When Kizzier first testified on this issue, he said Janssen "asked [his] question in a very suggestive nature. And that's why I interjected and said, 'This isn't your purpose for being here.' I felt that that was impeding the interview." Tr. 141. When I asked Kizzier to explain the incident again later, he testified, "it was my opinion at the time that Janssen was feeding answers to Thompson. . . . What I said to Janssen – I don't remember the specifics, but I told him that type of thing wasn't appropriate and not to do it because it's interfering with my investigation. I didn't tell him he couldn't ask any questions." Tr. 173. I am inclined to believe Kizzier that he didn't explicitly forbid Janssen from asking any questions at all, but even so, he restricted Janssen from engaging in a line of inquiry that was relevant to the very issue Kizzier had raised, and which might have elicited information helpful to Thompson in

[15] The witnesses testified differently as to when Thompson answered Kizzier's question regarding testing procedures, but I don't think it really matters who is correct. Janssen testified that he saw that Thompson was confused and immediately asked clarifying questions, which led Kizzier to intervene and then direct Thompson to answer the original question. Tr. 67, 76. In contrast, Kizzier testified that Thompson immediately answered his question and that Janssen asked his clarifying questions after that. Tr. 140. (Thompson did not specifically indicate whether his answer came before or after Janssen's questions.) Tr. 112-13, 126. Regardless of who spoke first, I accept that Janssen perceived Thompson's confusion and sought to provide Thompson with some examples that might help him understand what Kizzier was inquiring about.

[16] For his part, Kizzier assumed that an employee who had worked for BOP as long as Thompson would be familiar with drug testing procedures. Tr. 176-77. While this may be generally true, Janssen's role as Thompson's Weingarten representative is to elicit any facts that may possibly help him, and these questions were well within the boundaries of relevance.

his appeal to the warden. While Kizzier may have objected to Janssen's questions because they were leading, he didn't make this clear to Janssen, nor did he identify specifically what type of questions Janssen could ask. Absent such clarifications, Janssen was left with the impression that Kizzier would object to any question he might ask.

Furthermore, by shutting off Janssen's questions with the comment that Janssen was interfering with the investigation, Kizzier let Janssen know that he was risking disciplinary action of his own if he persisted in his objectionable questions. This was at least the second time Kizzier had referred to Janssen impeding or interfering with his investigation, making the implicit possibility of discipline more ominous. Whether this was Kizzier's intent or not, his words had a chilling effect on Janssen's actions for the remainder of the examination and limited Janssen's ability to represent Thompson. Janssen reasonably believed he "was on very thin ice" and that he needed to back off. Tr. 74. Indeed, it appears that Janssen didn't ask any further questions for the remainder of the examination. Tr. 74, 127.

The cases cited by the Respondent do not justify the restrictions placed on Janssen. While the Authority indicated in *Norfolk* that an investigator may place reasonable limitations on a union representative's participation, to protect the integrity of the investigation and to prevent an adversarial confrontation, neither of these justifications apply here. Janssen's questions did not threaten the integrity of Kizzier's investigation or defeat the purposes of Kizzier's examination; Janssen was not loud, insulting, or in any way disruptive, and his questions did not threaten Kizzier's control of the examination. They were the type of "interruptions" that are to be expected when a union representative seeks to elicit facts that may help an employee, as noted in *Customs*, 5 FLRA at 307. Unlike the questions found objectionable in *Library of Congress*, Janssen's questions did not go "far afield" from the scope of the investigation; 1983 WL 24600 at *5. On the contrary, as I have already noted, they were directly relevant to a subject that Kizzier himself had inquired about and that he cited repeatedly in his investigative report.

Based on the foregoing, I find that Kizzier improperly prevented Janssen from taking an active role in the examination of Thompson. Accordingly, I find that the Respondent violated §§ 7114(a)(2)(B) and 7116(a)(1) and (8) of the Statute. I now consider the remedy.

The Remedy

In *FCI Safford*, the Authority broadly discussed the range of appropriate remedies for Weingarten violations under § 7114(a)(2)(B) and articulated guidelines for future cases. 35 FLRA at 441-449. When there has been a denial of representation rights under § 7114(a)(2)(B) and discipline has ensued, it ruled that the policies of the Statute are best effectuated by ordering the agency, upon request of the union and the employee, to repeat the investigatory interview and to afford the employee full rights to union representation. After repeating the investigatory interview, the agency should reconsider the disciplinary action taken against the employee. If, on reconsideration, the agency concludes that the disciplinary action was unwarranted or that a lesser penalty is warranted, the employee should be made whole for any losses suffered. The agency should notify the employee of the results of its reconsideration, including whatever make-whole actions are appropriate and, if relevant, afford the employee any grievance or appeal rights that may exist under the parties' negotiated agreement, law, or regulation. 35 FLRA at 447-48. The Authority has applied these remedial guidelines in cases such as *U.S. Dep't of Justice, Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 395 (1999) (*OIA*), and *U.S. Dep't of Justice, Office of the Inspector Gen., Wash., D.C.*, 47 FLRA 1254, 1264-65 (1993).

In setting forth this remedial framework, the Authority stated that requiring an agency to repeat the examination and to reconsider disciplinary action taken against the employee would recreate the conditions and relationships that would have been had there been no ULP. *FCI Safford*, 35 FLRA at 448. Additionally, this remedy would deter violations of § 7114(a)(2)(B). By making the right to representation "ultimately inescapable," the remedy would provide an additional incentive to agencies to afford representation rights and diminish any advantage to denying the right at the outset. *Id.*

At the same time, the Authority in *FCI Safford* reaffirmed its determination in *Dep't of the Navy, Charleston Naval Shipyard, Charleston, S.C.*, 32 FLRA 222, 233 (1988), that it would not order traditional make-whole remedies – including reinstatement with back pay – for 7114(a)(2)(B) violations when the disciplinary action is imposed solely for employee misconduct independent of the examination itself. *FCI Safford*, 35 FLRA at 441-44. The Authority added that barring traditional make-whole remedies in such circumstances was consistent with the Civil Service Reform Act (CSRA) stating:

> [I]n addition to strengthening the position of unions, the CSRA and the Statute carefully preserved the ability of federal managers to maintain an effective and efficient Government. In

> order to achieve this purpose, one of the central tasks of the CSRA was to allow civil servants to be able to be hired and fired more easily, but for the right reasons. Requiring an agency to make whole an employee who has been disciplined for cause based solely on a failure to afford representation rights under section 7114(a)(2)(B) is not consistent with this purpose.

Id. at 443 (internal quotation marks, alterations, and citations omitted).

With these principles in mind, I must evaluate the Respondent's arguments that it should not be required to repeat Thompson's examination and to reconsider his disciplinary action, as well as the Union's arguments that additional penalties should be imposed on the Agency. Having done so, I conclude that the traditional remedy is appropriate. Thompson is entitled to be examined with the benefit of unfettered union representation, and to have his disciplinary action considered on the basis of the information obtained in the new interview, without reference to or reliance on information obtained in the December 24 interview. *See OIA*, 55 FLRA at 395. If this reconsideration results in any reduction of the disciplinary action against Thompson, he should be made whole for any losses suffered. Regardless of the action taken on reconsideration, Thompson should be afforded any grievance and arbitration rights to which he is entitled. But because Thompson's termination was based on his marijuana use (which he admitted to, and tested positive for, prior to the examination), rather than on his conduct during the examination, it would be inappropriate to order the disciplinary action rescinded. *FCI Safford*, 35 FLRA at 441-44.

The Union's reliance on the *BOP* decision, to support its request that the Agency rescind Thompson's termination, is misplaced. *BOP* involved a refusal to furnish information, not a Weingarten violation; nonetheless, in reviewing its "measured approach" to make-whole remedies, the Authority specifically acknowledged that "[w]here representation rights under section 7114(a)(2)(B) have been violated and an employee has subsequently been disciplined, the Authority will not order the agency to rescind the disciplinary action." 55 FLRA at 1259 (citing *FCI Safford*, 35 FLRA at 447). In light of the foregoing, I will not order a traditional make-whole remedy. Thus, I will not order the Agency to reinstate Thompson with back pay, nor will I order it to remove from Thompson's records all disciplinary incidents in question.

The Union further requests that I order the Agency to pay "legal fees and expenses," as well as compensatory damages one to ten times the backpay ordered. There is no basis for ordering these remedies. The United States, as sovereign, is immune from suit except as it consents to be sued. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Metro. Det. Ctr., Guaynabo, P.R.*, 68 FLRA 960, 963 (2015) (*Guaynabo*). An order by the Authority that an agency remedy a ULP by paying monetary damages must be supported by statutory authority to impose such a remedy. *See id.*; *see also Immigration & Naturalization Serv., L.A. Dist., L.A., Cal.*, 52 FLRA 103, 105 (1996). Thus, there is no right to monetary damages in a suit against the United States without a waiver of sovereign immunity. *Guaynabo*, 68 FLRA at 963.

Under the Back Pay Act, an award of back pay is authorized only when: (1) an unjustified or unwarranted personnel action (2) resulted in the withdrawal or reduction of pay, allowances, or differentials. If these requirements are met, then an employee, on correction of the personnel action, is entitled to receive an amount equal to all or any part of the pay, allowances, or differentials which the employee normally would have earned. *U.S. Dep't of Homeland Sec., Customs & Border Prot.*, 67 FLRA 107, 110 (2013) (*DHS*). Accordingly, the Authority has found that a remedy under the Back Pay Act must be pay, allowances, or differentials, as defined by the Office of Personnel Management (OPM). *Id.* And applying OPM's definition of pay, allowances, and differentials, the Authority has restricted a back pay remedy to pay, leave, or other monetary employment benefits to which the employee is entitled by statute or regulation. *Id.* The Authority has also indicated that attorney fees may not be awarded, absent a waiver of sovereign immunity. *Guaynabo*, 68 FLRA at 966. Attorney fees may be granted under the Back Pay Act, but only if there has been an award of back pay. *AFGE, Council of Prison Locals, Local 1010*, 70 FLRA 8, 9 (2016). Because I am not ordering the Agency to pay back pay here, there is no basis for ordering it to pay legal fees under the Back Pay Act. Moreover, the Union has not cited any authority that would justify its request, nor has it even submitted billing records or other evidence justifying such a request. Therefore, the request is denied.

The Union also requests that I order the Agency to pay "expenses." The Union has not demonstrated that these expenses are pay, leave, or other monetary employment benefits to which Thompson is entitled by statute or regulation, so there is no basis for ordering the Agency to pay these expenses under the Back Pay Act. Further, the Union has not cited any other authority to justify its request. *See DHS*, 67 FLRA at 107, 110 (finding, in absence of a justification by arbitrator or union, that sovereign immunity barred arbitrator's award of "actual expenses"). Moreover, there is no evidence

that the requested "expenses" would not have been incurred but for the Agency's violation of the Statute. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Tucson, Ariz.*, 66 FLRA 517, 519-20 (2012). For these reasons, such a remedy is not appropriate.

The Union finally asks that I order the Agency to pay Thompson and Janssen compensatory damages for the "intentional infliction of emotional distress," one to ten times the amount of back pay ordered. CP Br. at 10. Even if I had ordered back pay, such additional damages would be improper. Compensatory damages are obviously not pay, allowances, or differentials, and thus are not available under the Back Pay Act or under any other authority. *Guaynabo*, 68 FLRA at 963-64; *DHS*, 67 FLRA at 110. Moreover, even if the Union were eligible to receive compensatory damages, I would find no basis for ordering this nontraditional remedy. Nontraditional remedies are warranted when reasonably necessary and effective to recreate the conditions and relationships with which the ULP interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct. *See F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996). Here, the Union has not submitted any evidence to support its claim that the Agency's violation caused Thompson and Janssen to be emotionally distressed; it has, therefore, failed to show that a remedy beyond the one ordered in *FCI Safford* is warranted.

The Respondent argues that I should not order it to conduct a new examination, but its arguments are unpersuasive as well. In this regard, it insists that ordering a new examination would be pointless, because it would invariably result in Thompson's termination, because he has admitted to using marijuana. But counsel's argument that employee drug use invariably results in termination is contradicted by the testimony of his own witnesses. Kizzier and Espinoza both acknowledged that the warden at each institution has discretion to impose a range of penalties for employee drug use, based on the circumstances of each case. Given that a new examination might uncover new facts, it is possible that a new examination would convince the warden that Thompson merited a lesser penalty than termination. Even if it is unlikely that Thompson's discipline will change, it is appropriate to require the Agency to conduct a new examination, as it will deter future violations of § 7114(a)(2)(B). *FCI Safford*, 35 FLRA at 448.

With respect to § 7116(d) of the Statute, the Respondent concedes that the Authority has jurisdiction over the alleged ULP. Resp. Br. at 4. This is correct, because the ULP charge is based on an alleged violation of the right to representation at an investigatory examination, whereas Thompson's grievance-arbitration appeal is based on an alleged lack of just cause to terminate him. Nonetheless, the Respondent argues that 7116(d) bars me from ordering it to reconsider the disciplinary action against Thompson, because that same issue is pending before the arbitrator and the MSPB. This argument is without merit. In this regard, the Authority has stated that when an issue is properly raised as a ULP under § 7116, "nothing therein would prevent the Authority from remedying any violation found." *U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis-Monthan AFB, Tucson, Ariz.*, 64 FLRA 355, 361 (2009) (citation and internal quotation mark omitted). Further, the Authority stated that while it is appropriate to take into account the remedies awarded in other appeals processes, such considerations are best resolved in compliance proceedings. *See id.*

Because the ULP charge in our case is not barred by § 7116(d), it is appropriate to remedy the Agency's violation. Requiring the Agency to conduct a new Weingarten examination does not inherently conflict with the arbitration and MSPB appeal of Thompson's termination. If Thompson's appeal is denied (a decision that would be reached without the benefit of a properly conducted examination), then he and the Union would have every reason to want the Agency to conduct a new, proper examination and then to reconsider Thompson's discipline. This could help Thompson, and it certainly would deter the Agency from violating § 7114(a)(2)(B). If the arbitrator or MSPB sustains his appeal and orders Thompson reinstated, it is unlikely that he or the Union would request a new examination (*see* CP Br. at 10). In the event that a conflict arises between the remedy for the grievance and the remedy for the ULP, it can appropriately be resolved in compliance proceedings. Finally, I note that the Respondent has not submitted any evidence that an actual conflict exists between a remedy for the ULP and a remedy for the grievance. For these reasons, I reject the Respondent's argument.

The Respondent also argues that a remedy is barred under *Wildberger v. FLRA*. In *Wildberger*, the court upheld the Authority's determination that two ULP complaints were barred under § 7116(d), and reversed the Authority's determination that a third ULP complaint was barred under § 7116(d). 132 F.3d at 792-94. Because the ULP charge and complaint in our case are not barred under § 7116(d), and because *Wildberger* did not concern the appropriateness of remedies in ULP cases other than under § 7116(d), that case does not support the Respondent's claim that the remedy in our case should be limited.

Finally, the Respondent relies on *Dep't of the Navy, Norfolk Naval Shipyard, Portsmouth, Va.*, 13 FLRA 571 (1984) (*Portsmouth*) to argue that

Thompson's disciplinary appeal is before the arbitrator and MSPB, and that the Authority should not intrude on those proceedings. In *Portsmouth*, the Federal Service Impasses Panel had directed a union and agency to engage in continued negotiations; the parties then reached an agreement, but the union membership refused to ratify it. When the agency refused to renew negotiations, the union filed a ULP charge. 13 FLRA at 574-75. The Authority determined that the Panel continued to have jurisdiction over the failed negotiations, and that ULP proceedings were improper, unless or until the Panel disposed of the case or a party refused to comply with the Panel's decision. Otherwise, "a sense of comity would dictate that the General Counsel not intrude." *Id*. at 577.

The Respondent's attempt to extrapolate the *Portsmouth* rationale to the current case falls short of the mark, however. *Portsmouth* specifically involved the powers and jurisdiction of the Panel, and the Statute's separation of the powers of the General Counsel and the Panel. *Id*. It does not provide guidance for cases not involving the Panel. For cases such as ours, involving the overlap of ULP prosecutions and statutory appeal cases, § 7116(d) is the appropriate source of guidance. I have already noted (and the Respondent concedes) that § 7116(d) does not bar our resolution of the ULP charge here. Because there is no Panel involvement in our case, the Respondent's reliance on *Portsmouth* is misplaced.

To summarize, I conclude that the Respondent's unfair labor practice should be remedied by ordering it to conduct a new interview of Thompson, at the request of the Union and Thompson, and to reconsider its disciplinary action against Thompson based on that interview. Moreover, in accordance with the Authority's decision that ULP notices should be posted on bulletin boards and distributed to employees electronically, I will order both methods of distribution. *See U.S. Dep't of Justice, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

Accordingly, I recommend that the Authority adopt the following order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution Englewood, Littleton, CO (Respondent), shall:

1. Cease and desist from:

(a) Refusing to allow a representative of the American Federation of Government Employees, Local 709 (the Union), to play an active role in investigative examinations held pursuant to 5 U.S.C. § 7114(a)(2)(B).

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

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

(a) Upon request of the Union and David Thompson, repeat the examination of Mr. Thompson which occurred on December 24, 2015, at which he was denied his right to union representation. In repeating the examination, the Respondent will afford Mr. Thompson his statutory right to union representation. After repeating the examination, the Respondent will reconsider the removal action taken against Mr. Thompson.

(b) As appropriate, make Mr. Thompson whole for any loss suffered to the extent consistent with the Respondent's decision on reconsideration, and afford Mr. Thompson whatever grievance and appeal rights that may exist under any relevant collective bargaining agreement, law, or regulation.

(c) Post at its facilities where bargaining unit employees represented by the Union 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 Warden, and shall be posted and maintained for sixty (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) In addition to physical posting of paper notices, the Notice shall be distributed electronically, on the same day as the physical posting, such as by email, posting on an intranet or internet site, or other electronic means, if the Respondent customarily communicates with employees by such means.

(e) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Denver Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., April 28, 2017

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RICHARD A. PEARSON
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 U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution Englewood, Littleton, CO, violated the Federal Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT require bargaining unit employees to take part in an examination in connection with an investigation under § 7114(a)(2)(B) of the Statute without allowing a representative of the American Federation of Government Employees , Local 709 (the Union), to take an active role in such examination where representation 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 bargaining unit employees in the exercise of the rights assured them by the Statute.

WE WILL, upon request of the Union and by David Thompson, repeat the examination of Mr. Thompson which occurred on December 24, 2015, at which he was denied his right to union representation. In repeating the examination, we will afford Mr. Thompson his statutory right to union representation. After repeating the examination, we will reconsider the disciplinary action taken against Mr. Thompson.

WE WILL, to the extent consistent with our decision on reconsideration, make Mr. Thompson whole for any losses suffered and/or we will afford him whatever grievance and appeal rights may exist under any relevant collective bargaining agreement, law or regulation.

____
(Respondent)

Dated: _______________

By:_______________________________________
(Signature) (Title)

This Notice must remain posted for sixty (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, Denver Region, Federal Labor Relations Authority, whose address is: 1244 Speer Blvd., Suite 446, Denver, CO 80204, and whose phone number is: (303) 844-5224.