

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

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U.S. DEPARTMENT OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION  
  
Respondent  
  
and  
  
AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,  
NATIONAL COUNCIL FIELD  
OFFICE LOCALS, LOCAL 3316,  
AFL-CIO,  
  
Charging Party  
.....

Case No. 3-CA-80179

David L. Pena, Esq.  
For the Respondent  
  
Peter A. Sutton, Esq. and  
Phillip Boyer, Esq.  
For the General Council  
  
BEFORE: SALVATORE J. ARRIGO  
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).  
  
Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for Region III, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by conducting an examination of a unit employee, Elmer Fuller, in connection with an investigation which Fuller reasonably

believed might result in disciplinary action against him during which examination Respondent denied Fuller's request to be represented by the Union.

A hearing on the Complaint was conducted in Washington, D.C. at which Respondent and the General Counsel were represented by counsel and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

#### Findings of Fact

At all times material the American Federation of Government Employees, National Council of Field Office Locals (herein the Council) has been the exclusive collective bargaining representative of a nationwide unit of employees including various employees working at Respondent's Grundy, Virginia Field Office. At all times material Local 3316 has been an agent of the Council acting on its behalf representing unit employees at Respondent's Virginia locations.

The Office of the Inspector General of the Department of Labor (OIG) handles investigating allegations of fraud, waste and abuse within the Department of Labor. The OIG was created by the Inspector General Act of 1978, 5 U.S.C. App. § 1, et seq. The Inspector General is appointed by the President with the advice and consent of the Senate and is supervised directly by the Secretary of Labor. The OIG has an agreement with the Federal Bureau of Investigation (FBI) that certain statutory crimes which might be uncovered in the Department of Labor, including bribery, would be referred to the FBI for investigation after a preliminary investigation by the OIG to establish that the matter concerns a credible allegation. While the OIG might assist in the investigation, the FBI would be the charge of the matter.

In October 1986 an investigation of public corruption of certain Mine Safety and Health Administration (MSHA) mine inspectors was begun by the office of the United States Attorney for the Western District of Virginia using the services of the FBI. In February 1987 the FBI informed the OIG of the matter so the two organizations would not

duplicate work or work at cross purposes and the OIG agreed to share and work the investigation with the FBI when OIG was in a position to be of assistance. The responsibility to direct and control the investigation rested with the U.S. Attorney's office and the OIG did not open a separate investigative file on the matter.

Sometime thereafter MSHA personnel received anonymous allegations that employee Elmer Fuller, a member of the collective bargaining unit employed as an Education Training Specialist at Respondent's Grundy, Virginia Field Office, had engaged in, among other things, accepting bribes from coal mine operators in the course of his employment. Since MSHA was aware of the criminal investigation being conducted by the FBI in the area, MSHA referred the matter to the FBI in October 1987. FBI agent David Taylor contacted OIG agent Carter Elliott who arranged with MSHA's Grundy Field Office supervisor to have an interview with Fuller at the Grundy Field Office on November 24.<sup>1/</sup>

On November 23, 1987 Fuller was informed by a Grundy supervisor that he was to be interviewed on the following day by agents of the FBI and OIG. Fuller contacted Luther Ward, a Union representative, and asked him if he would sit in on the meeting as his Union representative. Ward agreed but informed Fuller that if he wished him to be present, Fuller would have to make a request for his attendance to whomever was conducting the interview.

In the morning of November 24, 1987 Fuller read a posting on the Union's bulletin board in the hallway of the office captioned "Guidance to Department of Justice Employees/Representatives" "Re: Internal Investigations", subcaptioned "things to remember:" The Document, among other things, cautioned employees in their dealings with "OPR" (Office of Professional Responsibility?) and indicated that employees should never talk to OPR or internal investigations personnel alone and should be cautious in dealing with them since they had purposes whose priorities were at odds with those of the employee. Information in the document included a statement that the employee had a right under law to have a representative present when questioned

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<sup>1/</sup> Although there is some variance in the testimony concerning the date of the meeting, I have relied on records of agents Elliott and Taylor in establishing this as the interview date.

and contained the statement "when faced with an OPR investigation demand your representative. State 'I hereby demand the presence of my representative under 5 U.S.C. § 7114'". Fuller made a notation of the reference to 5 U.S.C. § 7114 in his pocket notebook.<sup>2/</sup> In the posting employees were expressly told to "utilize" and indeed "demand" the right to a representative.

In the early afternoon of November 24, 1987 Fuller was told by a supervisor to report to his immediate supervisor's office to be interviewed by agents of the FBI and OIG. Fuller reported to the office and agents Taylor and Elliott introduced themselves. According to Fuller's account of the interview, one of the investigators told Fuller they had some questions to ask him and Taylor began the inquiry by asking Fuller about guns he owned and about his family when Fuller said he'd like the questions to stop, he didn't know what they had on him but he'd like to have a Union representative sit in and listen. Fuller was told by Taylor he was under criminal investigation and they did not have to let him have a Union representative and could not have one present. Fuller responded that a "Code of Law" allowed him a Union representative and took out his notebook and read the reference to 5 U.S.C. § 7114. One of the investigators responded<sup>3/</sup> they knew of no such law. Fuller told them of the

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2/ Section 7114 of the Statute provides, in relevant part:

"(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."

3/ Fuller was often not sure to which of the two investigators asked a particular question or made a specific remark.

posting on the bulletin board in the hall and indicated he would go out, get it and show it to them. The inspectors replied there was no need to do that. Fuller then said he didn't have to talk to the inspector and "would take the 5<sup>th</sup> Amendment." The inspectors responded that Fuller could be brought up before a grand jury and he would have no representative there. Fuller stated he would have an attorney at the grand jury proceeding and was told an attorney would not be allowed to be present with him before a grand jury. A brief period of silence followed and was broken when one of the inspectors stated they had a letter about Fuller which contained information that they presumed Fuller would not want to be made public and they would like to ask him some questions. Fuller told them to go ahead with the questions since he had nothing to hide. Thereafter the investigators questioned Fuller who was fully cooperative during the examination. During the examination Fuller turned over other letters he received and brought with him to the interview concerning the same matters which occasioned the interview. Fuller further testified he laughed and joked with the agents regarding some other allegations made against him because he thought they were "funny, such as an allegation that Fuller was "gay" which he denied. After some inquiry and discussion the investigators were satisfied with Fuller's explanation that the allegations were merely the work of a malicious ex-girlfriend and the meeting, which lasted about an hour, was concluded.

When Fuller left the interview he met Union representative Ward in the hallway. Fuller testified he pointed to the document on the Union bulletin board concerning employee rights which he read that morning, above, and told Ward he might as well remove it because "They won't recognize it".<sup>4/</sup>

FBI Agent Taylor testified that with regard to Fuller's interview of November 24:

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<sup>4/</sup> Union representative Ward also testified to meeting Fuller in the hallway after the meeting and described Fuller as " . . . real angry, and real upset, and his face was extremely red". Ward testified that Fuller told him he asked for Union representation and had been refused. According to Ward, Fuller referred to the "guideline" on the Union bulletin board and told him "he might as well do away with that, or throw it away, or not have it or something to that effect."

"Mr. Fuller came in, we identified ourselves to him and he was told that we needed certain background, which I obtained from him. He made a reference to -- well, wasn't he entitled to union representation, and I explained to him that we were conducting a criminal investigation, that our policy is that we would not interview him in anyone else's presence unless that person was an attorney that could represent him in court.<sup>5/</sup> He seemed to understand, went ahead and gave me complete background, and about that time, somewhere along there, asked us if we had received an anonymous letter, and we told him we had. And he produced from his shirt pocket or coat pocket or some -- something that he had with him, the same letters that we had received . . . with the same type of allegations."

Taylor testified that Fuller explained the allegations were made by an ex-girlfriend and after Taylor questioned Fuller about specific alleged conduct, Taylor was satisfied that Fuller had not engaged in any criminal conduct.

Taylor further testified Fuller never said he wished to leave and never made reference to the 5<sup>th</sup> Amendment of the Constitution. When asked if he advised Fuller that if he did not speak with Taylor at the interview, Fuller could be subpoenaed to appear before a grand jury, Taylor answered; "No. That would have been an option, but I do not recall having told him that."

Agency Elliott of the OIG testified that after the agents introduced themselves Elliott began questioning Fuller regarding background information such as occupation and work history. When these prehearing questions were just about completed Fuller stated he understood he had a right to have a union steward present and asked if the agents had any objections. According to Elliott, Agent Taylor replied that this was a criminal investigation and it was the FBI's policy that while he could have anyone he wanted present,

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<sup>5/</sup> Taylor testified it was not the policy of the FBI to honor requests for Union representation during such interviews.

since Fuller was not in custody and since the union representative was not his attorney, they would stop the interview. Fuller then pulled a "pamphlet" out of his pocket which Fuller said stated he had the right to have a union steward present. Elliott testified Fuller was again told that if he brought anyone into the interview other than his attorney, they would not continue the interview. Elliott stated he looked at Fuller's pamphlet and copied down what it said<sup>6/</sup> and told Fuller that before he got up and walked out he might want to know what the investigation was all about. Elliott asked Fuller if he knew of anyone who was attempting to "do a number" on him. At this point according to Elliott, Fuller broke into a wide grin said "I sure do" and brought out copies of some letters. The interview then commenced centering upon the allegations made by Fuller's ex-girlfriend. Elliott testified that during the interview Fuller did make a reference to the 5<sup>th</sup> Amendment of the Constitution and Elliott did not recall if Fuller had been told he could not leave the room or Fuller having been told if he didn't talk to the agents he would be going to a grand jury.

Elliott left the room during the interview to make copies of the various letters which contained the allegations of Fuller's improper conduct and the interview ended shortly thereafter.

The record reveals that although the investigation of the allegations concerning Fuller was directed by the U.S. Attorney's office and the FBI, if the allegation of bribery had been proven, administrative disciplinary action by MSHA would be taken against Fuller. The record also reveals that if something adverse to Fuller had been discovered during the investigation which Elliott concluded MSHA should be aware of, he would report the matter through channels to MSHA. Elliott acknowledged he was representing the OIG during the interview.

#### Ultimate Findings, Discussion and Conclusions

The General Counsel contends Respondent violated section 7116(a)(1) and (8) of the Statute when an employee of its

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<sup>6/</sup> Elliott's notes taken at the interview revealed no reference to any pamphlet notations but did have "AFGE" written thereon which Elliott said he copied off the pamphlet since he was "not familiar with it."

OIG proceeded to interview employee Fuller on November 24, 1987 after having denied Fuller's requests for Union representation as required by section 7114(a)(2)(B) of the Statute 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."

Respondent contends: (1) the interview was not conducted by a "representative of the agency" as required by section 7114(a)(2)(B) of the Statute since (a) the investigation was conducted by the FBI, and (b) the DOL OIG is separate and independent of the Respondent DOL by virtue of the Inspector General Act of 1978; (2) Fuller was properly afforded his Statutory rights; and (3) Fuller voluntarily waived his Statutory rights to union representation.

It is clear from the record that the interview of Fuller regarding alleged criminal activity concerning possible bribery was an examination in connection with an investigation within the meaning of section 7114(a)(2)(B) of the Statute. See Department of the Treasury, Internal Revenue Service, Jacksonville District et al., 23 FLRA 876 (1986). It is also clear that in the circumstances herein Fuller had a reasonable belief that discipline might result from the examination. Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Hartford District Office, 4 FLRA 237 (1980), enf'd 671 F.2d 560 (D.C. Cir. 1982).

With regard to Respondent's contention that the interview was not conducted by a representative of the Agency, the record establishes that while the investigation concerning Fuller was under the direction and control of the office of the U.S. Attorney and the FBI, an agent of the OIG was present during the interview, actively participated in the interview and admittedly represented the OIG during the

interview. Any information regarding improper conduct on Fuller's part which might have been disclosed during the interview could, and in all probability would, be forwarded by Elliott to Respondent through channels and could have resulted in disciplinary action against Fuller. In these circumstances I find Agent Elliott had the dual position during the interview of assisting the FBI and representing the interests of the OIG and ultimately the Department of Labor and its Mine Safety and Health Administration.

Further, in Defense Criminal Investigative Service v. FLRA, 855 F.2d 93 (3rd Cir. 1988), enforcing Department of Defense, Defense Criminal Investigative Service; Defense Logistics Agency and Defense Contract Administration Services Region, New York, 28 FLRA 1145 (1987), the court disposed of arguments similar to those raised by Respondent herein concerning the interpretation to be given to "representative of the agency" and the Statute. Thus, the Court held at 100:

"[4] Next, the DCIS (Defense Criminal Investigative Service) argues that, even if the DOD (Department of Defense) is the "agency" for purposes of § 7114(a)(2)(B), the DCIS is so independent of the DOD that Agent Johnson did not conduct the interviews as the "representative" of the DOD. We disagree because we believe the term "representative" should be construed with reference to the objective of the statute. In the context of implementing that objective, the degree of supervision exercised by DOD management over the affairs of the DOD-OIG is simply irrelevant. DCIS investigators are employees of the DOD and their purpose when conducting interviews like the ones here involved is to solicit information concerning possible misconduct of DOD employees in connection with their work. Concededly, the information secured may be disseminated to supervisors in affected subdivisions of the DOD to be utilized by those supervisors for DOD purposes. Under these circumstances, we are confident that Congress would regard a DCIS investigator as a "representative" of the DOD.

"[5] Finally, we turn to the DCIS's argument that, whatever "representative of the agency" may mean where other agencies are concerned, the mission of the DCIS is such that Congress could not have intended employees to have the right to be represented during interviews conducted by it. While we acknowledge that a substantial policy argument can be made that DCIS investigations should be excepted from the Weingarten<sup>7/</sup> rule, we do not find § 7114(a)(2)(B) and the mandate of the DCIS so clearly irreconcilable that we are willing to imply an exception based solely on the enactment of the IG Act. Section 7114(a)(2)(B) was adopted by Congress in 1978 shortly after the decision in Weingarten and purports on its face to confer Weingarten rights on all federal employees in a bargaining unit. The DCIS, in effect, asks us to find a partial, implied repeal of § 7114(a)(2)(B) based solely on Congress' decision in 1978 to authorize the creation of inspector general offices in a number of federal agencies. This we decline to do."

I find the Court's treatment of the matters before it to be particularly applicable to the issues herein and accordingly, I conclude in all the circumstances of this case that OIG Agent Elliott was "representative of the agency" within the meaning of section 7114(a)(2)(B) of the Statute.

I further find and conclude employee Fuller was not afforded his Statutory rights with regard to being permitted a union representative at the interview. The Authority has held that when an employee makes a valid request for union representation in an investigatory interview, the employer must: (1) grant the request, (2) discontinue the interview, or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview. Department of Defense, Defense Criminal Investigative Service, 28 FLRA 1145 (1987) at 1149. I find employee Fuller made a valid request for a union

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7/ NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

representative at the examination conducted on November 24, 1987. The testimony of all three participants at the interview clearly establish this fact. It is also clear from the testimony of Fuller, Taylor and Elliott that Fuller's request was not granted nor was the interview discontinued.

I further find Fuller was not offered a choice between continuing the interview unaccompanied by a union representative or having no interview. I base this finding primarily upon the testimony of Fuller which I find more reliable than that of either Taylor or Elliott. I was particularly impressed with Fuller's demeanor when testifying. In addition, his recollection of events of November 24, 1987 was reasonably clear and precise and where related, was corroborated by Union representative Ward with regard to his desire to be represented during the interview by a Union representative and displeasure with being denied such representation. I note further that OIG Agent Elliott testified that Fuller was told the interview would stop if Fuller brought anyone other than his attorney into the interview while FBI Agent Taylor testified that Fuller was told only that they would not interview him in anyone else's presence unless that person was his attorney. In addition, Taylor testified Fuller made no reference to the 5<sup>th</sup> Amendment to the Constitution while Elliott recalled Fuller making a reference to the 5<sup>th</sup> Amendment which in part corroborated Fuller's testimony on this matter. Further, Fuller testified that the response to his request to have a union representative present was that the agents did not have to let him have a union representative and he could not have one present. Indeed, FBI Agent Taylor's testimony regarding this matter seems to support Fuller's version. Thus, FBI Agent Taylor testified that his response to Fuller's indication that he wished union representation was to inform Fuller that they would not interview him in anyone else's presence. In my view this statement, without further explanation, might reasonably be interpreted as an outright refusal to allow Fuller to have anyone else present during the interview. Accordingly, crediting employee Fuller's recollection of the interview on November 24, 1987, I find Fuller was denied his request to have a union representative present at that interview.

I also reject Respondent's contention that Fuller, by his conduct, waived his right to union representation. In support of this position Respondent relies on the fact that

at some point in the interview Fuller invited the agents to proceed with the interview, laughed and joked during the interview and came to the interview with letters and turned over the letters to the agents. The record reveals Fuller told the agents Taylor and Elliott to proceed with the investigation since he had nothing to hide and furnished other letters to the agents only after having requested and been refused union representation. Proceeding with an interview under these circumstances does not support an argument of a waiver of the Statutory right to union representation. That Fuller joked and laughed during the interview is immaterial and the fact that Fuller brought letters to the interview to support his position that the allegations he suspected being made were made by a jealous ex-girlfriend is not evidence of a waiver in the circumstances herein. Indeed had a union representative been made available to Fuller he, in all probability, would have conducted himself in the same manner, i.e., joked and laughed at a matter which appeared to him to be humorous and supplied documents in his possession to support his defense. A waiver of a Statutory right will be found only if it can be shown that a party clearly and unmistakably waived it and I conclude no waiver has been established on the facts in this case. Cf. United States Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, New York, 27 FLRA 874 (1987).

#### Remedy

Respondent acknowledges a cease and desist order directed to DOL, MSHA would require Respondent to order OIG to comply with "Weingarten" rights, i.e., rights of employees under 7114(a)(2)(B) of the Statute. Respondent argues against the issuance of an order contending "it is possible such an order would in some cases mean that for all practical purposes, continuation of an investigation would be useless "and" . . . could interfere with OIG's statutory responsibility to conduct investigations independent of interference by the Department."

I reject this contention. In my view compliance with the Federal Labor Management Relations Statute would not necessarily interfere with OIG's performance of its duties and, in any event, the resolution of any problem in this regard would appear to be a matter requiring Congressional action. Cf. Defense Criminal Investigative Services v. FLRA, supra.

To remedy the violation herein the General Counsel seeks a "broad cease and desist order" and urges that the Notice to All Employees receive a nationwide party coextensive with the entire bargaining unit. While I am not sure what constitutes a "broad cease and desist order," in my view a requirement that the Notice be posted only within the offices of MSHA would suffice in the circumstances of this case and it shall be so ordered.

In view of the entire foregoing I conclude Respondent, by the conduct described herein, violated section 7116(a)(1) and (8) of the Statute and recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S. Department of Labor, Mine Safety and Health Administration shall:

1. Cease and desist from:

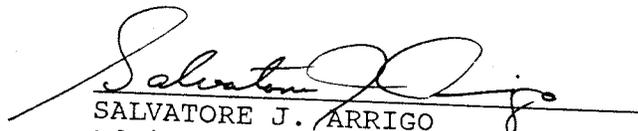
(a) Interfering with the right of its employees represented by the American Federation of Government Employees, National Council of Field Office Locals, Local 3316, AFL-CIO to union representation at examinations in connection with investigations.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured them by the Federal 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 U.S. Department of Labor, Mine Safety and Health Administration facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Assistant Secretary of Labor for Mine Safety and Health 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 III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

  
SALVATORE J. ARRIGO  
Administrative Law Judge

Dated: August 11, 1989  
Washington, D.C.

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY  
AND TO EFFECTUATE THE POLICIES OF THE  
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with the right of our employees represented by the American Federation of Government Employees, National Council of Field Office Locals, Local 3316, AFL-CIO to union representation at examinations in connection with investigations.

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 III, whose address is: 1111 18th Street, N.W., 7th Floor, P.O. Box 33758, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.