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

U.S. DEPARTMENT OF VETERANS AFFAIRS WASHINGTON, D.C. Respondent and U.S. DEPARTMENT OF VETERANS AFFAIRS VETERANS ADMINISTRATION MEDICAL CENTER, SALEM, VIRGINIA Respondent and U.S. DEPARTMENT OF VETERANS AFFAIRS OFFICE OF THE INSPECTOR GENERAL WASHINGTON, D.C. Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1739, AFL-CIO Charging Party	Case No. WA-CA-03-0014

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 **JULY 18, 2005**, 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: June 16, 2005
Washington, DC

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

MEMORANDUM DATE: June 16, 2005

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, D.C.

Respondent

and

U.S. DEPARTMENT OF VETERANS AFFAIRS
VETERANS ADMINISTRATION MEDICAL
CENTER, SALEM, VIRGINIA

Respondent

and

U.S. DEPARTMENT OF VETERANS AFFAIRS
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON, D.C.

Respondent

and Case No. WA-CA-03-0014

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1739, AFL-CIO

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

OALJ 05-36

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

U.S. DEPARTMENT OF VETERANS AFFAIRS WASHINGTON, D.C. Respondent and U.S. DEPARTMENT OF VETERANS AFFAIRS VETERANS ADMINISTRATION MEDICAL CENTER, SALEM, VIRGINIA Respondent and U.S. DEPARTMENT OF VETERANS AFFAIRS OFFICE OF THE INSPECTOR GENERAL WASHINGTON, D.C. Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1739, AFL-CIO Charging Party	Case No. WA-CA-03-0014

Laurie R. Houle, Esquire
For the General Counsel

Timothy M. O'Boyle, Esquire
For the Respondent

Michael R. Bennett, Esquire
For the Respondent

Edward Burnett
For the Charging Party

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. pt. 2423 (2005).

American Federation of Government Employees, Local 1739 (the Charging Party or Union) initiated this case on October 8, 2002, when it filed an unfair labor practice charge against the Department of Veterans Affairs. After investigating the charge, the General Counsel of the Federal Labor Relations Authority (General Counsel) issued a complaint on December 23, 2002, against the three Respondents, the U.S. Department of Veterans Affairs, Washington, D.C. (DVA), the U.S. Department of Veterans Affairs, Veterans Administration Medical Center, Salem, VA (VAMC), and the U.S. Department of Veterans Affairs, Office of the Inspector General, Washington, D.C. (OIG). The complaint alleges that the Respondents violated section 7114 (a)(2)(B) of the Statute, and thereby committed an unfair labor practice, by denying an employee's request for union representation at an examination in connection with an investigation. Each of the Respondents filed answers to the complaint, admitting some of the factual allegations but denying that the employee requested union representation or that they committed an unfair labor practice.

A hearing was held in Salem, Virginia, on April 10, 2003, 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 Respondents 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 American Federation of Government Employees, AFL-CIO (AFGE), a labor organization within the meaning of 5 U.S.C. § 7103(4), is the exclusive collective bargaining representative of a consolidated nationwide unit of DVA employees. DVA operates a Veterans Administration Medical Center in Salem, Virginia, and the Union is an agent of AFGE for the purpose of representing bargaining unit employees

there. In May 2002[1], JF[2] was working as a pharmacy technician at the Salem facility; Dr. Carlos Tam was the pharmacy manager and her second-level supervisor.

The central events in this case occurred on May 3, when JF was questioned by representatives of the Respondents at the Salem VAMC. Approximately two weeks earlier, on April 17, JF had been with her fiancé and other people at a relative's house, when federal Drug Enforcement Administration (DEA) and county police officers had conducted a search at the house and seized some pills (later identified as the narcotic Oxycodone, which JF claimed had been prescribed for her) and a substance (later alleged to be marijuana, which JF claimed was her sister's) in JF's possession. DEA requested that an agent from DVA's Office of Inspector General interview JF to find out more about her possession of these substances and whether they were related in any way to her work at the VAMC pharmacy (Tr. 83-84, 308).

In preparation for interviewing JF, Special Agent Patrick McCormack of Respondent IG's Washington office contacted the police chief at the Salem VAMC, William Dale Hendley, for assistance in obtaining a private conference room. Around noon on May 3, McCormack met Hendley at the VAMC police station, and at around 1:00 p.m. they walked to the pharmacy and spoke to Dr. Tam privately. Tam recognized Hendley as the police chief; Agent McCormack introduced himself, asked Tam if JF worked in the pharmacy, and said they needed to talk to her (Tr. 171, 225-26). According to all parties to the conversation, the officers did not tell Tam why they needed to speak to JF (Tr. 171, 226, 314). Tam then left the room to find JF, who was working in the hospital wards.

After Dr. Tam paged JF, she phoned him back, and he told her to return to the pharmacy, because two visitors wanted to talk to her. Either during this phone conversation or upon her arrival at the pharmacy, JF asked who the visitors were, and Tam told her they were the police chief and an IG agent (compare Tr. 68-69 and 172-73). JF then asked Tam whether she needed a Union representative; according to JF, Tam replied "no" (Tr. 69), but according to Tam, he told her that he didn't know what they wanted to talk about and so he didn't know whether she needed a

[1] All dates occur in 2002, unless otherwise stated.

[2] The General Counsel requested that for reasons of personal privacy, this employee not be referred to by her name, and I have granted that request.

representative (Tr. 172-73). Dr. Tam then escorted her to the pharmacy office and introduced her to the two officers. McCormack asked JF if she would come with him and Hendley to the police station, which was in a nearby building, to answer some questions. She agreed, and on the way to the police station she told them she thought she knew what they wanted to talk about; she then asked if it was about Vince Journell (a man doing work for JF and her fiancé and the purported target of the DEA raid on April 17). Either on the way to the police station or after they arrived, McCormack confirmed that they wanted to discuss the events of April 17, when the DEA had searched her property (Tr. 72-77, 249, 315).

When JF, McCormack and Hendley arrived at the police conference room, JF used a telephone in the room to contact the Union. When she first called, Union President Edward Burnett was out, so she left a message with the secretary to have Burnett call her. Shortly thereafter, Burnett paged her and she returned the call immediately, using the phone in the office. While Burnett and JF gave different accounts of the exact conversation during this call (Tr. 41-42, 82), it is clear she told Burnett that she was being questioned by the police and that she would call him back later. She did call Burnett again, but not until the interview at the police station had been concluded.

Each of the participants in the May 3 interview gave different accounts of the interview itself. JF testified that after she got off the phone with Union President Burnett, Agent McCormack told her the interview was informal, and that she was entitled to have an attorney present but not a Union representative (Tr. 82). He then asked her to explain what happened the night of April 17, and they proceeded to have a lengthy discussion of those events, with the officers repeatedly asking her to explain about the drugs found and insinuating that she had gotten the pills from the VA pharmacy (Tr. 83-84). She denied that either officer advised her in any other respect concerning her legal rights during the interview, or that they showed her or asked her to sign a form explaining her legal rights (Tr. 88, 102, 125-28). Other than the initial comment by McCormack that she could have an attorney but not a Union representative, JF testified that the subject of Union representation never came up again at the interview (Tr. 89, 161-62).

Hendley and McCormack testified, however, that McCormack gave JF detailed advice at the start of the interview concerning her legal rights. Both men said McCormack showed JF a one-page document that listed her

rights to remain silent, to consult a lawyer and to stop the questioning at any time she wished (Respondent OIG Ex. 1 at p. 5). According to McCormack, he asked JF to sign the document after she read it, and she refused to sign (Tr. 315-18); but according to Hendley, McCormack read from and showed her the document but didn't ask her to sign it (Tr. 229-30, 261-63). Hendley testified that McCormack used the word "informal" to describe the interview (Tr. 238), but McCormack denied using such a term (Tr. 319-20). Both officers testified that the subject of Union representation never came up during the session: they said they never told JF that she could not have a Union representative, and she never requested one (Tr. 235, 262, 263, 300-301, 318-19).

After Agent McCormack finished examining JF, he prepared a four-page Memorandum of Interview (Respondent OIG Ex. 1), which he e-mailed to Hendley for review but which was never shown to JF. A copy was also sent to local police and the DEA. On July 11, local police charged JF with possession of marijuana and oxycodone, and as a result of those charges JF was reassigned to a position at VAMC outside of the pharmacy (Tr. 197-98). Subsequently, the criminal charges were dropped without prejudice.

DISCUSSION AND CONCLUSIONS

Issues and Positions of the Parties

Although the complaint in this case alleges simply that the Respondents denied JF's "request for representation at the examination" on May 3, the General Counsel argued at the hearing (and attempted to prove) that JF put the Respondents on notice on two separate occasions that day that she wanted Union representation, and that the Respondents violated her rights under section 7114(a)(2)(B) on each occasion. According to the General Counsel, the first such occasion was when JF asked Dr. Tam whether she needed Union representation and he said "no." The second such occasion was when she phoned the Union President at the start of her meeting with Hendley and McCormack and when McCormack told her she could have an attorney but not a Union representative.

The Respondents dispute as a matter of fact that JF ever asked for Union representation, that Tam ever told her she did not need representation, or that McCormack ever told her she could not have a Union representative at the interview. They further disagree as a legal matter that JF's words or conduct in any way communicated to any of the Respondents that she wanted Union representation. Finally, because the complaint refers only to a "request for

representation" in the singular, and because paragraphs 14 and 15 of the complaint cite only McCormack and Hendley as conducting the "examination," Respondents moved to exclude evidence alleging that Dr. Tam had violated JF's section 7114 rights.

With regard to Dr. Tam, the General Counsel notes that Tam himself conceded that JF asked him whether she needed Union representation. The General Counsel cites two decisions arising out of NLRB cases, *Southwestern Bell Telephone Company*, 227 NLRB 1223 (1977), and *NLRB v. New Jersey Bell Telephone Company*, 936 F. 2d 144 (3rd Cir. 1991), in which it was held that employee questions to interrogators as to whether they "needed" a union representative constituted an actual request for representation. While the Authority has not decided a case on precisely those facts, it has stated in cases such as *U.S. Department of Justice, Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C.*, 55 FLRA 388, 394 (1999) (*DOJ-OIA*), that an employee's request need not be in a specific form but must put the agency on notice of the employee's desire for representation. The G.C. also relies on *Lackland Air Force Base Exchange, Lackland Air Force Base, Texas*, 5 FLRA 473 (1981) (*Lackland*), for the principle that when an employee tells one management representative that she wants a union representative, that official must honor the request, even if that official does not actually interrogate the employee. In the G.C.'s view, JF's query to Tam put the three Respondents on notice of her desire for representation, and McCormack was obligated to follow the procedures set forth in *Weingarten*[3] from that point on. The Respondents, however, argue that Dr. Tam himself had no knowledge of what Hendley and McCormack wanted to discuss with JF, and that he responded in an entirely appropriate manner to her query. Based on his lack of knowledge, and on the fact that he did not examine her in any way, he should not be held obligated to relay her inquiry to the officers when JF herself was about to meet with them and could ask them the same question.

With regard to Hendley and McCormack, it is undisputed that they examined JF in connection with an investigation. Moreover, the General Counsel concedes that JF never expressly told them she wanted a Union representative, or even asked them if she needed one. The crucial dispute here is whether, in the words of *U.S. Department of Justice, U.S. Immigration and Naturalization Service, U.S. Border Patrol, Washington, D.C.*, 41 FLRA 154, 167 (1991) (*INS*), JF put them "on notice of [her] desire for representation." The G.C.

[3] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

argues that JF's phone call to Union President Burnett, made while Hendley and McCormack were sitting nearby, communicated to the officers that she wanted to have a representative. McCormack's statement to JF immediately after she got off the phone, that she could have an attorney but not a Union representative, communicated to her that any request for Burnett to assist her would be useless. The Respondents deny that Hendley or McCormack knew JF was speaking on the phone to the Union President, and they further deny that she was told she couldn't have a Union representative at the interview. The Respondents argue that the responsibility for affirmatively requesting representation was on JF, and that she never fulfilled that responsibility. They argue further that her testimony should not be accorded any credibility, where it conflicts with any other witness' testimony.

Although OIG Agent McCormack conducted most of the questioning of JF, the General Counsel urges that all three Respondents be held liable for the denial of JF's right to representation. The incident occurred at the VAMC, and in the G.C.'s view Dr. Tam and Police Chief Hendley, officials of the VAMC, participated in the unlawful activity, and therefore VAMC should be held responsible along with OIG. Moreover, DVA should also be held liable as the parent agency of VAMC and OIG. The G.C. further points to ongoing communications between the three Respondents, both prior to and after May 3, showing that the organizations acted in concert with regard to JF. The Respondents argue that, if an unfair labor practice is found, each Respondent should only be held liable for actions in which it participated. Accordingly, it asserts that any unlawful actions attributed to Dr. Tam should not be extended to OIG or DVA, while VAMC and DVA should not be held liable for Agent McCormack's actions.

As a remedy, the General Counsel urges initially that the Respondents should be required to post a notice; it further requests that if the Respondents propose any disciplinary action against JF related to the events of April 17 and May 3, they should be required to repeat the investigatory examination of JF, at which JF would be allowed to have Union representation.

Analysis

I.

As a preliminary matter, I deny the Respondents' motion to limit the General Counsel's case to the actions of Hendley and McCormack (Tr. 8-10). The Authority has often

stated the due process requirement that every respondent in an unfair labor practice proceeding be adequately notified of the matters of fact and law asserted in order to have a meaningful opportunity to litigate the underlying issue. *United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas*, 57 FLRA 787, 788 (2002). This requirement is met if an issue is expressly alleged in the complaint, or where the complaint is ambiguous, if the issue was "fully and fairly" litigated. *Id.*, citing *Bureau of Prisons, Office of Internal Affairs, Washington, D.C., and Phoenix, Arizona*, 52 FLRA 421, 429 (1996).

With this in mind, the complaint itself can be read broadly to allege a denial of JF's section 7114 rights by Tam as well as Hendley and McCormack, but the complaint is most accurately viewed as ambiguous in this respect. Tam, Hendley and McCormack are all named in the complaint as actors on behalf of the Respondents, either in paragraph 9 or 14. But however ambiguous the complaint may be, the General Counsel made it quite clear to the Respondents in its prehearing disclosure, at the prehearing conference and in its opening argument at the hearing, that JF made two requests for representation: first to Dr. Tam and then to McCormack and Hendley. Therefore, the Respondents understood the General Counsel's allegations prior to the hearing, and they had a full and fair opportunity to litigate those issues. The General Counsel is entitled to pursue its theories that JF twice requested Union representation on May 3 and that the Respondents violated her rights under section 7114(a)(2)(B) on both occasions.

II.

With regard to the merits of this case, 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.*, *DOJ-OIA*, 55 FLRA at 393-94.

It is clear from the facts in this case that Hendley and McCormack conducted an examination of JF, and that it was in connection with an investigation of possible off-duty crimes committed by JF. Not only could that investigation have resulted (as it did) in criminal charges being brought against JF, but it could reasonably have been the basis for disciplinary action against her. The factual and legal issues posed by this case all involve the question of whether JF requested representation at any time on May 3. More specifically, the problems arise because JF did not explicitly say, "I want to see my Union representative," or words to that effect. The case therefore requires a determination of whether JF's words or conduct put the Respondents "on notice of the employee's desire for representation." *INS*, 41 FLRA at 167.

Looking at the events of the case chronologically, JF's conversation with Dr. Tam presents the first set of issues. Both JF and Tam testified that after he told her that some people needed to talk to her, she asked him, "Do I need Union representation?" (Tr. 69, 172). The Respondents argue that by these words, JF was not expressing her <u>desire</u> for representation, but rather she was inquiring whether she <u>needed</u> a representative; by the Respondents' reasoning, this does not meet the requirement of the Statute that the employee "request" representation. The NLRB, however, has taken a contrary view of such language. Starting at least

with the case of *Southwestern Bell Telephone Company*, 227 NLRB 1223 (1977), the Board has held in several cases that almost identical language as JF's, in which employees merely asked their supervisors whether they "needed" a union representative, "were sufficient to put the Employer on notice as to the employees' desires." 227 NLRB at 1223. *See also, Bodolay Packaging Machinery, Inc.*, 263 NLRB 320 (1982). At least two Circuit Courts of Appeals have agreed with this rationale: *NLRB v. New Jersey Bell Telephone Company*, 936 F.2d 144 (3rd Cir. 1991); *NLRB v. Illinois Bell Telephone Co.*, 674 F.2d 618 (7th Cir. 1982). The Authority expressly cited *Southwestern Bell* with approval in reference to another statement by a different employee in *INS, supra*, 41 FLRA at 167, and the NLRB's rationale seems equally applicable to JF's request.

Therefore, if JF had asked Hendley or McCormack the question she asked Tam, I would fully agree with the General Counsel that the Respondents were on notice that she desired Union representation. The problem for the G.C., however, is that the official she asked, Dr. Tam, was not in a position to answer her question, and he told her so. While the G.C. tried to argue that Tam should have understood the gravity of JF's situation when the police chief and an IG agent asked to speak to her privately, I refuse to make any such inference. Although there may have been rumors at the VAMC prior to May 3 about the DEA raid involving JF, they were just that – rumors – and Tam had no factual basis to believe such gossip or to connect those two-week-old rumors to the appearance of Hendley and McCormack at the pharmacy. Hendley and McCormack consciously chose not to tell Dr. Tam why they wanted to question JF, and Tam was quite correct to note in his testimony that there were many possible innocuous reasons why they might have needed to speak to her or to any employee. Thus, when Tam spoke to JF and told her that Hendley and McCormack wanted to speak to her, he could not possibly evaluate whether she needed a Union representative. At that point in time, he did not know whether she was going to be examined "in connection with an investigation," nor did he know whether disciplinary action might reasonably result from the examination. Moreover, he himself did not question JF, nor did he participate in any way in her subsequent examination by Hendley and McCormack. Thus, JF's question whether she needed Union representation did not have the same meaning to Dr. Tam as it would have had if she had posed the same question to her actual interrogators.

I note in passing here that I credit Dr. Tam's testimony over JF's concerning his reply to her question;

that is, I find that when JF asked Tam whether she needed Union representation, he told her that he didn't know (Tr. 172-73). Although I cannot say with any certainty that JF was lying when she testified that he told her she did not need Union representation, Tam's testimony is simply much more plausible in the overall circumstances of the case. As I have already indicated, Tam had little or no knowledge of why Hendley and McCormack were asking to talk to JF, and it would have made no sense for him to expose himself to adverse repercussions by giving his opinion on something he didn't know. Furthermore, Dr. Tam and JF had had other conflicts on personnel matters, and this would have made him even more reluctant to inject himself into a matter that did not directly involve him. JF had much more motivation to testify falsely on this point, and Dr. Tam's limited testimony struck me as being straightforward and believable.

Regardless of how Dr. Tam answered JF's question, the General Counsel still argues that Tam was obligated at least to notify Hendley and McCormack that JF had inquired about Union representation. In other words, even though Tam himself did not question JF, he should have told the people who did conduct the examination that JF had asked him whether she needed Union representation. In support of such a principle the G.C. cites the Authority's decision in *Lackland*. There, a cashier was suspected of "cash register manipulation" and was taken by a store detective to a private office, to await the arrival of OSI agents who would formally interrogate her. An OSI agent didn't arrive for another two hours or so, and in the interim the store detective asked the cashier some questions directly related to the suspicious events being investigated.[4] The employee asked repeatedly to have a union representative, but all her requests were either denied or ignored. By the time the OSI agent arrived and questioned her, the employee did not renew her request for a representative. But the ALJ and Authority held that despite the employee's failure to request representation to the OSI interrogator, she had made her desire known much earlier to the detective, and that the examination had been conducted jointly by store management and OSI.

It is evident from these facts that the General Counsel is seeking to expand the holdings of the *Lackland* case considerably to apply to the instant case. The Authority in *Lackland* did hold OSI responsible in part for the actions of

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The General Counsel asserts in its brief that the detective did not question the cashier (G.C.'s Brief at 19), but this point was refuted by the ALJ in his decision in *Lackland*, 5 FLRA at 479, 485, and affirmed by the Authority.

the store detective, but this was because the detectives themselves had engaged in examination of the employee, and because the examination was conducted jointly by both respondents. As the ALJ stated, "A union representative was specifically requested and . . . should have been provided . . ., at least as soon as the commencement of the interview." 5 FLRA at 486. In our case, Dr. Tam did not question JF at all, and he didn't even know what she would be questioned about. Thus "the interview" did not begin until Hendley and McCormack took her to the police station. To require Tam to consider JF's question to him as an outright request for a Union representative in these circumstances seems to me to be an unreasonable expansion of the holdings of both *Lackland* and *Southwestern Bell*. It places all the responsibility on a manager who didn't know what JF was being questioned about, and it places almost no responsibility on JF herself. An essential element of section 7114(a)(2)(B) is that the employee must request representation, and the Authority has reiterated this on many occasions. *Social Security Administration, Albuquerque, New Mexico*, 56 FLRA 651, 655 (2000); *Norfolk Naval Shipyard, Portsmouth, Virginia*, 35 FLRA 1069, 1073-74 (1990). While recognizing that employees are given the right to representation because they are often frightened and confused, this does not obviate the requirement that an employee request representation before the *Weingarten* protections come into play. *Id.* at 1076, quoting *Montgomery Ward & Co.*, 269 NLRB 904, 905 (1984).

A factor that is present in both *Lackland* and *Southwestern Bell* and its progeny, and which is absent in the instant case, is the intimidation and deceit of the suspect employees by their interrogators. The cashier in *Lackland* was forced to endure hours of waiting, in addition to questioning by numerous officials; some of these officials responded to her requests for representation by assuring her they would not question her, and then they went ahead and questioned her anyway. In *Southwestern Bell*, supervisors discouraged the suspects' inquiries about the union by warning them that union involvement would result in the involvement of higher management and likely more severe punishment. On the other hand, Dr. Tam was involved in the events of May 3 only momentarily, and he was completely straightforward and honest in his communications with JF. She likely had a better idea of why she was being questioned than Tam did, yet she seeks to place the burden of responsibility on Tam to advise her blindly. Based on the circumstances surrounding the events of May 3, I would find that Dr. Tam responded appropriately to JF that he could not honestly advise her whether she needed a Union representative, and that it was up to her to either make the

decision herself or ask the people who were about to interview her. Thus, as of the time Dr. Tam handed her over to Hendley and McCormack, JF had not put any of the Respondents on notice that she desired a Union representative, and the Respondents were not under any obligation to follow the mandates of *Weingarten*.

III.

For all intents and purposes, the "*Weingarten* examination" of JF began when McCormack and Hendley asked if they could talk to her and the three of them began walking to the police station. While there is almost no complete agreement among the witnesses on any aspect of the ensuing events, one thing they do agree on is that JF never raised the issue of a Union representative with the officers at any point in their meeting: she didn't affirmatively demand a representative, nor did she ask Hendley or McCormack if she needed or was entitled to one (as she had to Dr. Tam) (Tr. 89, 161-62, 235, 262-63, 300-01, 318-19). It is also agreed that JF phoned the Union office at least once, possibly twice, as soon as she arrived at the police station.[5] She first spoke to a secretary in the Union office, and then to Union President Burnett; after speaking briefly with Burnett, she told him she'd call him back. The issue for me is whether JF's conversation with Burnett put the officers on notice that she wanted a repre-sentative, or alternatively whether McCormack told her explicitly that she could not have a representative. My answer to both questions is "no."

I will address the latter question first, because it is by far the most serious allegation against the Respondents. If Agent McCormack told JF that she was not entitled to a Union representative, then he certainly misrepresented the law to her and violated her section 7114(a)(2)(B) rights. Even though JF did not explicitly ask to have a Union representative present, such a misrepresentation of JF's rights, coming at the beginning of the interview, would have "effectively prohibited" JF from pursuing the subject further. *DOJ-OIA*, 55 FLRA 388, 394 (1999), quoting *Montgomery Ward & Co.*, 273 NLRB 1226, 1227 (1984). Unfortunately for JF, I cannot credit her testimony on this point.

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5 While JF testified that she made both calls at the police station, it seems more probable to me that she made the first call prior to her arrival at the police station, and that she noticed that Burnett had returned her call when she arrived at the station.

JF testified that as soon as she got off the phone with Burnett, McCormack said that he wanted to discuss "the incident with Vincent Journell" and he asked her to explain what happened (Tr. 83). He told her it was an "informal meeting" and "the union wasn't allowed to be there or something to that effect, that an attorney could be there but not the union." (Tr. 82). McCormack and Hendley testified that when JF got off the phone, McCormack stated the purpose of the interview and began to explain her legal rights to her. He showed her a piece of paper that set forth her legal rights (Respondent OIG Ex. 1, p. 5), and he read from that paper (Tr. 229-30, 316-18). Among other rights, he noted that she had the right to consult a lawyer (Tr. 230, 318). Both officers denied that they ever told her she could not have a Union representative present (Tr. 235, 318-19). While Hendley and McCormack disagreed as to whether McCormack asked JF to sign the form, they both agreed he showed her the form and read from it; JF denied ever seeing such a document or being read her rights.

Thus we have the testimony of two experienced police officers, corroborated by a document purportedly shown to JF, with McCormack's handwritten entry that JF refused to sign it, against the uncorroborated testimony of JF. In order to find for JF and the General Counsel, I would have to find that both Hendley and McCormack perjured themselves on this central point and that McCormack fabricated the document that he purported to show her.[6] The General Counsel has not given me any basis for believing that these officers committed such a fraud. I recognize that there is a discrepancy between Hendley and McCormack as to whether JF was asked to sign the form, but I do not believe this discrepancy is significant enough to convince me they were lying on the other points on which they agree. Hendley played only a backup role in the actual interrogation of JF, and he may not have been paying full attention when McCormack actually asked her to sign the form. Moreover, JF's testimony was vague and inconsistent in a variety of respects, and it was sometimes inconsistent with Burnett's and with her own earlier affidavit. She insisted that McCormack did not advise her of her right to remain silent or to terminate the interview at any time, and it is inconceivable to me that an experienced agent would have omitted these standard rights at the outset of the interview. Indeed, nobody's account of the events of May 3

[6] The Memorandum of Interview prepared by McCormack the day after the interview (and long before the ULP charge was filed alleging a *Weingarten* violation) also states that JF was asked and refused to sign the acknowledgment form (Respondent OIG Ex. 1 at p. 1).

was entirely consistent with anyone else's; given the lapse of time between the events and the hearing, this is not surprising. But in most relevant respects, and certainly on the question of what McCormack told JF about her rights at the interview, Hendley and McCormack were in agreement, and I find their account more credible than hers.

It is most likely in my view that JF simply misunderstood what McCormack was telling her and its significance at the time of the interview. I also believe she made the decision not to ask Burnett to attend the interview consciously and voluntarily. She had just gotten off the phone with the Union when McCormack began to explain her legal rights. Page 5 of Respondent OIG Ex. 1 refers to her "right to talk to lawyer" [sic], and even JF agreed that McCormack did tell her she had the right to have a lawyer. Since she had just finished speaking to Burnett, she may have inferred from McCormack's mention of a lawyer that she was not entitled to a Union representative, but I am convinced that McCormack never said that or meant that.

From JF's testimony, it seems she didn't consider it necessary to have a lawyer on May 3 because she had not been charged with a crime at that time, but I consider it highly significant that she had taken the trouble to call the Union office twice that day before the interview began. From this, I infer that she was well aware of her right to have Union representation at her interview. She had been engaged in a variety of disputes with Dr. Tam prior to this, and she had utilized the Union to assist her in those efforts. She went out of her way to get Union President Burnett on the phone, yet she chose not to ask him to come to the police station on her own, prior to McCormack advising her of her legal rights. She already knew that the officers were going to question her about the drug raid of April 17, and she knew that at least one other pharmacy employee had gotten into trouble for drug-related issues. But as she testified, "At that time, I didn't think I needed it [Union representation]." (Tr 96; see also 114). While at various times she tried to blame her decision on the statements of Dr. Tam or Agent McCormack, I believe that she thought at the time she could handle the situation herself, without a lawyer and without a Union representative. It was only after the interview got more complicated than she thought it would, after the officers repeatedly disputed her explanations of the events of April 17, that she began to question her decision, at which time she sought rationalizations for her decision. Just as I do not believe Dr. Tam told her she didn't need a Union representative, I don't believe that Agent McCormack told her she couldn't have one. He had prepared for the interview in advance, and

I believe he followed his script closely. While that script didn't expressly mention the right to Union representation, it did advise JF that she could have a lawyer, and I don't believe McCormack departed from the script by telling her she couldn't have a Union representative.

Alternatively, the General Counsel argues that McCormack and Hendley must have overheard JF's conversations with the Union secretary and Burnett, since they were only a few feet away in a small conference room, and that by virtue of knowing that JF was talking to the Union, they were put on notice of her desire for representation. The officers both deny paying any attention to her phone call (s), and thus they say they did not know whom she was speaking to. While it is hard to understand how trained interrogators could have not heard at least some of their suspect's phone conversation in such close quarters,[7] I don't think this brings the General Counsel any closer to winning its argument. Even if McCormack knew that JF was talking to the Union President, that did not put McCormack on notice that she wanted Burnett to attend the interview with her. Indeed, a contrary interpretation is more reasonable: if she had just gotten off the phone with Burnett and told him she'd call him back if she needed him, it was perfectly logical for McCormack to conclude that she had consciously chosen to go ahead with the interview without Burnett. This would also explain why, immediately after JF ended her phone conversation, McCormack told her she had the right to a lawyer while saying nothing about the right to a Union representative: she had just finished talking to her Union representative.

Regardless of whether McCormack knew that JF had just phoned the Union, her conduct did not put him or Hendley on notice that she desired Union representation. Moreover, his words and conduct during the interview did not deceive JF or otherwise violate her section 7114 rights. Although he did not expressly inform her that she could have a Union representative, an agency is not required to give such specific advice to an employee at an investigatory examination. *Portsmouth Federal Employees Metal Trades Council and Portsmouth Naval Shipyard*, 34 FLRA 1150, 1155 (1990); *Sears v. Department of the Navy*, 680 F.2d 863 (1st

[7] Even if McCormack or Hendley overheard JF's phone conversation, they might not have known that she was talking to Burnett. According to Burnett, JF called him and said, "I can't talk now the police have me down here and hung the phone up on me." (Tr. 42). If that is all the officers heard, they would have had no way of knowing who was on the phone with JF.

Cir. 1982). The responsibility is on the employee's shoulders to request representation, and the overall evidence indicates to me that JF was aware of her right to a Union representative, that she affirmatively exercised that right by phoning and speaking to Union President Burnett, and that she consciously decided to proceed with the interview on her own. She later regretted that decision and sought to shift the blame to others, but in my view she must accept the consequences of her own actions. Nobody deceived her on May 3 except herself.

Based on the foregoing, I conclude that JF did not request Union representation on May 3, 2002, and none of the Respondents committed an unfair labor practice. 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, June 16, 2005

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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. WA-CA-03-0014, were sent to the following parties:

_____

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