

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: April 11, 2006

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: DEPARTMENT OF TRANSPORTATION

Respondent

and
CA-03-0340

Case No. AT-

NICHOLAS SCIARTELLI

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcripts, exhibits and any briefs filed by the parties.

Enclosures

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DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION JACKSONVILLE ARTCC HILLIARD, FLORIDA Respondent	
and NICHOLAS SCIARTELLI Charging Party	Case No. AT-CA-03-0340

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before MAY 15, 2006, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20005

RICHARD A. PEARSON
Administrative Law Judge

Dated: April 11, 2006
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
Washington, D.C.

DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION JACKSONVILLE ARTCC HILLIARD, FLORIDA Respondent	
and NICHOLAS SCIARTELLI Charging Party	Case No. AT-CA-03-0340

Brent S. Hudspeth, Esquire
Brad A. Stuhler, Esquire
For the General Counsel

Barbara A. Ellison
For the Respondent

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423 (2005).

Nicholas Sciartelli (the Charging Party or Sciartelli) initiated this case on February 14, 2003, when he filed an unfair labor practice charge against the Federal Aviation Administration, Jacksonville ARTCC. Sciartelli amended his charge on May 5, 2003. After investigating the charge, the Regional Director of the Authority's Atlanta Region issued a complaint on October 29, 2003, against the Department of Transportation, Federal Aviation Administration, Jacksonville ARTCC, Hilliard, Florida (the Respondent or Agency). The complaint alleges that the Respondent failed to comply with section 7114(a)(2)(B) of the Statute, thereby violating section 7116(a)(1) and (8), by denying Sciartelli's request for union representation at an examination in connection with an investigation. The

complaint further alleges that the Respondent improperly questioned Sciartelli's use of official time, in violation of section 7116(a)(1). The Respondent filed an answer to the complaint, admitting some of the factual allegations but denying that it committed an unfair labor practice.

A hearing was held in Jacksonville, Florida, at which all parties were represented and afforded the opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The General Counsel and the Respondent subsequently filed post-hearing briefs, which I have fully considered.

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

FINDINGS OF FACT

The Professional Airways Systems Specialists (PASS) is the exclusive collective bargaining representative for a nationwide unit of certain employees of the Federal Aviation Administration (FAA), and PASS and the FAA are signatories to a collective bargaining agreement covering those employees. Among the FAA's organizational components are Air Route Traffic Control Centers (ARTCCs) located at most major airports, and regional System Maintenance Offices (SMOs). The events of this case primarily occurred at the FAA's Jacksonville ARTCC, whose SMO employees are managed by officials in the regional SMO headquarters in Tampa.

The incident at the center of this case was a meeting that occurred in the early afternoon of August 19, 2002, between Patrick McQueen, manager of the Automation Unit of the Systems Support Center (SSC) of the SMO, and Mr. Sciartelli, a software specialist working in McQueen's unit. Sciartelli was also the PASS representative who serviced the entire Tampa SMO.² At that meeting, McQueen allegedly made improper comments to Sciartelli about his use

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All dates are in 2002, unless otherwise stated.

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The PASS organizational structure parallels that of the FAA; accordingly, there are two levels of management and union officials below the SMO level, who handle grievances and other issues that arise at the facility (ARTCC) level and in each unit (such as the SSC) within the facility. Sciartelli primarily dealt with the SMO manager and assistant manager in Tampa on matters that reached that level, but he would sometimes step in when local union representatives were not available. Tr. 39-42, 64-66.

of official time and denied Sciartelli's requests for a union representative.

According to the testimony presented by witnesses for the General Counsel, the events of August 19 began with a series of discussions that morning between Mr. McQueen and another employee in the Automation Unit, James Prosser, concerning Prosser's requests to attend Agency-sponsored training. Prosser felt that McQueen was not approving training he needed to advance his career, and he consulted with Sciartelli on August 19 to see what the Union could do to help him on this issue. Tr. 21-23, 113-15. Although Sciartelli did not speak directly to McQueen about Prosser's problem that morning (Tr. 81), Prosser shuttled between Sciartelli and McQueen, trying to get his problem resolved, without success. Finally, Sciartelli phoned his management counterpart in the Tampa SMO, Levon Garden. Sciartelli and Prosser explained the training dispute to Garden and asked for Garden's help; Garden allegedly told them that he would "handle it" (Tr. 25) or "look into it" (Tr. 115), and the discussion ended. This series of conversations occurred roughly between 7:30 and 10:00 a.m. Tr. 26, 81.

At approximately 12:30 that afternoon (2:00, according to McQueen), as Prosser and Sciartelli were finishing their lunch in the break room of the facility, McQueen came down to the area and asked to speak to Prosser in the hallway. Tr. 25. According to Prosser, McQueen told him of the availability of a "pop-up" training session beginning in September; Prosser replied that he doubted he could attend that session on such short notice, and this allegedly caused McQueen to become angry with him. Tr. 116. Prosser testified that McQueen also told him that there was "no reason to call Von Garden with training issues; he doesn't have anything to do with the selections". Tr. 117. At about that moment, Sciartelli walked out of the break room, causing McQueen to call out that he wanted to talk to him in his (McQueen's) office. Tr. 26-27, 116.

For his part, McQueen agreed that he met at length with Sciartelli on the afternoon of August 19, but he could not recall having any discussions with Prosser that day about training or related issues. While he conceded that he might have mentioned something to Prosser off-the-cuff about a pop-up class or a work detail that morning, he had no specific recollection of it. Tr. 151-55. He further denied receiving a call from Mr. Garden or anyone else in management about training for Prosser that day. Tr. 134, 155. He testified that he was in the break room at about 2:00 p.m., saw Sciartelli there, and told Sciartelli he needed to talk with him about a modification to the WARP

computer software system that Sciartelli was responsible for. He denied having any conversation with Prosser at that time. Tr. 134-35. McQueen and Sciartelli went upstairs to McQueen's office, where they met one-on-one for 30 to 45 minutes. Tr. 84, 138-39, 172.

In their testimony, McQueen and Sciartelli painted entirely different pictures of what was actually said during their meeting. According to Sciartelli, "the conversation started with accusations of me, of why certain jobs weren't done and what I was doing, and how come certain things weren't accomplished." Tr. 27. "He was talking very fast. I tried to interject and say, I tried to do this, and I was doing this, and I worked on that, but I had nothing to do with this. And he would talk . . . over me." Tr. 28. Sciartelli further testified that at this point in the conversation (Tr. 28-29):

[McQueen] also was bringing up the fact that - - asking me if I had itemized my time that I was spending as a union representative. He asked me if I was putting it down on my T&A. He asked me and accused me of spending too much time as a union rep and not being able to accomplish these tasks.

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At this point, I was trying to answer his questions, because I felt that, you know, possibly there was concern over it and that maybe we could come to some kind of agreement or somehow be able to - - there was going to be a positive effect on this. But after about five to seven minutes of this conversation, I knew that this was a derogatory inquisition basically, that these - - I wasn't given enough time to even respond to these questions. . . . I felt that it was nothing more than a derogatory meeting. . . . I had no doubt really that at this point that this was going to turn into some kind of disciplinary action

Sciartelli testified that he then asked for union representation for the first time, but that McQueen told him he didn't need one. Tr. 30. As the conversation continued, Sciartelli testified, McQueen "got terribly insulting." McQueen called him "an f-ing joke . . . f-ing worthless . . . an f-ing clown." *Id.* Sciartelli again asked for union representation, and was again told that he didn't need one. Tr. 30-31. Sciartelli began to get physically ill, with a severe headache and stomach pain, his

eyes twitching and his hands trembling. He told McQueen he needed to leave because he was sick, but McQueen jumped up, slammed the office door shut and ordered him to sit down. Tr. 31-32. He asked for union representation and was denied a third time, but finally Sciartelli was feeling so sick that he simply walked out of the office. He went down to the flight surgeon's office, but no doctor was on duty. The nurse there took his blood pressure, told him it was "198 over 130-plus" and told him to see a doctor as soon as possible. Tr. 33-34.

According to McQueen, however, it was Sciartelli, not he, who became angry and loud at the meeting. He said that the WARP software system was part of a high-profile project that was being implemented nationally by the FAA to take live weather data from radar and to present it to all the air traffic controllers at their work stations. Tr. 135-38. It involved new technology, and Jacksonville was the second site in the country to utilize it. Tr. 136-37. McQueen's unit maintains and supports the DSR software system, which was being connected to the WARP system, and McQueen said he had assigned Sciartelli the job of implementing the modifications (referred to as the SSM or system support modification) in July. Tr. 138, 139. On August 19, McQueen was trying to find out what Sciartelli had been working on that day, and how the WARP modifications were progressing. Tr. 141; Resp. Ex. 2, p. 1. When Sciartelli told him he was working on some problems other than the WARP modifications, they discussed those problems in some detail, and McQueen tried to emphasize the priority of the WARP SSM. *Id.*

In the file memo that McQueen wrote immediately after his August 19 meeting with Sciartelli, McQueen admitted that both he and Sciartelli became "frustrated with each other" as the conversation proceeded: he felt that "Nick has 'dropped the ball'", while Sciartelli felt that McQueen was trying to blame him "for something that is not his responsibility." Resp. Ex. 2, p. 2. In the second half of the meeting, Sciartelli began to raise his voice louder, prompting McQueen to get up and close the office door, but McQueen denied that he raised his own voice or used any profanity. Tr. 143. McQueen told Sciartelli that he had given the SSM to him and that it had not been completed. At that point, Sciartelli told McQueen "he did not have to sit here and listen to my disparaging remarks." *Id.* Sciartelli then said he was taking sick leave immediately and left the office. McQueen insists that Sciartelli never asked for union representation during the meeting, and that he never

denied such a request.³ Tr. 141-42. McQueen also denied saying anything to Sciartelli linking his activity as a union representative to his work performance. Tr. 142. A few minutes after Sciartelli left McQueen's office, Sciartelli gave McQueen some worker's compensation forms and said he needed to go to the doctor. Tr. 144, Resp. Ex. 2, p. 3.

Beginning on the afternoon of August 19, Sciartelli was out of work on sick leave and worker's compensation until some time in October. Tr. 73. On one of his worker's compensation forms, he described his conditions as "physical stress and trauma, mental stress and trauma, loss of sleep/nightmares, [and] reoccurrences/flashbacks." Resp. Ex. 1. He testified that this was all as a result of the August 19 incident at work, and that during his absence he was treated by psychiatrists, psychotherapists and cardiologists. Tr. 74.

Prosser also testified that he saw Sciartelli later in the afternoon of August 19, at which time Sciartelli "looked bad . . . he was trying to describe to me what had just happened, and it was just very short, choppy sentences. His thought process wasn't complete." Sciartelli told Prosser that McQueen had "berated" him "for being worthless" and made some reference to Sciartelli being Italian, "but he did not specifically tell me what was said." Tr. 118-19.

Two employees who work in the area immediately outside McQueen's office also testified for the Agency. Deborah Robertson, the facility manager's secretary, and Kay Davis, a program analyst who also has labor relations responsibilities for the Agency, testified that they were working a short distance from McQueen's office on the afternoon of August 19, and that they overheard pieces of

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McQueen testified that as they discussed Sciartelli's work on the WARP modifications, he became aware of a different problem. Sciartelli told him that he had been "looking into new drives on the SDARC[.]" Resp. Ex. 2, p. 1; see also Tr. 140. As they discussed what Sciartelli had been doing on this other software system, McQueen learned that Sciartelli had not made certain log entries that he had been instructed to perform "months ago". Resp. Ex. 2, p. 2. At this point in the meeting, McQueen testified that he told Sciartelli they would need to meet at some later time about that issue, and that Sciartelli should bring his union representative with him to that meeting. Tr. 140-41. According to McQueen, that was the only time on August 19 that the issue of union representation was mentioned by either of them.

McQueen's meeting with Sciartelli. They could not hear the substance of what was being discussed, but both of them identified Sciartelli's voice as being loud and McQueen's as not being loud. Tr. 178, 186-87. Ms. Davis saw McQueen get up during the meeting and close his door. Tr. 188. After Sciartelli left McQueen's office, he spoke briefly to Ms. Robertson, who felt he appeared angry. Tr. 179.

Mr. Sciartelli did not register any official complaint about McQueen's conduct immediately after August 19, but in one of the worker's compensation forms he completed (dated as "originally submitted 9/1/02"), he stated that his medical problems were "caused by meeting with supervisor". Resp. Ex. 1, p. 1. In the narrative description of the events of August 19, which he attached to that form, he stated that McQueen had made "verbal assaults" on his "virtue as a man and my ethnicity." *Id.* at p. 3. Sciartelli further stated that during the meeting he got "a terrible headache", he became hot and sweating and shaking and told McQueen he had to leave. McQueen refused to allow him to leave and blocked the door, but Sciartelli finally left anyway. *Id.* at pp. 3-4.

Finally, Hector Ramirez, the assistant SMO manager, testified at the hearing. He worked closely with Mr. Garden, the SMO manager, on administrative and labor matters, and Mr. Sciartelli was the union official they generally worked with. Ramirez testified that he did not receive a call on August 19 about McQueen denying training to Prosser, but that he heard about the issue around that date, perhaps from Garden. Tr. 199, 219-21. (Garden himself was unable to testify, because he was on extended sick leave at the time of the hearing. Tr. 198.) While he did not know specifically what happened with regard to Prosser's complaint, Ramirez and Garden generally contact the Jacksonville facility manager or Kay Davis to follow up on such complaints. Tr. 221.

After August 19, Ramirez heard that Sciartelli had gone on medical leave following a dispute with his supervisor, and he phoned Sciartelli at his home to express his best wishes, but neither Ramirez nor Sciartelli discussed the details of the McQueen-Sciartelli incident. Tr. 213-14. Sciartelli complained to the Agency about McQueen's actions for the first time in early November, shortly after Sciartelli returned to work. Ramirez and Garden traveled to Jacksonville to discuss a variety of pending labor issues with Sciartelli, and at the end of that meeting Sciartelli told them about his August 19 encounter with McQueen. Tr. 34-37, 199-202. Sciartelli read the narrative description of the incident that he had attached to his

worker's compensation form (Resp. Ex. 1, pp. 3-4), in a "very intense manner." Tr. 201. In these respects, the accounts of the November meeting given by Ramirez and Sciartelli were in accord. But whereas Sciartelli testified that he expanded on his written statement by telling Ramirez that McQueen had refused to allow him to have a union representative (Tr. 36-37), Ramirez testified that Sciartelli basically stuck to his written account and stated that he had witnesses but refused to identify them (Tr. 201-02). After that November meeting, Ramirez sent Sciartelli a letter asking for more details about the August 19 incident, but Sciartelli didn't respond. *Id.* On February 14, 2003, however, Sciartelli filed his unfair labor practice charge against the Agency.

DISCUSSION AND CONCLUSIONS

Issues and Positions of the Parties

The General Counsel alleges that the Respondent, through McQueen, committed two unfair labor practices during the August 19 meeting: it improperly denied Sciartelli his right to have a union representative assist him at the meeting, and it coercively interrogated Sciartelli about his union activity, linking his protected activity to his perceived work deficiencies.

With regard to the alleged denial of union representation, the Respondent asserts both a factual and a legal defense. It insists that Sciartelli never asked for representation, and it further argues that he would not have been entitled to it, even if he had. Respondent submits that while McQueen was trying to obtain information from Sciartelli on August 19, he was not engaged in an investigation of any suspected misconduct. Thus, it argues, the meeting was not an "examination . . . in connection with an investigation" within the meaning of section 7114(a)(2)(B) of the Statute, and Sciartelli had no reasonable grounds to believe that it might result in disciplinary action against him. The General Counsel, however, urges that Sciartelli's account was more credible than McQueen's, and that the meeting met the statutory criteria of section 7114(a)(2)(B).

Both the General Counsel and the Agency appropriately cite *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403 (9th Cir. 1978), to support their legal position. In that case, the Circuit Court enforced an NLRB ruling that employees were entitled to union representation at "informal counseling sessions" conducted by management with employees with a record of low productivity. Although the company had

emphasized the informal and nondisciplinary nature of the sessions when it began them, the Board and the court noted that the sessions were expressly set up as a preliminary step that would lead to formal discipline if the employee did not improve, and that the supervisors conducting the sessions asked the employees questions regarding any reasons for their low productivity. Thus, the counseling sessions were investigatory in nature and were part of the disciplinary process. Here, the General Counsel argues that McQueen questioned Sciartelli, and that Sciartelli could have been disciplined for poor work if he did not answer the questions to McQueen's satisfaction. The Respondent argues, however, that this was more in the nature of a "run-of-the-mill shop-floor conversation" that had neither an investigatory nor a disciplinary component to it. See, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 257-58 (1975), citing *Quality Mfg. Co.*, 195 NLRB 197, 199 (1972).

With regard to McQueen's alleged comments to Sciartelli about his union activity, the dispute between the parties is primarily a factual one. The Respondent simply denies that the allegedly threatening statements were made by McQueen. The General Counsel points to Sciartelli's assistance of Prosser the morning before the meeting, and it urges me to "connect the dots" between Prosser's training grievance, Sciartelli's phone call to Garden, McQueen's comment to Prosser that there was "no reason to call Von Garden with training issues," and McQueen's verbal assault on Sciartelli. The GC also argues that because Sciartelli became so upset and ill after the confrontation with McQueen, McQueen's behavior could not plausibly have been as mild as he described. The Respondent counters that Sciartelli's credibility (regarding both the *Weingarten* issue and the threat) is undermined by his failure to mention either allegation in his worker's compensation claim or at any point between August 19, 2002 and February 14, 2003.

Analysis

The Weingarten Allegation

Section 7114(a)(2)(B) of the Statute requires an agency to give an exclusive representative

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 in

disciplinary action against the employee; and
(ii) the employee requests representation.

Section 7114(a)(2)(B) expressly grants to federal employees the right that was first extended to private sector employees as an implied right by the National Labor Relations Board and approved by the Supreme Court in *Weingarten, supra*. Because of the link between 7114(a)(2)(B) and *Weingarten*, the Authority has often referred to decisions under the National Labor Relations Act in applying this statutory provision. See, e.g., *U.S. Department of Justice, Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C.*, 55 FLRA 388, 393-94 (1999).

In order for the right to union representation to attach under section 7114(a)(2)(B), four elements must be met. There must be an examination of an employee; the examination must occur in connection with an investigation; the employee must reasonably believe that the examination may result in disciplinary action; and the employee must request union representation. *Social Security Administration, Albuquerque, New Mexico*, 56 FLRA 651, 655 (2000) (SSA).

In the case at bar, the undisputed evidence indicates that on the afternoon of August 19, McQueen wanted to ascertain the status of the modifications to the WARP software system, a high-priority nationwide project, and that he began by asking Sciartelli what he was currently working on. When McQueen learned that Sciartelli was doing work other than the WARP modifications, they discussed those other jobs in some detail; McQueen then instructed Sciartelli to give immediate priority to the WARP SSM.

Considering these facts and the other circumstances surrounding this meeting, it is clear that McQueen was "examining" Sciartelli: McQueen himself testified that he began by asking questions of Sciartelli and that he was trying to find out how much progress had been made on the WARP modifications. But it is not at all clear that McQueen's questions were in connection with an "investigation," in any sense of that term. Further, Sciartelli did not have a reasonable basis for believing discipline might result from the meeting. The line between normal supervisory diligence and an investigation is often blurry, as it is here, but a proper application of the case law indicates that this was not the sort of discussion that triggered the *Weingarten* right to union representation.

In the earliest years of the Statute, the Authority recognized that almost any discussion between a supervisor

and employee has the potential of forming the basis of future discipline, but it cautioned that the mere potential for discipline is not enough to constitute an investigatory examination. See, e.g. *Internal Revenue Service, Detroit, Michigan*, 5 FLRA 421, 435 (1981), where it was held that a performance evaluation reviewing all of an employee's work over the previous year did not trigger the right to union representation. In *Norfolk Naval Shipyard*, 14 FLRA 82, 95 (1984), the ALJ (affirmed by the Authority) noted that courts have not required *Weingarten* representation when the purpose of the meeting is "supervisory rather than investigatory, e.g. where the meeting is designed simply to show an employee how to improve his work performance." (Emphasis in original court decision cited by the ALJ, *Lennox Industries, Inc. v. NLRB*, 637 F.2d 340, 343-44 (5th Cir. 1981).) In the *Alfred M. Lewis* decision, *supra*, 587 F.2d at 410, the Ninth Circuit noted:

It should be acknowledged that a supervisory interview in which the employee is questioned or instructed about work performance inevitably carries with it the threat that if the employee cannot or will not comply with a directive, discharge or discipline may follow; but that latent threat, without more, does not invoke the right to the assistance of a union representative.

Many of the decisions finding 7114(a)(2)(B) violations share some common fact patterns. Typically, an incident has occurred which has caused management to believe that some type of misconduct may have occurred; an official representing the agency then questions an employee who may have been involved in the incident; often, a higher-level manager or a trained investigator conducts the meeting. Thus in *Norfolk Naval Shipyard, supra*, an employee who had already refused a supervisor's order was called into the office of a third-level supervisor, who tried to persuade the employee to carry out the order. This was found to be an investigatory examination, not just an attempt at directing the employee, because the employee was already accused of having committed misconduct, and a higher-level manager was utilized. 14 FLRA at 95-97. See also *Department of the Naval, Norfolk Naval Base, Norfolk, Virginia*, 14 FLRA 731, 745-47 (1984). Similarly, in *SSA, supra*, 56 FLRA at 654, the employee's supervisor told her she wanted to meet with her after lunch about an "incident" that had just occurred, and the subsequent meeting was held with the section manager.

The factors cited above distinguish those cases from the circumstances surrounding the McQueen-Sciartelli

meeting. Sciartelli's testimony did not contradict McQueen's description of the general purpose of the meeting: i.e., that McQueen needed to find out the status of the WARP modifications. In this sense, McQueen was certainly questioning him and thus conducting a form of examination, but there was nothing "investigatory" about it. McQueen was simply exercising his responsibility as a supervisor to ascertain what projects his employees were working on, and to make sure that the highest-priority projects got the most urgent attention. There was no evidence to suggest that Sciartelli had been accused or suspected of any type of misconduct. It is clear from the record that the software specialists in McQueen's unit are responsible for many different types of assignments on many different systems, and a routine part of McQueen's job is to make sure these employees focus on the most important or most urgent assignments first. That was what McQueen was trying to do on the afternoon of August 19. While there is always the possibility that an employee who is found to be doing work he shouldn't do, or in an improper manner, will be disciplined, that possibility here never went beyond the "latent" state; *Alfred M. Lewis, supra*, 587 F.2d at 410. Accordingly, the purpose of the meeting was supervisory, not investigatory. The examination was not in connection with an investigation, and Sciartelli had no objective basis to fear that he would be disciplined; therefore, he was not entitled to union representation under section 7114(a)(2)(B).

The Threat Allegation

In light of the above finding, it is not strictly necessary for me to determine whether Sciartelli requested union representation at the August 19 meeting. However, in order to determine whether McQueen coercively interrogated Sciartelli about his union activity, I must resolve an intractable credibility dispute between the two men. The facts surrounding the alleged *Weingarten* violation and the alleged threat are inextricably entwined in this regard, as they occurred nearly simultaneously, during the same conversation. Crediting one man's testimony here unavoidably means discrediting the other, and this is equally true for the *Weingarten* allegation as it is for the threat allegation. As I will explain, I find McQueen's account of the events of their meeting more credible than Sciartelli's, and thus I conclude that he did not link Sciartelli's work performance to his union activities or otherwise threaten, coerce or interfere with Sciartelli's protected rights. For similar reasons, I do not believe that Sciartelli asked for union representation during the meeting. I make this latter finding explicit, because it is

relevant to the alleged threat as well as the alleged *Weingarten* violation, and in order to avoid a remand if the Authority were to disagree with my prior conclusion that Sciartelli was not entitled to union representation at the August 19 meeting.

First, it should be noted that the General Counsel sought to buttress Sciartelli's credibility by making some broad accusations about McQueen. From the first sentence of its opening argument at the hearing, the GC sought to portray McQueen as a "bully boss," a person who supervised through intimidation. Tr. 10. Sciartelli and Prosser testified that McQueen's denials of training and other decisions relating to Prosser and other employees were part of a pattern of McQueen retaliating against employees. Tr. 24, 111-112. These accusations were never supported by evidence, however, and on the contrary, they detract from Sciartelli's and Prosser's credibility. I am left with the impression, particularly from Sciartelli's testimony, that when he could not ascertain a reason for a supervisor's decision, he would attribute the decision to retaliation or anti-union bias. His readiness to assume hostility from McQueen correspondingly affected his responses to McQueen's legitimate attempts to discuss Sciartelli's work assignments.

The General Counsel made a similarly excessive leap of logic in its post-hearing brief. Citing Sciartelli's illness "as a result of [the August 19] meeting" and the fact that he then missed over a month of work, the GC argues that "a reaction of this nature does not just happen. It is evident that the August 19 meeting did not transpire in the manner in which McQueen would have us believe." Post-Hearing Brief at 5. Although it was demonstrated that Sciartelli had very elevated blood pressure at the end of the meeting and subsequently missed a great deal of work, there was no proof (other than the bare allegation to that effect in Sciartelli's OWCP claim) that his medical symptoms were "as a result of" the meeting with McQueen or due to any direct actions by McQueen himself. There was no actual medical evidence offered by either party in our hearing, and it is impossible to tell, from the record before us, what caused Mr. Sciartelli to become as sick as he did. It is equally, if not more, plausible to me that Sciartelli's extreme symptoms were due to an entirely different cause (such as a pre-existing medical condition) than the words exchanged between him and McQueen.

This brings me to the very perplexing questions at the heart of this case. Sciartelli was an experienced union steward who had served as the union's representative to SMO

management for at least seven years prior to the incident in dispute. He had been involved in many disagreements with supervisors before August 19. This makes his reaction to the dispute with McQueen on that date all the more surprising and difficult to assess. While the exact nature and degree of Sciartelli's medical condition on August 19, and in the weeks thereafter, cannot be evaluated on the evidence in this record, it is clear that he became acutely ill that afternoon and required medical treatment for at least two more months. Even if McQueen said all the things Sciartelli alleges, and used profanities attacking his character and his ethnicity, that would not explain the extreme and prolonged nature of Sciartelli's medical symptoms. This was evident even at the hearing, which took place more than a year and a half after the August 19 incident. When testifying about his meeting with McQueen, Mr. Sciartelli was moved to tears on several occasions. In my long career handling labor relations cases, I have never seen an employee so emotionally affected by a dispute with a supervisor, much less one that resulted in no disciplinary action whatever. Sciartelli's response seems significantly out of proportion to the incident itself, and it further leads me to believe that the physical and psychological symptoms he experienced on August 19 were attributable to factors other than Mr. McQueen's behavior.

I mentioned above that Sciartelli seemed predisposed to assume that a supervisor's (or at least McQueen's) denial of an employee's request was due to discrimination or retaliation. After meeting with Prosser on the morning of August 19, and after Prosser was unable to resolve his complaint on discussing it further with McQueen, it was "obvious" to Sciartelli that McQueen was singling out or retaliating against Prosser. Tr. 24. Moreover, this was not an isolated incident in Sciartelli's view but a pattern of McQueen's "bad behavior," which Sciartelli felt he needed to "stop" by contacting the SMO manager. Tr. 111-12. It is further revealing that Sciartelli understood that McQueen was a relatively new supervisor and thus was "under the microscope so to speak". Tr. 111. If indeed McQueen was a bully who was singling out Prosser or other employees, there is no actual evidence of that here. It seems instead that Sciartelli was unduly suspicious of McQueen before he even met with McQueen that afternoon, and as a result he over-reacted to his supervisor's words.

This impression is buttressed by Sciartelli's testimony describing the actual meeting with McQueen. In describing McQueen's questioning him about the projects he was working on, Sciartelli repeatedly characterized them as "accusations." Tr. 28-29. He never actually described in specific terms the issues and questions that McQueen had

about the various projects and software systems, in contrast to McQueen, who provided considerable detail about precisely what he was trying to ascertain, and about Sciartelli's assignments that appeared to be uncompleted. Tr. 135-38; Resp. Ex. 2. Even when describing the words McQueen allegedly used to insult him, Sciartelli often was less than specific. The one instance in which he was specific was when he said McQueen called him "an f-ing joke . . . f-ing worthless . . . an f-ing clown." Tr. 30. But more often, Sciartelli just referred to "insults" attacking his "character." Resp. Ex. 1. Rarely did he directly quote full statements made by McQueen, and as a result it is extremely difficult to understand the actual context of McQueen's comments. This is particularly true with regard to McQueen's alleged questioning of Sciartelli's use of official time for union work and his alleged accusation that the "failure of the projects [was] due to my union activity." Tr. 29.

I do not doubt that by the time the McQueen-Sciartelli meeting on August 19 ended, both participants were upset and that they both may have used heated language, but I do not believe the General Counsel has proved that McQueen attributed Sciartelli's work deficiencies to his union activity, or that McQueen refused to allow him to have a union representative at the meeting. In and of themselves, the allegations that McQueen used profanity or insulted Sciartelli, or even his ethnicity, do not constitute violations of section 7116(a)(1), although I realize here that if these accusations were proven, they would impeach McQueen's testimony and buttress Sciartelli's. The evidence here is simply not persuasive to show that McQueen used any specific, unlawful language during the meeting, or particularly that McQueen referred to Sciartelli's union activity in a threatening manner.

It is certainly true, as the General Counsel asserts, that a supervisor's comments linking the use of official time to an employee's work deficiencies may violate the Statute. *See, e.g., U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1034 (1994). Such statements may, in a particular context, communicate to an employee the message that protected activity will hinder his career advancement. But the circumstances surrounding the statement, and the actual words and their context, are also important in evaluating whether the supervisor's statement was coercive. *Compare, e.g., Veterans Administration, Washington, D.C. and Veterans Administration Medical Center and Regional Office, Sioux Falls, South Dakota*, 23 FLRA 123 (1986) (words found to be threatening), *with Department of the Air Force, Scott*

Air Force Base, Illinois, 20 FLRA 761, 764 (1985) (words found to be lawful). In my opinion, Sciartelli's testimony about what McQueen said about his union activity was simply not specific enough to convince me that McQueen violated section 7116(a)(1). Sciartelli first testified that McQueen asked him if he had itemized the time he was spending as a union representative and whether he had put it down on his time and attendance sheets. Tr. 28. He then said McQueen "accused me of spending too much time as a union rep and not being able to accomplish these tasks." Tr. 28-29. McQueen denied making such comments. Tr. 142. I am not persuaded that McQueen made the union-related statement described by Sciartelli. I cannot say for certain whether the subject of Sciartelli's union activity came up at some point in the meeting, but I do not believe, from the evidence here, that McQueen said anything that could be reasonably interpreted as discouraging Sciartelli from doing union work.

Sciartelli's testimony is further weakened by the fact that he did not cite McQueen's comments about his union activity or McQueen's denial of his request for union representation in his OWCP claim or at his meeting with Garden and Ramirez in November. Sciartelli's OWCP claim (Resp. Ex. 1) did contain some specifics of the derogatory comments McQueen allegedly made about him, but it did not say anything about either of the things that are now alleged as unfair labor practices: the *Weingarten* allegation and the alleged threat regarding Sciartelli's union activity. Sciartelli's explanation at the hearing about these omissions is at least somewhat plausible: he didn't feel that McQueen's comments about his union activity or the denial of union representation were necessary for OWCP to process his claim and determine whether his medical condition was job-related. Tr. 36, 52-55. But this ignores the fact that it was the specific nature of McQueen's comments and actions on August 19 that caused (in Sciartelli's view) him such mental and physical trauma. Sciartelli was not simply alleging to OWCP that he was traumatized by false accusations from his supervisor; he was alleging that the egregiousness of his supervisor's comments and actions (particularly McQueen's refusal to allow him to obtain assistance from his union) caused him to become so terribly ill. In this context, I think his omission of these details from the form, at a time when the events were fresh in his mind, undermines their reliability.

This inference is even stronger with respect to Sciartelli's meeting with Garden and Ramirez in November. I fully credit Ramirez's testimony about that meeting, because of the detail of his account, and because he appeared to be less than adversarial, indeed rather

sympathetic, toward Sciartelli. Ramirez had been dealing with Sciartelli as his labor counterpart for a considerable time, and he went to the trouble of phoning Sciartelli at home shortly after August 19. Thus the meeting between Sciartelli and Ramirez in November (shortly after Sciartelli returned from medical leave) would have been the perfect occasion for Sciartelli to raise his objection to McQueen's alleged threat concerning his union activity and McQueen's denial of his *Weingarten* rights. Sciartelli insists that he did raise these objections, but I credit Ramirez's account of the meeting. Both men agree that Sciartelli began by reading the narrative statement from his OWCP claim verbatim. While Sciartelli testified that he then "expounded" on the details of McQueen's insults and denial of union representation (Tr. 36-37), Ramirez testified that Sciartelli only read the form itself (Tr. 200-01). Ramirez prodded Sciartelli to provide some additional facts about the nature of McQueen's insults, and Sciartelli said he had witnesses to support him but refused to provide details. *Id.* Ramirez testified that he would particularly have recalled if Sciartelli had claimed a *Weingarten* violation, because he was listening (without success) for whether Sciartelli was alleging anything tangible such as an unfair labor practice. Tr. 207-08. This strikes me as the type of thing an experienced labor relations official would do, whether he was a union or a management official. Moreover, it was my impression that Sciartelli read his OWCP form verbatim to Garden and Ramirez because he was still upset by the August 19 incident and didn't want to lose his composure. I don't believe that Sciartelli departed from his "script" any more than absolutely necessary, and thus I don't believe that he raised any new allegations (such as the denial of a union representative or McQueen's remarks about his official time) to Ramirez and Garden, even though this would have been the most appropriate time and place for him to do so. Indeed, his failure to raise those allegations in November significantly undermines the credibility of those allegations that were finally made later.

In light of all these factors, I decline the General Counsel's invitation to infer that McQueen was angry at Sciartelli and lashed back at him on the afternoon of August 19 because Sciartelli had assisted Prosser that morning. Such a conclusion would actually require several inferences that are only circumstantially supported. It is not at all clear that after Sciartelli spoke to Mr. Garden about Prosser's training problems, Garden immediately contacted one of the managers at the Jacksonville ARTCC, or that the Jacksonville official then spoke to McQueen about the problem. McQueen's alleged comment to Prosser outside

the break room about contacting Garden might warrant such an inference, but this is truly a slender reed that cannot support the weight that the GC places on it. Moreover, even if McQueen was aware that Prosser had complained to Garden and that Sciartelli had assisted Prosser, I still do not accept that McQueen reacted to that knowledge by personally and viciously maligning Sciartelli's character, making false accusations about his work, blaming his work deficiencies on his union activity, and denying Sciartelli union representation.

Ultimately, the discussion between McQueen and Sciartelli was not directly witnessed by anyone else, and the case boils down to which participant's testimony is more believable. Comparing the intrinsic accounts of the two men, as well as the circumstantial factors surrounding the events and the other witnesses' perspectives, I cannot accept Sciartelli's. I have no doubt that Sciartelli got quite ill on the afternoon of August 19, but I believe his illness interfered with and clouded his view, rather than clarifying it. It has not been shown that McQueen threatened Sciartelli because of his union activity or made any other statement to Sciartelli that could reasonably have coerced or intimidated an employee in the exercise of protected rights.

For all of the reasons stated above, I conclude that the Respondent did not commit either of the unfair practices alleged in the complaint. I therefore recommend that the Authority issue the following Order:

ORDER

IT IS ORDERED that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, April 11, 2006.

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RICHARD A. PEARSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. AT-CA-03-0340, were sent to the following parties:

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