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

FEDERAL AVIATION ADMINISTRATION NEW ENGLAND REGION (BURLINGTON, MASSACHUSETTS)	
Respondent	
and	Case No. 1-CA-70037
NATIONAL ASSOCIATION OF AIR TRAFFIC SPECIALISTS	
Charging Party	

Carol Waller Pope, Esq.
For the General Counsel

Norma F. Roth, Esq.
For the Respondent

James S. Ruckle, Jr., Esq.
For the Charging Party

Before: JOHN H. FENTON
Chief Administrative Law Judge

DECISION

Statement of the Case

This proceeding arises under the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 et seq.) and the Final Rules and Regulations issued thereunder (5 C.F.R. § 2423.14 et seq.) It is based on a Complaint issued by the Regional Director of Region I, Federal Labor Relations Authority. The Complaint alleged that Respondent violated Section 7116(a)(1), (5) and (8) of the Statute by refusing to provide data to the Union prior to investigatory interviews regarding alleged falsification of travel vouchers by unit employees.

Findings of Fact

In March and April 1984 some twenty employees were reassigned from the Boston Station to the Bridgeport Flight Service Station. Travel vouchers were submitted by these employees for the period from March 3, to May 3, 1984.

In April 1985, management became aware of possible falsification of some travel vouchers. In July 1985 William Fogerty, Special Agent of Civil Aviation Security, was requested to look into the matter. As a result, investigatory interviews were conducted in September of 1985. The employees were represented by Union General Counsel James S. Ruckle, Jr.

The U.S. Attorney's office, in a letter dated September 9, 1986, notified the employees that no criminal actions would be instituted. However, it was noted that this decision would not preclude the Federal Aviation Administration (FAA) from taking administrative action if deemed appropriate. Thereafter FAA notified the Union of further interviews scheduled for October 29, 1986.1/ Ruckle, upon agreeing to represent the employees, requested from Norma Roth, Manager of Labor Relations for the Respondent, data collected by Fogerty and maintained in a "working file." He requested the following data for purposes of adequately representing employees:

> (1) A copy of any and all Reports of Investigation prepared on each of the above-named individuals by S/A Fogerty to the present date.
>
> (2) A copy of any and all school attendance records subpoenaed by S/A Fogerty on the children of any and all of the above-named individuals to the present date.

1/ The memorandum acknowledged:

> Since you are a bargaining unit member, your attention is drawn to Article 5, Section 2 of the FAA/NAATS Agreement of November 1984: "In an investigatory interview conducted by Special Agents, an employee shall be entitled to representation if the employee reasonably believes the examination may result in disciplinary action and the employee requests representation."

(3) A copy of any and all employment records subpoenaed by S/A Fogerty on the spouses of any and all of the above-named individuals to the present date.

(4) A copy of any and all hotel/motel receipts subpoenaed or given to S/A Fogerty on any and all of the above named individuals to the present date.

(5) A copy of any and all statements given by anyone interviewed by S/A Fogerty who gave information on any and all of the above-named individuals concerning the ongoing voucher investigation to the present date.2/

Roth denied the request in a letter dated October 20, 1986 which stated:

> Since these interviews are simply investigatory in nature, your request appears to be premature. If action is to be proposed at a later date, we will provide you with the information you requested as permitted by law. At the moment, we must deny your request for this information.

On October 23, 1986 Ruckle filed a charge against the Agency requesting that the Authority seek injunctive relief from future interviews. Such relief was not sought. Subsequently, the interviews were conducted on or about October 28-30 at the Bridgeport Station by Fogerty, Roth and Mr. Holmer, an agent from the Office of Inspector General. Six unit employees were interviewed in Bridgeport while two others were interviewed at their job locations in Bangor, Maine and Concord, New Hampshire. Ruckle was at each interview and participated as an advisor. Prior to the questioning, each employee was required to sign a statement acknowledging the obligation to answer all questions or be subject to disciplinary action. The employees were then questioned regarding specific locations, dates, the length of the stay and the number of family members present on each trip.

2/ The amended Complaint does not include a request for a copy of statements or of spousal records. Thus, only the data requested in 1, 2, and 4 is at issue.

The employees' requests to review documents during questioning were denied. However, copies of reports, prepared in November 1986, were made available to the employees upon request. After disciplinary action was proposed, the documents originally sought were furnished.

Discussion and Conclusions

On these facts, General Counsel contends Respondent failed to comply with Section 7114(b)(4) and violated Section 7116(a)(1), (5) and (8) by refusing to furnish the Union with such data. General Counsel also alleges such refusal denied the Union an opportunity to fully participate in the investigatory examinations, thereby depriving employees of effective representation, in violation of Section 7116(a)(1) and (8).

Respondent argues that the Union has no right to information from an "ongoing, incomplete, investigative file," and that the Weingarten 3/ doctrine, from which Section 7114(a)(2)(B) derives, contemplates a very limited, non-adversarial role, for the Union representative in such interviews.

This is a question never faced by the Authority, nor, rather incredibly, by the NLRB, or its General Counsel, although the doctrine has been in existence for some 13 years. It is clear that an agency must provide data to the collective bargaining representative which is relevant and necessary to the performance of its representational functions. These functions include, not just negotiation of agreements, but their administration, which of course involves the processing of grievances. Thus, there is no dispute over a union's entitlement to information necessary to effectively process a grievance or necessary to decide intelligently whether to process a grievance. The issue here is whether the employee's representative is entitled to information before any grievance would lie, i.e. before any discipline has been proposed or taken.

In the abstract, it cannot be gainsaid that a union can more effectively represent an individual under investigation if it has access to the investigative file. Thus, the information here sought is clearly "relevant and necessary"

3/ NLRB v. Weingarten, 420 U.S. 251 (1975)

if the role the Union wished to play is one reasonably contemplated by Section 7114(a)(2)(B).4/ As noted above, unions are entitled to information relevant to grievances resulting from the imposition of discipline. And this case presents facts which are not too dissimilar from those where discipline has been imposed. The Weingarten right, which all agree attaches here, requires that the risk of discipline reasonably inheres in the circumstances. General Counsel appears to ask, then, only for a small step in the direction of more effective representation of employees: from the acknowledged right to represent those who have been disciplined to the right to represent those who have reasonable grounds to fear discipline. As the interview must be pregnant with the prospect of discipline, it would seem reasonable and civilized to extend the Union's role, as a representative entitled to information, from representing those found "guilty" to those merely suspected. But is such a result consistent either with Weingarten or with this Statute's apparent codification of that doctrine?

The language, of Section 7114(a)(2)(B) throws no light on the issue, although it may raise a question in conferring upon the union the "right to be represented at" an investigatory interview. Such language may be taken to give greater rights to federal sector unions then exist in the private sector. Weingarten premised the right to representation on Section 7 of the NLRA, which gives employees the right to engage in "concerted activities . . . . for mutual aid and protection," a concept not even requiring the presence of a union. Thus, the right belongs to the individual, and Section 8(a)(5), which has to do with the duty to bargain with the union (or, on the other side of the coin, the union's representational functions) is not implicated. The language of our Statute can at least be read as indicating that the union has an institutional right to be represented at the interview, notwithstanding that it must be triggered by the individual's request. Literally, at strange hybrid is suggested.

4/ It provides that an "exclusive representative . . . shall be given the opportunity to be represented at . . . any examination of an employee . . . by a(n) agency in connection with any investigation if - the employee reasonably believes that the examination may result in disciplinary action . . . and the employee requests representation."

Leaving the language as indecipherable, the legislative history does seem to indicate that Congress did not intend, at least directly, to give broad rights to the individual.

It was the House which first addressed this question, on which the Senate was silent in its original bill. HR 3793 provided that an employee could not be required to answer questions during an investigation of misconduct which could lead to suspension, removal or reduction in rank or grade unless first advised in writing of the fact of the investigation, the nature of the alleged misconduct, and the right to a representative of his choice. (Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, 96th Congress, 1st Sess., Committee on Post Office and Civil Service, Committee Print No. 96-7, p. 230). Should such rights be violated, § 7171(c) provided its own sanction: "(a)ny statement made by or evidence obtained during questioning of an employee . . . may not be used as evidence in the course of any action for suspension, removal or reduction in rank or pay subsequently taken against the employee" (Legislative History, supra, p. 231). In the Committee's Report (Legislative History, supra, pp. 647-648) it was noted that the sanction set forth in § 7171(c):

> is similar to the exclusionary rule in criminal law, although certain differences should be noted. First, the phrase "statement made or evidence obtained during questioning" (emphasis supplied) reflects the Committee's intention that only evidence obtained (1) at the time of the questioning and (2) from the employee, may not be used in a subsequent adverse action. Evidence obtained other than through the questioning of the employee, even if such evidence was uncovered due to a lead developed during the questioning, could be used provided, of course, that it was otherwise competent.

In conference all these matters were eliminated. The word "discipline" was substituted for misconduct with certain specific and serious consequences; the references to the requirement that questions be answered and to the inadmissibility of evidence gathered in the absence of representation were dropped; the requirement that the employee be informed of the nature of the investigation and his right to representation was removed; and "investigation" was modified so as to encompass "any examination . . . in connection with an

investigation . . ." (Legislative History, supra pp. 823 and 824. The requirement that employees be informed of the right to representation was retained in the weakened form of an annual notice.

Thus, the eventual product both broadened the right to representation by extending it from very serious matters to anything which might lead to discipline and narrowed the protections the House Bill envisioned by removing the requirement that the individual receive any indication of the nature of the probe, the right to a representative and, most importantly, the sanctions for agency non-compliance. It is entirely possible that the Congress, as it so often does, simply left such matters to be fleshed out by the Authority. I don't find this history in any sense conclusive or compelling on the point. But it clearly diluted the rights of the individual, proposed by the House Bill, by removing the right not to answer in the absence of written notice of the nature of the investigation and the right to be represented, and by deleting the severe sanctions which were to flow if such requirements were ignored. It is hard to see how an agency can effectively be deterred from ignoring Weingarten rights if it is nevertheless free to use the fruits of the unlawful examination, but it is clear that Congress chose not to erect an explicit barrier on its own.5/

While not directly relevant to the question of entitlement to information for use during an examination, this history seems to me to suggest, more than mildly, that the Congress was not generous in protecting the employee facing an interrogation which might lead to discipline. The House Bill proposed something akin to the rights of a criminal suspect. The thought was scrapped, and the substitute was merely the right to be represented if you recalled the annual assurance and had the presence of mind to ask. I think it fair to conclude that Congress did not intend an expansive reading of the rights conferred on employees, or unions as their representatives, in the investigatory setting.

5/ The Labor Board first chose and then abandoned, after enforcement difficulties, the route of requiring employers to show that just cause existed for discharge independent of what it may have learned through violation of Weingarten rights, Illinois Bell, 251, NLRB 932, 118 LRRM 1645.

The difficulties for the General Counsel's thesis are compounded by the Weingarten decision itself. It is, as noted, the genesis of the notion that union's have any role to play during investigations of employees. While I would not argue that the small role for unions described by the Supreme Court is fixed and limited for all time, the limitations set by the Court, and the reasons for them, seem to be formidable obstacles to any union right to information for purposes of an investigatory interview in the private sector.

The case, as noted, was grounded in Section 8(a)(1) of the NLRA, and conferred no bargaining rights on the representative, as well as otherwise appearing to place rather severe limitations on the function or role of the representative. Two paragraphs are often cited in support of this thesis:

> First, the right inheres in § 7's guarantee of the right of employees to act in concert for mutual aid and protection. In Mobile Oil, the Board stated:
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> "An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for 'mutual aid and protection.' The denial of this right has a reasonable tendency to interfere with, restrain and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action." 196 NLRB, supra, at 1052, 80 LRRM, at 119.

Fourth, exercise of the right may not interfere with legitimate employer prerogatives. The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one . . . .

The Board explained in Quality

"This seems to us to be the only course consistent with all of the provisions of our Act. It permits the employer to reject a collective course in situations such as investigative interviews where a collective course is not required. but protects the employee's right to protection by his chosen agents. Participation in the interview is then voluntary, and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions, he may choose to forego it unless he is afforded the safe-guard of his representative's presence. He would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on the basis of whatever information he had and without such additional facts as might have been gleaned through the interview." 195 NLRB, supra at 198-199, 79 LRRM, at 1271.

Fifth, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview. The Board said in Mobil, "we are not giving the Union any particular rights with respect to predisciplinary discussions which it otherwise was not able to secure during collective-bargaining negotiations." 196 NLRB,

> supra, at 1052 n. 3, 80 LRRM, at 1191. The Board thus adhered to its decisions distinguishing between disciplinary and investigatory interviews, imposing a mandatory affirmative obligation to meet with the union representative only in the case of the disciplinary interview. Texaco, Inc., 168 NLRB 361, 66 LRRM 1296 (1967); Chevron Oil Co., 168 NLRB 574, 66 LRRM 1353 (1967); Jacobe-Pearson Ford, 172 NLRB 594, 68 LRRM 1305 (1968). The employer has no duty to bargain with the Union representative at an investigatory interview. "The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested at that time, in hearing the employee's own account of the matter under investigation."
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> Finally,
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> A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest. (All underscoring mine.)

Thus, the seminal decision emphasizes, at least for NLRA purposes, that the employer has no duty to bargain with the union representative. Rather, that right arises when discipline is to be or has been imposed. And as the duty to supply relevant information derives from the bargaining obligation, or the corresponding duty of the union to represent, it is difficult to see how information can be relevant and necessary in circumstances where the Supreme Court says there is no bargaining obligation. As noted, the Supreme Court seems to have created an odd, hybrid form of representation. The Union has no right to be present unless

the individual seeks its assistance to enforce his right to concerted action, and the Union's right to represent is severely limited: it may not, apparently, turn the interview into an adversarial confrontation, and it is suggested that the Union's participation may well assist the employer in getting to the bottom of the matter. Further, while the Union may seek to clarify matters, or suggest other sources of information, the employer is free to insist that it wants only to hear the employee's account. Whatever the Court meant, these motions seem incompatible with the idea that a union is entitled to be armed with documents from an investigative file. Such materials, forewarning the subject of the investigation, may well serve to complicate, if not obstruct and defeat the effort to get to the truth. Furnishing them seems more in harmony with the thought that the union representation is adversarial, as of course it very often is in the true bargaining situation.

The bottom line would seem to be that the right recognized in Weingarten is rooted in NLRA Section 7's guarantee of employee's right to engage in concerted activity for mutual aid and protection, and therefore does not import the bargaining obligation which is owed to unions rather than individuals. The union then, is the individual's advocate and is not entitled to that data which it could call for when functioning as collective bargaining agent. Only when discipline is imposed, apparently, are the terms and conditions of employment for the entire unit implicated, so as to give rise to a bargaining obligation and the attendant right of the union to such information as is relevant and necessary to its task.

It is interesting to note that the NLRB has reached the same conclusion in its effort to apply the Weingarten doctrine.6/ It has held that an employee is entitled to be informed prior to an interview of the subject matter of the interview, and to a pre-interview meeting with the union representative.7/ In dicta, provoked by the dissenting

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6/ We are cautioned in the Conference Report (H Rept. No. 95-1717, 95th Cong. 2d Sess., 155-156), that the "conferees recognized that the right to representation in examinations may evolve differently in the private and Federal sectors, and specifically intend that future court decisions interpreting the right in the private sector will not necessarily be determinative for the Federal sector."

7/ Pacific Tel. & Tel. Co., 262 NLRB No. 127, enf. 113 LRRM 3529 (CCA-9).

member's observation that the majority view would transform interviews into "formalized adversary contests with all the attributes of full scale criminal proceedings . . . interfering with legitimate employer prerogatives," the Board said:

> The employer does not have to reveal its case, the information it has obtained, or even the specifics of the misconduct to be discussed. A general statement as to the subject matter of the interview, which identifies to the employee and his representative the misconduct for which discipline may be imposed, will suffice.

In sum, I conclude that an agency is under no obligation to furnish a union with materials from its investigative files during an examination of an employee pursuant to Section 7114(a)(2)(B).

Accordingly, I recommended that the Authority issue an Order dismissing the Complaint in its entirety.

Issued, Washington, D.C., September 9, 1988

John H. Fenton

JOHN H. FENTON
Chief Administrative Law Judge