Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

LETTERKENNY ARMY DEPOT
CHAMBERSBURG, PENNSYLVANIA
Respondent/Agency

and Case No. BN-CA-60770

NATIONAL FEDERATION OF FEDERAL

EMPLOYEES, LOCAL 1442
Charging Party/Union

Mr. Gary Goshorn, Labor-Employee Relations Representative for the Respondent

Marilyn Blandford, Esq. Counsel for the General Counsel, FLRA

Before: ELI NASH, JR. Administrative Law Judge

DECISION

Statement of the Case

On December 19, 1996, the Regional Director of the Washington, D.C. Region of the Federal Labor Relations Authority (Authority) pursuant to a charge filed on July 30, 1996[1] by the National Federation of Federal Employees, Local 1442 (Union) issued a Complaint and Notice of Hearing alleging that the Letterkenny Army Depot, Chambersburg, Pennsylvania (Respondent) violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) on or around May 29, 1996, when it conducted a second examination of a bargaining unit employee in connection with an investigation into certain unauthorized Internet activities without complying with section 7114(a)(2)(B) of the Statute.[2]

A hearing was held in Chambersburg, Pennsylvania, at which all parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The General Counsel and the Respondent filed timely post-hearing briefs which have been carefully considered.

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

Findings of Fact

A. Background

At all times material, Respondent has been an agency within the meaning of section 7103(a)(3) of the Statute. At all times material, the Union has been a labor organization within the meaning of section 7103(a)(4) of the Statute.

At all times material herein, the Union was one of four labor organizations representing bargaining unit employees at Respondents facility. It represented approximately 600 of Respondent's general schedule and nonprofessional employees at all times material herein.

Deborah Witherspoon, has been the Union's president for the last eight years. In addition to holding the position of President, Witherspoon held the positions of First Vice-President, Second Vice-President, Third Vice-President, Chief Steward and Secretary.

Regina Taylor, a GS-11 Management Analyst, is an employee in the bargaining unit represented by the Union.

Respondent adheres to a Code of Conduct which prescribes employee behavior. Respondent disciplines employees for violations of this Code. In addition, Respondent follows a Table of Penalties which prescribes a range of disciplinary penalties for various administrative offenses. Among the Code violations covered by the Table are false statements, including misrepresentation and concealment, failure to observe written regulations, orders, rules or procedures, and conduct unbecoming of a federal employee. Also, included in the Table is misuse or abuse of Government property. The recommended penalty for each of these violations ranges from a written reprimand to removal, even for a first offense. These items have been the basis for disciplinary charges that Respondent has brought against employees as a result of information and evidence uncovered in connection with official investigations. Finally, Respondent has a history of taking disciplinary actions against unit employees who have knowledge of misconduct by other employees, even though the disciplined employees were not originally the subjects of Respondent's investigations.

B. The Investigation

Sometime in May 1996, Respondent initiated an investigation into unauthorized use of the Internet, including pornographic material downloaded from the Internet and stored on Respondent's premises. The investigation centered on two unit employees who were Taylor's co-workers. Taylor apparently was located near the employees who were subjects of the investigation. Taylor was examined on two occasions by Security Systems Analyst Basil Pittman and Criminal Investigator David Miller, in connection with the above investigation into the activities of those employees possible wrongdoing. It is undisputed that both Pittman and Miller were employees and agents of the Respondent during this investigation.

Taylor was initially examined by Pittman and Miller on May 22, 1996. Prior to this examination, Taylor was told by her supervisor, Craig Mason, that she would be questioned but that she would not be disciplined. Mason, too, was a witness in the investigation. The questioning during this examination focused on Taylor's knowledge of the suspected activities of the two employees under investigation. On this occasion, Taylor was not sworn in, but the investigators took notes of Taylor's answers during the examination. Pittman and Miller apparently suspected that Taylor may have withheld information during the May 22 interview, and it was subsequently decided to reexamine her. Pittman contacted Taylor's supervisor Mason, who notified Taylor that she was to be reexamined. This time, unlike the previous time, Mason did not give Taylor any assurances that she would not be disciplined as a result of this examination.

On May 29, 1996, Taylor was informed that she was to be reexamined by nvestigators Pittman and Miller because they believed that she may have withheld information during the May 22, examination. It is uncontroverted that, Taylor asked Miller and Pittman if she could have a union representative during this examination. Taylor testified that Miller told her she was not allowed to have a union representative because she was not charged with anything. Miller testified that he stated to Taylor, "no, you're here as a witness, not a subject." Both Miller and Taylor stated, that Miller then asked Taylor why she felt she needed a union representative. Taylor explained that, after being involved in a prior IG investigation, she learned that employees could have a union representative at any investigation.(3) Miller then told Taylor that the meeting could be stopped so that she could call a representative, however, the representative would have to sit in the back of the room. According to Taylor, one of the investigators stated that the representative would not be able to help her answer their questions. That investigator also said that the representative would be a presence in the back of the room. While Miller took a phone call, Pittman and Taylor continued to discuss her request for union representation, and Pittman motioned toward the back of the room for emphasis.

According to Taylor, she relied on the investigators' response to her request for union representation, and concluded that it "would be a waste of time to have a union rep come and sit in the back of the room and be able to do absolutely nothing." Consequently, she allowed the examination to proceed without obtaining a union representative.

During the May 29, 1996, examination, Pittman initially recapped Taylor's answers from her first examination. The investigators began questioning Taylor about her use of the Internet and showed her "header sheets" representing various sites on the Internet which had been accessed. When the questions turned to her own conduct, Taylor did not renew her request for union representation because, relying upon the investigators' response to her initial request, she believed it was useless to do so.

At the end of his questions, Pittman told Taylor that he planned to speak to one of the employees who was the focus of the examination. Taylor testified Pittman told her that if that employee gave answers to the questions which differed from her answers, he would call Taylor up and read her rights. Pittman repeated this statement to Taylor. Taylor testified that she, interpreted Pittman's statement as a threat that she would be fired. As a result of Pittman's statement, Taylor left the May 29, examination believing that she would be fired if the other employees' answers did not match her own.

When Taylor returned to her office, she requested that her supervisor, Mason contact the investigators to find out why Pittman had made such a statement to her. Taylor's supervisor contacted investigator Miller, who opined that if employees were upset as a result of his examinations, "they must have a guilty conscience."

Analysis and Conclusions

A. Issue

Whether Respondent violated section 7116(a)(1) and (8) of the Statute by causing a bargaining unit employee to forego her right to union representation at an examination within the meaning of section 7114(a)(2)(B).

B. Positions of the Parties

1. General Counsel

The General Counsel considers this a straightforward case under section 7114(a)(2)(B) of the Statute, where it is provided that in any examination of a unit employee by a representative of the agency in connection with an investigation, the employee has the right to have a union representative present, if the employee reasonably believes that the examination might result in disciplinary action and the employee requests representation. *Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas,* 36 FLRA 41, 48-49 (1990)(*INS, Border Patrol*). Section 7114(a)(2)(B) applies to all examinations in connection with all investigations. The General Counsel asserts that the investigators engaged in a course of conduct that dissuaded Taylor from obtaining representation during the questioning. Furthermore, it is argued that the investigation's statements convinced Taylor of the futility of obtaining a representative, so she allowed the examination to continue. Finally, the General Counsel argues that the investigator's threats extinguished any claim that the examination was not one in which Taylor was entitled to a representative. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

2. Respondent

Respondent offers several defenses in this matter. Initially, Respondent maintained that not only was Taylor aware of and understood the process of asking for a union representative in an investigative situation, but that she was given the opportunity to have a Union representative, an offer that she declined, "at that time," thereby waiving her right to a union representative when it was offered to her. *U.S. Department of Justice, Office of the Inspector General, Washington, DC, 47 FLRA 1254 (1993); Social Security Administration, Baltimore, Maryland*, 19 FLRA 748 (1985); *Department of Justice, Bureau of Prisons, Federal Correctional Institution*, 14 FLRA 334 (1984). In addition, Respondent argues that the May 29, meeting was an interview rather than an investigation and that Taylor did not have a reasonable belief that the examination would result in disciplinary action by her supervisor, Mason.[(4)] In this regard, it is asserted that Taylor was questioned about previous information she gave investigators who were simply seeking to find out whether she had more to add to her original interview of May 22, 1996.

C. Credibility

The salient facts in this case are not actually at issue. It is undisputed that Taylor made a valid request for Union representation at the May 29, 1996, examination. It is also undisputed that Taylor was told by one of the investigators during the investigation that if she did have a union representative, the representative would have to sit in the back of the room. Moreover, it is uncontroverted that Taylor was told that she was being reexamined by Pittman and Miller because they believed that she had withheld information during an interview on May 22, 1996.

With regard to any argument that a credibility dispute does exist, it is clear that Taylor's testimony on almost every major point is corroborated by Respondent's own witness, Miller. Indeed, both Taylor and Miller testified that Taylor made a request for representation for the May 29, interview. Both also agreed that Miller asked her why she felt she needed a representative, and that the statement was made that a representative would be allowed. Miller also testified that he told Taylor "no, you're here as a witness, not a subject [of the

investigation]" which is consistent with her testimony that Miller told her she was not allowed to have a representative because she was a witness and was not charged with anything. The essence of their testimony no matter which is credited as to the actual words is that Taylor, because she was not the subject of the investigation she did not need a union representative. There is also no real inconsistency over the statement that Taylor was told that if she did have a union representative, the representative would have to sit in the back of the room. Thus, Miller testified that Pittman indeed "said something to [the] effect . . ." that the representative had to stay in the back of the room and could not assist her with her answers.(5) He also recalled Pittman motioning to the back of the room. Additionally, Miller acknowledged that Pittman told Taylor that the representative "had to sit there. . . ." Thus, Taylor's inability to recollect which statements were made by which investigator, in the circumstances of the examination, does not detract from the fact that the statements were indeed made. In this regard, I also find nothing in Taylor's July 22, 1996, statement that would discredit her testimony.

In determining whether a credibility issue does exist, one need also take into account that Taylor and Miller also testified that Pittman threatened to read Taylor "her rights" if Taylor's answers did not match those of one of the employees under investigation. Finally, Taylor and Miller both testified that Miller later made a comment that if employees were upset as a result of his examination, "they must have a guilty conscience." Thus, the major points of Taylor's testimony were corroborated by investigator Miller, leaving little or no reason to doubt Taylor's credibility unless Miller is also discredited.

Consequently, on those details where the testimony differs, I find that Taylor's testimony, which is basically uncontroverted on the central points should be and is, therefore, credited. Taylor testified that the reason she agreed to proceed with the examination without a representative was, because she believed it would have been a waste of time to have a representative come to the examination and simply sit in the back of the room. She also testified that she did not renew her request for union representation later on during the examination for the same reason. Taylor's reasoning is logical and consistent with having been told that the representative would have to sit in the back of the room and not assist her with answering the questions. Furthermore, the record does not indicate that Taylor was disciplined. Thus, she had nothing to gain by not testifying truthfully. Respondent claims that Taylor agreed to proceed without a union representative *before* she was told that any representative would have to sit in the back of the room and not assist her with her answers. It is contrary to logic that Taylor would make such a statement to the investigator *after* she agreed to proceed without representation.

It was more reasonable, in my view, for Taylor to act as she testified. She undoubtably agreed to proceed without representation in relying on the investigators' statements to her that she could not have a representative because she was a witness and not charged with anything, and that the Union representative could only sit in the back of the room and not assist her. Thus, I credit Taylor's repeated statements that she relied on the investigators' statements because "they're supposed to know things like this."

Assuming that Taylor initially declined representation before the "back of the room" statement was made, it is clear that this statement even then would have caused her to forego renewing her request for representation later in the interview when the investigators began questioning her about her own use of the Internet, again she was relying on the investigators' statements on things that she thought were in their area of expertise. There is no dispute that Taylor was discouraged from having a union representative at some point during the investigation. Since there is no evidence that she asked that the investigation be stopped so that she could obtain representation when the questions began to focus on her, it is reasonable to find that the statement was made before the investigators began to question her at all. Thus, I credit Taylor that she believed it was "absolutely useless" to have a representative come and sit in the back of the room and not assist her with answers, even after the investigation turned to focus on her.

D. The May 29, Interview was an Examination Within the Meaning of Section 7114(a)(2)(B) of the Statute

Respondent contends that the interview of May 29, 1996, was not an examination but an interview. Since the term "examination" under section 7114(a)(2)(B) of the Statute is not limited to formal interrogations of employees the case does present an example of an examination. For the purposes of this case, it is clear that the "examination" involved questioning to secure information that could proceed in a number of different ways, including investigatory interviews like those conducted herein. *National Treasury Employees Union v. FLRA,* 835 F.2d 1446 (D.C. Cir. 1987).

There is no dispute that Respondent's security staff was conducting an investigation into unauthorized Internet activities. It is also undisputed that Taylor was questioned twice in connection with the above investigation on May 22 and 29, 1996, respectively.

Taylor's request for a union representative is also undisputed. Thus, the evidence to be considered is whether or not Taylor had a reasonable belief that discipline might result from the investigatory interview conducted on May 29, 1996, and whether Taylor waived her right to have a union representative at her examination. Those questions are considered below.

E. Taylor Had a Reasonable Belief that Discipline Could Result From the Examination on May 29, 1996

Although Respondent recognizes that Taylor was questioned "about previous information she gave to investigators and whether she had more to add to her original story," it maintains that Taylor could not have reasonably believed that the instant examination would result in disciplinary action. Miller testified that Taylor was told, "We're going to reinterview you because we think you know more than you told us the last time." At that point, according to Miller, Taylor said "she needed or wanted a union rep." Miller's statement, in my opinion, certainly would raise the specter in a reasonable person that discipline might result from or was indeed a possibility, especially since the statement suggests that Taylor was withholding information from the investigators. In my opinion, it would not have been unreasonable for Taylor to suspect that discipline might be forthcoming based on her answers during this examination.

In *Internal Revenue Service v. Federal Labor Relations Authority*, 671 F.2d 560 (D.C. Cir. 1982)(IRS v. FLRA), the court affirmed the

Authority's determination that even though an employee was not the subject of an investigation, the employee nonetheless was entitled to union representation. The court thus validated the administrative law judge's finding that in determining whether an employee reasonably believes that discipline might result from an interview, the relevant inquiry is whether, in light of the external evidence, a reasonable person would conclude that disciplinary action might result from the interview. *Id.* at 563.

Subsequently, the Court further clarified this standard, noting that it is the *possibility,* rather than the *inevitability,* of future discipline that determines the employee's right to union representation. *American Federation of Government Employees, Local 2544 v. Federal Labor Relations Authority,* 779 F.2d 719, 723 (D.C. Cir. 1985)(AFGE, Local 2544) (emphasis in original). The court stated that a union has the right to represent an employee even if the employer does not contemplate taking any disciplinary action against an employee at the time of the interview, since disciplinary action will rarely be decided upon until after the results of the inquiry are known.

In *IRS v. FLRA,* a bargaining unit employee was interviewed by agency inspectors who were investigating possible misconduct by another employee. The interviewee arrived at the investigatory interview with his union representative. The inspectors would not allow the representative to stay, telling the employee that he could not have a union representative because he was not the subject of the investigation. The interview proceeded without the representative and the employee was asked whether certain taxpayer information could have been discovered from papers in the possession of the interviewee. The interview was conducted away from the interviewee's usual workplace, and under oath by two trained investigators. The employee who was interviewed was not disciplined and had no further involvement in the investigation after his interview.

The Court agreed with the judge's finding that the interview was one in which the risk of discipline inhered. In this regard, the Court found that even though the interviewee was not the subject of the investigation, he had custody of certain taxpayer records, which, if handled improperly could have subjected him to discipline. Thus, the Court determined that even though the investigation targeted another employee, that fact did not eliminate the risk that the interviewee could be placed in jeopardy as a consequence of something he said to the inspectors. *IRS v. FLRA,* 671 F.2d at 563. The Court further noted that the location of the interview, and the fact that it was conducted under oath by trained investigators, also contributed to the judge's determination that the employee could have reasonably feared discipline as a consequence of the interview and was therefore entitled to union

representation at the interview.

Like *IRS v. FLRA,* Taylor's investigatory interview on May 29, was one in which the risk of discipline existed. In this case, Taylor was initially informed by the investigators that she could not have a union representative because she was not the subject of the investigation and that she was not charged with anything. Notwithstanding what Taylor was told, the evidence shows that the investigators had reason to believe that Taylor had not been completely forthcoming in her first interview on May 22, and according to Miller, she was told, " we think you know more than you told us the last time." No assurances were given to Taylor that discipline would not occur as a result of the May 29, examination. Furthermore, Taylor would not have known that she was not a suspect simply because she was not given an "oath." Moreover, during the course of the interview the focus of the May 29, 1996, interview shifted to her conduct. Finally, during the May 29 examination, investigator Pittman informed Taylor that he intended to interview, one of the known targets of the investigation and if that individual's answers differed from hers, he would "call [her] up and read [Taylor] her rights."

As in *IRS v. FLRA,* Taylor's examination on May 29, was conducted in a separate building away from her usual workplace, by two investigators, at least one of whom is a trained criminal investigator responsible for investigating allegations of employee misconduct. The investigators also took notes of Taylor's answers. Finally, the evidence shows that Respondent's Table of Penalties prescribes disciplinary actions for a variety of Code of Conduct offenses which could be applied in connection with investigations. The Code of Conduct is distributed to employees. Union President Witherspoon's testimony that Respondent has taken actions against employees who were aware of other employee's misconduct, but who were not the subjects of investigation at the time of inquiry was not challenged.

It is well established that a union has the right to represent an employee in an investigatory interview, even where the employer does not contemplate taking any action against the employee at the time of the interview, because disciplinary action will rarely be decided upon until after the results of the investigation are known. *AFGE Local 2544 v. FLRA,* 779 F.2d at 724. In determining whether an employee reasonably believes that disciplinary action might result from an examination in connection with an investigation, the relevant inquiry is whether, in light of the *external* evidence, a reasonable person would decide that disciplinary action might result from the examination. *Id.* (emphasis in original). Moreover, an employee's subjective state of mind is not relevant in determining whether he or she is entitled to union representation during an examination. *IRS v. FLRA,* 671 F.2d at 563. Even where the employee has been given assurances of no discipline, the inquiry still focuses on the external evidence to determine if a

reasonable person would fear the possibility of discipline. *See AFGE Local 2544 v. FLRA, 779* F.2d at 725.

A somewhat similar matter is *INS, Border Patrol,* where the Authority held that the respondent violated section 7116(a)(1) and (8) of the Statute by making statements which interfered with and coerced a unit employee in the exercise of his right to a union representative pursuant to section 7114(a)(2)(B). There, even though the respondent indicated that it would allow a union representative to be present during the interview, the respondent repeatedly cautioned the employee that having union representation would not be to either his or the representative's advantage and thus, the employee agreed to continue the examination without a representative. The Authority rejected the respondent's claim that its only purpose was to advise the employee of certain facts and protect the integrity of the investigation, noting that the respondent would have only had to caution the employee once to achieve its purpose. The Authority concluded that the respondent discouraged the employee from remaining firm in his request for union representation and had coerced the surrender of that protection. *INS, Border Patrol,* 36 FLRAat 51-52.

The record in this case reveals that similar intimidation tactics were used on May 29, 1996, to persuade Taylor to forego union representation and thereby coerced her. Miller testified that in response to Taylor's request for Union representation for the May 29, 1996, examination, she was told, "no, you're here as a witness, not a subject." Miller testified that he then asked Taylor why she believed she needed a representative. It is undisputed that one of the investigators stated that, even though they could stop the interview to allow a representative to arrive, the representative would have to sit in the back of the room. Miller even recalled Pittman pointing to the back of the room. The handling of Taylor's requests for representation appears to have been designed to dissuade her from obtaining assistance during the examination. Thus, the investigators while assuring her on one hand that she was not a subject, threatened her on the other hand with possible prosecution if she gave the wrong answers. Similarly, there is no question that one of the investigators told Taylor that the representative would not be allowed to assist with her answers, and would simply be a presence in the back of the room.

The external evidence discloses that Taylor could reasonable believe that disciplinary action might result from the May 29, 1996, examination. Again it is noted that, possibly Taylor was informed before the examination that she was being reexamined because the investigators believed that she may have withheld information during her earlier interview on May 22. Further, it is undisputed that Taylor was told twice during the examination, that if her answers did not match those of another employee's, Investigator Pittman intended to call her up and "read her rights." Taylor also testified that she left the examination on May 29, believing that Pittman had threatened her job. In addition, the Respondent's history of disciplining employees who were not the targets

of investigations is undisputed. Lastly, Pittman's threat fully validates the Court's determination that disciplinary action will rarely be decided upon until after the results of an inquiry are known.

In all these circumstances, it was certainly reasonable for Taylor to conclude that disciplinary action might occur as a result of the examination. Accordingly, it is found that since Taylor could and did reasonably believe that discipline might result from the examiniation, she was entitled to have a union representative present during the May 29, examination.

F. Did Taylor Waive Her Right to a Union Representative at the May 29, 1996, Examination?

It is inviolable that the waiver of a statutory right to union representation pursuant to section 7114(a)(2)(B) of the Statute must be clear and unmistakable. *U.S. Department of Labor, Mine Safety and Health Administration*, 35 FLRA 790, 805 (1990) (Department of Labor). This long standing principle makes it clear that the right to a union representative under section 7114(a)(2)(B) is designed to prevent intimidation by an agency. *See INS, Border Patrol,* 36 FLRA at 52. Consequently, the Authority will not infer a waiver of that statutory right unless there is a clear indication that the very tactics the right is meant to prevent were not used to coerce a surrender of protection. *Id.*

In view of the responses by the investigators' to her request for representation, it was also reasonable for Taylor to legitimately conclude that it would be a waste of the representative's time to simply sit in the back of the room and not be able to assist her. Taylor testified credibly and repeatedly that she relied on the investigators' statements about her entitlement to union representation because, "they're supposed to know things like this." As a result, she agreed to go forward with the examination without a representative. Case law is clear however that after an employee makes a valid request for union representation in an investigatory interview, the employer must: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview. *Department of Labor,* 35 FLRA at 803. The evidence shows that Respondent did none of those things, but instead proceeded with the examination. Accordingly, it cannot be inferred from the facts in the instant matter that Taylor clearly and unmistakably waived her right to union representation in this matter. Thus, it is found that no waiver exists herein.

In addition, Respondent alleges that Taylor was familiar with the right to union representation by virtue of her prior IG experience, and that she rejected the investigators' offer to allow her to obtain representation. The record evidence does not support this assertion.

Taylor is a GS-11, Management Analyst, a position she has held for nine years. Her background is in security and computers. There is no evidence in the record to suggest that Taylor has knowledge regarding the requirements of section 7114(a)(2)(B) of the Statute, or that she has any background in Federal sector personnel or labor law. Rather, the record reflects that at best, Taylor has nothing more than a vague awareness that employees can have union representation during investigations. Indeed, Taylor testified that all she knew about the right to union representation was that she was told after an IG investigation that employees are "allowed to have a union representative . . . at an investigation to answer questions."

The very fact that Taylor relied on the investigators' statements that she was a witness and not the subject of the investigation indicates that Taylor had very little knowledge at all about the requirements of section 7114(a)(2)(B).

Further, there is no evidence to suggest that Taylor has any technical knowledge of the term "disciplinary action."[(6)] Indeed, when asked what she believed disciplinary action to be, Taylor testified that she considered discipline to be "two or three days on the street" or a "reprimand." Taylor further testified that she believed being fired from her job to be something different from disciplinary action. Accordingly, Respondent's attempt to attribute knowledge of the requirements of section 7114(a)(2)(B) of the Statute to Taylor is therefore, rejected.

Since Respondent has failed to establish that Taylor waived her right to union representation, it is found that Respondent violated section 7116(a)(1) and (8) of the Statute by making certain statements which coerced and intimidated Regina Taylor into forgoing union representation at an examination in connection with an investigation on May 29, 1996. In light of the foregoing, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Letterkenny Army Depot, Chambersburg, Pennsylvania, shall:

1. Cease and desist from:

(a) Interfering with the right of its employees represented by the National Federation of Federal Employees, Local 1442, to union representation at examinations in connection with investigations.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured them by the Federal Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Statute:

(a) Post at its Letterkenny Army Depot, Chambersburg, Pennsylvania facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commanding Officer, Letterkenny Army Depot, Chambersburg, Pennsylvania, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

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

Issued, Washington, DC, April 10, 1997.

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ELI NASH, JR

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

WE NOTIFY OUR EMPLOYEES THAT:

The Federal Labor Relations Authority has found that Letterkenny Army Depot, Chambersburg, Pennsylvania, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE WILL NOT discourage and intimidate any bargaining unit employee from requesting representation by the National Federation of Federal Employees, Local 1442, during an examination in connection with an investigation if the employee reasonably believes that the examination might result in disciplinary action against the employee and the employee requests such representation.

WE WILL NOT require any bargaining unit employee of the Letterkenny Army Depot, Chambersburg, Pennsylvania, to take part in an examination in connection with an investigation without the assistance of his or her union representative when such 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 our employees in the exercise of their rights assured them by the Federal Service Labor-Management Relations Statute.

_____

(Activity)

Dated: _____ By: _____ (Signature)
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Boston Regional Office, Federal Labor Relations Authority, whose address is: 99 Summer Street, Suite 1500, Boston, MA 02110-1200, and whose telephone number is: (617) 424-5730.

1. The charge in this matter was filed in the Boston, Massachusetts Regional Office, the matter however, was transferred to the Washington Regional Office on September 11, 1996.

2. The complaint also alleged an independent violation of section 7116(a)(1) of the Statute which the General Counsel withdrew at the hearing.

3. While Taylor testified that the discussion about her prior IG experience took place on May 29, 1996, Miller recalled that they discussed the previous IG investigation on May 22, 1996. At the very least, their testimony confirms that such an exchange actually took place.

4. There is no evidence that Miller is the only official at the Respondent's facility with the authority to recommend or even require discipline of Taylor, therefore, it is unnecessary to decide which of the Respondent's officials would be responsible for administering discipline to Taylor.

5. If the Respondent intended to allow Taylor to have a representative present, then there was no need to tell her where the representative would have to sit. The statement required Taylor to read between the lines and could reasonably have been construed by Taylor to mean that having a union representative would be a waste of time.

6. Disciplinary action is a technical term which commonly refers to admonishments confirmed in writing, written reprimands, and suspensions up to 14 days. Severe disciplinary actions, such as suspensions of 15 days or more, reductions in grade and removal, are referred to as adverse actions, but are disciplinary actions nonetheless. *See United States v.*

Fausto, 484 U.S. 439, 445–47 (1988).