

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

.....

DEPARTMENT OF THE ARMY .
HEADQUARTERS, XVIII AIRBORNE .
CORPS AND FORT BRAGG .
FORT BRAGG, NORTH CAROLINA .

Respondent .

and .

Case No. 4-CA-70910

AMERICAN FEDERATION OF .
GOVERNMENT EMPLOYEES, .
LOCAL 1770 .

Charging Party .

.....

Captain Timothy W. Lucas, Esq.
For the Respondent

Kenneth D. Battle, Esq.
For the General Counsel

Reinhard U. Witiak
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on January 29, 1988 by the Regional Director, Federal Labor Relations Authority, Region IV, a hearing was held before the undersigned on February 25, 1988 at Fayetteville, North Carolina.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 et seq. (herein called the Statute). It is based on a charge filed on September 28, 1987 by American Federation of Government Employees, Local 1770 (herein called the Union) against

Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, (herein called the Respondent).

The Complaint alleged, in substance, that on or about May 22, 1987 Respondent, by its Investigating Officer, Captain Harrison L. Marshall, conducted an investigation of bargaining unit employee Truman Bullard; that, despite said employee's request he be provided with union representation during the investigation, Respondent did not provide such representation. Accordingly, it was alleged that Respondent failed to comply with section 7114(a)(2)(B) of the Statute and therefore violated sections 7116(a)(1) and (8) thereof.

The Complaint also alleged that, by failing to provide Bullard with a union representative, Respondent repudiated the collective bargaining agreement between the parties - all in violation of sections 7116(a)(1) and (5) of the Statute.

Respondent's Answer, served on February 18, 1988, denied that Bullard requested union representation during the investigation; that Respondent refused same; and that it committed unfair labor practices as alleged in the Complaint.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed with the undersigned which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the Union has been, and still is, the exclusive representative of an appropriate unit of Respondent's employees at Fort Bragg, North Carolina.

2. At all times material herein the Union and Respondent have been parties to a collective bargaining agreement covering such unit employees. The said agreement, under Article XXVII, Section 3 provides as follows:

The Employer agrees that prior to taking
a written or sworn statement from

employee(s) concerning contemplated disciplinary action against the employee(s), the employee(s) will be advised of his rights to representation. If the representation is desired by an employee, further questioning of the employee will be done in the presence of the union representative.

3. On March 11, 1987^{1/} unit employee Truman E. Bullard, Second Vice-President of the Union, gave a document known as DA 1391 to a Congressman. The DA 1391 is a programming document for new construction at Fort Bragg. Bullard took this action because he believed there were severe problems with the way the Command set their priorities, and there was a potential for loss of life and property.

4. On May 13 management representative Cleatus J. Cox told Bullard that the latter had misappropriated government property by providing the document to a Congressman. Cox stated that Bullard was under investigation for security violations of Federal law and could be disciplined or even terminated.

5. Captain Harrison Marshall, an attorney, was assigned by Respondent to conduct an investigation concerning the act of providing DA 1391 to a Congressman. He testified that, based on information received, he did suspect that Bullard had provided the document. Further testimony by Marshall reveals he spoke to Respondent's legal representative before the investigation; that he was advised if an individual requested representation, he should arrange for it before any interview.

6. On May 20 Marshall visited the Union hall and advised several Union officials, including Bullard, that he would be interviewing them individually re the document which was allegedly provided the Congressman. Based on information he received beforehand, Marshall suspected that Bullard had given the document.

7. Thereafter, on May 22, Marshall revisited the Union hall to interview, and take statements from, various individuals thereat. After interviewing several Union repre-

^{1/} Unless otherwise indicated, all dates hereinafter mentioned occur in 1987.

sentatives. Marshall proceeded to conduct his investigation of Bullard at about 11:00 A.M. This was done in the Union office with just these two persons present thereat.^{2/} After Marshall entered the office he stated he would like to close the door as it was a private discussion. He asked Bullard if he was ready to proceed. Whereupon Bullard asked if he could get his representative.^{3/} Marshall replied that, according to Army Regulation 15-6, Bullard was only entitled to civilian counsel with whom to discuss his answers - he was not entitled to a representative. The interview or investigation then commenced and centered around the DA 1391. Marshall asked questions concerning what the employee knew about 1391s, Bullard's role in taking the document and having it printed, as well as his delivery thereof to the Congressman.

8. Marshall took notes during the investigation of Bullard. He returned to his office, dictated them in the form of an interview, and brought them back to the employee for his additions or deletions. Bullard made several comments thereon and Marshall had the statement retyped. A day or so later, after the interview was put in final form,

^{2/} Since the two individuals disagree as to what occurred at the interview, a credibility issue is posed with respect to essential facts herein. The facts set forth by the undersigned represent the credited version of the principal statements made by Bullard and Marshall during the investigation on May 22.

^{3/} Respondent advances several arguments to support its contention that Bullard did not request a representative. It adverts to the fact that the charge merely recites that Marshall did not advise him of his right to representation, and it did not aver he was denied such right. Thus, it argues this demonstrates no such request was made. I reject this argument. The charge was not filed by Bullard, but by Union President Witiak, and the controlling allegations are those in the Complaint which, I found, are supported by the record. Further, it is insisted that since Bullard did not mention the word "union" when asking for representation, it diminishes his claim entirely. I do not agree. Record facts support the conclusion that Bullard was referring to union representation and it was so understood by Marshall. This would seem to follow from the latter's statement that Bullard was only entitled to civilian counsel.

Bullard signed the statement which included an admission that he had given the DA 1391 to a Congressman.

9. Army Regulations, No. 15-6, dated June 15, 1981, is entitled "Procedure For Investigating Officers And Boards Of Officers" (G.C. Exhibit 3). Section II, 5-6 provides that a respondent^{4/} may be represented by civilian counsel during the taking of statements of said individual.

10. On August 6 Bullard received a proposed five day suspension for giving the document to a Congressman based on the admission made by him in the statement taken by Marshall. This suspension was later reduced to a three year reprimand which was then the subject of a grievance filed on January 26, 1988 on Bullard's behalf. The reprimand was upheld in Step 3 of the grievance procedure and the matter is scheduled for arbitration.

Conclusions

Certain responsibilities devolve upon an agency when conducting an investigation of a unit employee. Its statutory obligation in such instance is reposed in section 7114(a)(2)(B) which provides:

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at -

(B) 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.

^{4/} Chapter 4 of AR 15-6, dealing with Informal Investigations, provides that a person is not designated as a respondent during these informal procedures.

The Authority has clearly declared that the purpose of the foregoing statutory provision is to grant Federal employees a right to representation in employee examinations similar to those held by private sector employees as set forth in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). Thus, the public sector employee is entitled to union representation during such interviews when a request is made and he has reasonable belief that discipline may result from such an examination. Such belief must be determined, as under Weingarten, by an objective test. Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina, 32 FLRA 222; U.S. Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, N.Y., 27 FLRA 874.

It seems clear, based on the facts herein, that the Union was entitled to be represented at the meeting between Respondent's agent Marshall and employee Bullard on May 22. No dispute exists that Marshall was conducting an investigation on Respondent's behalf in regard to the releasing of the DA 1391 document to a Congressman. The purpose of his visit to the Union hall was to examine several officials to ascertain which person had taken that action. Moreover, as heretofore found, Bullard requested representation at the outset of the examination. While he did not use the word "union" when making this request, I am persuaded that it could have no other reference. The fact that Bullard was an officer of the Union does not offset this conclusion, and this is confirmed by Marshall's reply to the request that the employee was only entitled to civilian counsel under the pertinent Army Regulation. This response, made at the outset of the interview on May 22 by Marshall, constitutes a denial of the request for union representation. Unless otherwise excused, Respondent's investigator was required to suspend the examination until such representation was procured.

It must also be shown that the employee who is examined had reasonable grounds for believing that the examination could result in disciplinary action being taken against him. Bullard had, it is apparent, substantial basis for such belief in view of supervisor's statements to him on May 13. Cox told the employee that he was under investigation for providing the document to a Congressman and could be disciplined or terminated for committing a security violation. There is little room for doubt that such remarks lead to a reasonable belief that Marshall's examination might result in discipline of Bullard. I so conclude.

In sum, I conclude Respondent failed to comply with its obligation under section 7114(a)(2)(B) of the Statute and thus violated sections 7116(a)(1) and (8) by failing and refusing, upon request, to provide the Union an opportunity to be represented at the investigative interview of Bullard on May 22, 1987.

General Counsel and the Union also contend that Respondent breached Article 27, Section 3 of the collective bargaining agreement by not notifying Bullard of his right to union representation prior to the taking of his statement on May 22, 1987. Such failure and breach is alleged to be violative of sections 7116(a)(1) and (5) of the Statute.^{5/}

Several cases have arisen in the public sector dealing with breaches of contractual provisions by an agency. The Authority has adhered to the view that a single instance of a failure or refusal by a party to comply with a contractual provision does not, under the Statute, constitute a rejection of the collective bargaining agreement in violation of section 7116(a)(1) and (5) of the Statute. Veterans Administration, Veterans Administration Medical Center, Muskogee, Oklahoma, 19 FLRA 1054; Internal Revenue Service and Internal Revenue Service, Detroit District, 12 FLRA 445.

In the Veterans Administration case, supra, it was contended by the General Counsel that an employee was entitled to a representative of his choice at a counseling session pursuant to the collective bargaining agreement. Further, that denial of such right by the agency was a patent breach of contracts and violative of the Statute. The Authority, while concluding that such entitlement involved an arguable interpretation of the agreement, stated that in any event this single failure to abide by the contract would not violate sections 7116(a)(1) and (5).^{6/}

^{5/} Respondent urges that such notice was provided Bullard in January 1987 by the issuance of its Bulletin, Number 4-87 which recites its statutory obligation in this regard.

^{6/} In the Internal Revenue case, supra, the Authority concluded that the agency's failure to comply with a contractual provision requiring advance notice of an intent to withhold a within-grade increase, was also not violative of sections 7116(a)(1) and (5) of the Statute.

It may well be debatable as to whether Respondent's Bulletin No. 4-87 (January 16, 1987) complies with its contractual obligation set forth in Article 27, Section 3 of the agreement. I am inclined to conclude that notification to an employee, as required by the agreement, should be given just prior to an investigation or examination of the individual. Thus, it could be said that Respondent has not literally complied with its contractual obligation. Nevertheless, I would not find its failure to do so violative of the Statute. In accord with the past decisions of the Authority, such a single instance of breach of contract is not a rejection of the collective bargaining agreement. Hence, I conclude that Respondent by its actions did not violate sections 7116(a)(1) and (5) of the Statute.

REMEDY

General Counsel urges that, in addition to a cease and desist order and the customary posting required, Respondent be ordered to expunge from Bullard's personnel file any disciplinary action resulting from the meeting on May 22, 1987. In this respect, General Counsel cites Department of the Navy, Norfolk Naval Base, Norfolk, Virginia, 14 FLRA 731.

However, it is noted that in the cited case the discipline of the employee resulted from his asserting his protected rights under the Statute, which was alleged as a violation of 7116(a)(2) of the Statute. It was not shown that such discipline was attributable to the employee's insubordination, which was the subject of the Weingarten investigation. Further, the Authority has held that, as in the private sector, it is unable to "justify the imposition of a make-whole remedy where the employer's only violation is the denial of an employee's request for representation at an investigatory interview." Thus, where the disciplinary action taken relates solely to employee misconduct independent of the examination itself, no make whole remedy will be ordered. Charleston Navy Shipyard, supra. In the instant case it is not alleged, nor was it proven, that the suspension of Bullard, or the reprimand, was due to his request for representation during the examination. Accordingly, the requested remedy to expunge from Bullard's file any disciplinary action occasioned by his releasing the document to a Congressman is denied.

It is also recommended that the allegation in the Complaint that Respondent repudiated the parties collective bargaining agreement by failing to provide Bullard with a

union representative in violation of sections 7116(a)(1) and (5) of the Statute be dismissed.

Having concluded that Respondent failed to comply with section 7114(b)(2)(B) of the Statute by failing and refusing to provide the Union with an opportunity to be present at its investigative examination of employee Truman Bullard on May 22, 1987 in violation of sections 7116(a)(1) and (8) of the Statute, it is recommended that the Authority issue the following order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, shall:

1. Cease and desist from:

(a) Failing and refusing to afford the American Federation of Government Employees, Local 1770, an opportunity to be represented at any examination of an employee in its unit in connection with an investigation if such representation has been requested by the employee, and the employee reasonably believe that the examination may result in disciplinary action against him or her.

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

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

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

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IV, Federal Labor Relations Authority, 1371 Peachtree Street, N.E., Suite 736, Atlanta, GA 30367, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., December 12, 1988

A handwritten signature in cursive script, reading "William Naimark", written over a horizontal line.

WILLIAM NAIMARK
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE
WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to offer the American Federation of Government Employees, Local 1770, an opportunity to be represented at any examination of an employee in its unit in connection with an investigation if such representation has been requested by the employee, and the employee reasonably believe that the examination may result in disciplinary action against him or her.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

(Activity)

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

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region IV, whose address is: 1371 Peachtree Street, N.E., Suite 736, Atlanta, GA 30367, and whose telephone number is: (404) 347-2324.