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

VETERANS ADMINISTRATION MEDICAL CENTER, LONG BEACH, CALIFORNIA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1061, AFL-CIO Charging Party	Case No. 8-CA-80226

Cathy R. Lewitt, Esquire
For the Respondent

Deborah S. Wagner, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.1/, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether telephone interviews of MSPB witnesses were formal discussions within the meaning of § 14(a)(2)(A) of the Statute. For reasons more fully set forth hereinafter, I find that they were formal discussions.

1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statutory reference, e.g., Section 7114 (a)(2)(A) will be referred to, simply as "§ 14(a)(2)(A)."

This case was initiated by a charge filed on February 19, 1988 (G.C. Exh. 1(a)) and a First Amended charge filed on April 22, 1988, (G.C. Exh. 1(b)) each of which alleged violations of §§ 16(a)(1) and (8) of the Statute. The Complaint and Notice of Hearing issued on May 27, 1988 (G.C. Exh. 1(c)), alleged violations of §§ 16(a)(8) and (1), and set the hearing for August 16, 1988, pursuant to which a hearing was duly held on August 16, 1988, in Los Angeles, California, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which Respondent waived and which General Counsel also waived except to emphasize that General Counsel asserted not only a formal discussion but, also, a violation of § 16(a)(1) under Brookhaven as to one witness who stated she not wish to participate and then was required to do so. At the close of the hearing, September 16, 1988, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, upon timely motion of Respondent, to which General Counsel did not object, to October 7, 1988. Respondent and General Counsel each timely mailed an excellent brief, received on, or before, October 17, 1988, which have been carefully considered. Upon the basis of the whole record, 2/ including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. Ms. Patricia Geffner is employed as a staff attorney for the Veterans Administration (hereinafter referred to as the "VA")(Tr. 102). In that capacity, she is required to represent the VA in various matters, including Merit Systems Protection Board (MSPB) cases. When an employee appeals an adverse action to the MSPB, the local facility, such as Veterans Administration Medical Center, Long Beach,

---

2/ General Counsel filed a motion to correct transcript which is hereby granted. The transcript has been corrected by: (a) removing Respondent Exhibits C, D, F, L and M from the exhibit file for the reason, as General Counsel very correctly noted, they were never offered into evidence and, of course, they were never received into evidence; and (b) Respondent Exhibits B, E and O have been removed from the exhibit file and placed in a separate "Rejected Exhibit File" as the Reporter had been instructed to do but, obviously, as General Counsel has noted, failed and refused to do.

California, Respondent herein, contacts the Office of District Counsel and the appeal is assigned to one of the staff attorneys, such as Geffner (Res. Exh. A; Tr. 103, 104). Ms. Geffner was designated to represent the agency in the Dekoekkoek appeal (Tr. 51).

2. In January 1988, bargaining unit employee Gary Dekoekkoek was terminated. An appeal of this termination was filed with the MSPB by the Union, American Federation of Government Employees, Local 1061, AFL-CIO. Mr. Dekoekkoek was represented by Mr. Ted Merrill, Business Agent for Local 1061 (Tr. 47).

3. Mr. Dekoekkoek had worked in Supply Processing and Distribution (SPD), under the immediate supervision of Ms. Juanita Simmons (Res. Exh. I).

4. Ms. Stella Smith, an employee in SPD, testified that Ms. Simmons, her immediate supervisor, told her that Mr. Teruo Sakoda, Assistant Chief of Supply Processing and Distribution and Ms. Smith's second level supervisor, wanted to see her in his office (Tr. 62-63). She went to Sakoda's office as directed and Mr. Sakoda asked if she wanted to be questioned on the Gary Dekoekkoek case (Tr. 63). Ms. Smith said "no"; that she, ". . . did not care to get involved." (Tr. 63); and Mr. Sakoda said, "Okay, fine," (Tr. 63). Ms. Smith testified that later on the same day Mr. Sakoda, ". . . came back to get me, and we went to his office, and he said I had no choice, that I had to be asked" [questioned]; that she said, ". . . Fine . . . I'll answer the questions" (Tr 63-64); that Mr. Sakoda, ". . . said there would be a Pat Griffin (sic) (Geffner), an attorney for the Veterans Administration, asking me questions. So he got on the phone, called her, and I got on the phone with her, and he [Sakoda] had left. I was the only one in the office . . . Mr. Sakoda's office" (Tr. 64). Mr. Sakoda testified that he told each employee they had the "choice" or "prerogative" to speak to Ms. Geffner or not (Tr. 156, 157, 158); however, on cross-examination, Mr. Sakoda admitted that he told the employees, ". . . if you don't want to [be questioned], you have to tell her that, because I was asked to leave the room." (Tr. 158). Thus, while Mr. Sakoda did not quite concede that he told any employee that he, or she, had no choice about being questioned by Ms. Geffner, he did admit that he told employees they had to speak to Ms. Geffner and if they didn't want to be questioned, "you have to tell her that." Accordingly, having considered the record carefully, I fully credit Ms. Smith's testimony and find that, as Ms. Smith credibly testified, when she first went to Mr. Sakoda's office she

told him she did not want to be questioned on the Dekoekkoek case, that she did not care to get involved; that Mr. Sakoda told her, "Okay, fine"; that she returned to her work station and later that day Mr. Sakoda came and got her and she went to his office; that on the second occasion, Mr. Sakoda told her she had no choice, that she had to be questioned; and that Mr. Sakoda called Ms. Geffner, put Ms. Smith on the line and he (Sakoda) left his office while Ms. Smith was questioned by Ms. Geffner.

Ms. Geffner introduced herself (on the telephone, of course), explained that she would be asking questions about Gary Dekoekkoek's case, and directed Ms. Smith to answer the questions to the best of her knowledge. Ms. Geffner then asked Ms. Smith if she knew Dekoekkoek, what she knew about the cart cleaning incident (one of the charges which formed the basis for the termination). The conversation was brief, having lasted only about five minutes. At the conclusion of the conversation, Ms. Geffner asked Ms. Smith to notify Mr. Sakoda if she remembered the date that Mr. Dekoekkoek cleaned the cart so that Mr. Sakoda could notify her (Tr. 64-65). Ms. Smith testified at the MSPB hearing on behalf of the Union (Tr. 65, 68).

5. Mr. Kevin Anthony, also employed in SPD, was first approached by Ms. Simmons, his immediate supervisor, who asked if he would be willing to testify about the Dekoekkoek matter. Mr. Anthony said "yes" and Ms. Simmons told him he would be questioned about the incident (Tr. 70). A few days later, Mr. Anthony, while at work, was informed that there was someone on the telephone to talk to him about the Dekoekkoek case (Tr. 71). Mr. Anthony took the call in "the supervisor's office"3/ (Tr. 71) and there was no one else present in the room during the call (Tr. 71). Ms. Geffner introduced herself, explained that Mr. Dekoekkoek was appealing his termination, that she was representing the VA in the case, and that she was trying to get witnesses for the hearing. She talked to Mr. Anthony for about 15 to 20 minutes about Mr. Dekoekkoek; about the supervisor, Ms. Simmons; about Mr. Anthony's relationship with each and

---

3/ The record does not show whether this was Ms. Simmons' office or Mr. Sakoda's office. Mr. Sakoda stated only that: "When Ms. Geffner called me, she wanted to talk to certain people and due to the nature of our SPD, I was not able to get everyone at one time -- I mean, at any given time. So I called the individuals into my office . . . ." (Tr. 156).

their relationship with each other. Ms. Geffner also asked about an incident that occurred on Dekoekkoek's final day of work which Mr. Anthony, who had not been present, learned about second hand (Tr. 72-73). Ms. Geffner asked Mr. Anthony if he would be willing, ". . . to come to court and testify." (Tr. 73); but Mr. Anthony did not participate in the hearing (Tr. 73).

6. Ms. Nancy Wolgamott, at the time of the Dekoekkoek termination was employed in SPD, but shortly thereafter and at the time she was interviewed, and at the time of the hearing, she was employed as an Electrician's Helper (Tr. 76). Ms. Wolgamott received a message from her supervisor to contact Pat Geffner regarding a matter in SPD. Ms. Wolgamott said she knew immediately that the call had to be about Gary Dekoekkoek (Tr. 77). She went to her supervisor's office and called Ms. Geffner. Ms. Geffner introduced herself and then asked Ms. Wolgamott about Dekoekkoek (Tr. 78). Ms. Geffner talked to Ms. Wolgamott for about an hour and discussed several specific incidents as well as general matters (Tr. 79), but she did not recall whether they discussed the specific charges against Dekoekkoek (Tr. 82). Ms. Wolgamott was asked if she were willing to testify and she was listed as a VA witness, attended the hearing but did not testify (Res. Exh. H; Tr. 79).

7. In February 1988, Ms. Geffner called Mr. Ted Merrill, Dekoekkoek's representative, and told him she had talked to ". . . some of the employees out there and perhaps I should talk to them" (Tr. 51) and Ms. Geffner gave Mr. Merrill a list of about seven bargaining unit employees she had interviewed4/ (Tr. 52). The record does not specifically show whether witnesses other than Smith, Anthony and Wolgamott were interviewed by telephone; however, the tenor of Mr. Merrill's testimony (Tr. 51-52; Res. Exh. G) warrants the inference, and I draw the inference, that Ms. Geffner interviewed at least seven bargaining unit employees by telephone in preparation for a MSPB hearing.

4/ Mr. Merrill remembered the names of four (Tr. 52); the names of at least nine, including the four he identified at the hearing, were set forth in Res. Exh. G, seven of whom Mr. Merrill sought to exclude as agency witnesses; two of whom (Stella Smith and Bill Miller) he requested as Appellant witnesses; and two (Wanda Ringo and Willie Outley) Ms. Geffner may or may not have interviewed but were also requested as Appellant witnesses.

8. On March 16, 1988, Mr. Merrill filed a motion with MSPB that seven named employees be excluded from testifying in the MSPB hearing because they had been interviewed by Ms. Geffner on behalf of the VA outside the presence of the Union in violation of § 14(a)(2)(A) of the Statute (Res. Exh. G). This motion was denied without explanation (Res. Exh. H).

Conclusions

A. This proceeding is not barred by § 16(d)

Section 16(d) of the Statute provides in pertinent part as follows:

> "(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. . . ." (5 U.S.C. § 7116(d))

Respondent asserts that because the exclusion of testimony of witnesses interviewed by Respondent in violation of 14(a)(2)(A) was raised before the MSPB,5/ it may not be raised as an unfair labor practice. I do not agree.

The MSPB does not have jurisdiction to decide allegations of unfair labor practices. Thomas P. Kuahine v. Department of the Navy, 4 MSPB 408, 4 MSPR 346 (1980); but allegations of unfair labor practice may be raised as an affirmative defense in actions brought before the Merit Systems Protection Board. Gerald P. Gragg v. United States Air Force, 13 MSPR 296 (1982); Wesley K. Lim v. Department of Agriculture, 9 MSPB 393, 10 MSPR 129 (1982). The issue in this case, namely, whether the interview of bargaining unit employees by telephone is a formal discussion within the meaning of § 14(a)(2)(A), has not been decided by the

---

5/ Before the trial judge, the Union sought to exclude testimony by seven witnesses (Exhibit A to Motion to Dismiss Complaint); and before the Board, the Union objected only to the testimony of one witness (Mr. George Blasevich) (Exhibit C to Motion to Dismiss Complaint) because only one of the seven persons interviewed, whom the Union initially sought to exclude, actually testified.

Authority6/ and the unfair labor practice alleged for failure to comply with § 14(a)(2)(A) could not have been decided by the MSPB for the reason that it does not have jurisdiction to decide unfair labor practices. Of course, as General Counsel states, "The issues raised before the MSPB are set out in the Administrative Law Judge's Prehearing Order dated March 21, 1988 (Res. Exh. 1). The issues are:

> "1. Whether appellant appropriately obtained authorization to be late to work on October 2, 1987.
>
> "2. Whether Appellant cleaned the medical cart between November 16 and 18, 1987, as directed.
>
> "3. Whether the penalty was too harsh.
>
> "4. Whether the charges against appellant were based on the personal animus of his supervisor.
>
> "5. Whether the agency's action was reprisal for the grievance filed by appellant. (Res. Exh. 1)."
> (General Counsel's Brief, p. 6).

The issues in this case are set forth in the Complaint (G.C. Exh. 1(c) and are wholly different. It is true, that as a collateral matter, the Union, by motion dated March 16, 1988, sought to exclude the testimony of witnesses (see, n. 5, supra), and while the MSPB may address the harm caused to an appellant by any improper interview, it can not address either the violation of the Union's rights or the violation of other employees' rights. Cf, National Institute for Occupational Safety and Health, Cincinnati Operations, Cincinnati, Ohio, 22 FLRA 1037 (1986) (Authority found a violation of § 16(a)(1) despite the fact that a Federal District Court Judge had already imposed certain sanctions on the agency for the same conduct). Even if the MSPB had

---

6/ The issue was decided in Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California and AFGE, Local 1857, AFL-CIO, Case Nos. 9-CA-70343, 9-CA-70376, OALJ-89-04 (October 13, 1988) and is now pending before the Authority.

excluded certain testimony, it would not have precluded this proceeding. On the other hand, if the Authority had ruled on this issue, the MSPB would have taken the Authority's decision into consideration. See e.g., Gerald P. Gragg v. United States Air Force, supra.

B. Telephone interviews were formal discussions

§ 14(a)(2)(A) of the Statute provides:

> "(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at --
>
> > "(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practice or other general condition of employment; . . . ." (5 U.S.C. § 7114(a)(2)(A).

Under substantially identical language of the Executive Order,7/ the Assistant Secretary had held that the interview of bargaining unit witnesses in preparation for an adversarial hearing were formal discussions. United States Air Force, McClellan Air Force Base, California, 7 A/SLMR No. 830, 7 A/SLMR 351 (1977); Internal Revenue Service, South Carolina District, A/SLMR No. 1172, 8 A/SLMR 1370 (1978). There was dissatisfaction with the Assistant Secretary's conclusion for a variety of reasons, including contentions similar to those advanced by Respondent in this case, but in essence that proper investigation and gathering of facts in preparation for the hearing demanded the interview of witnesses. As the Court of Appeals for the District of

---

7/ Section 10(e) of Executive Order 11491, as amended, provided, in part, as follows:

> "Sec. 10, Exclusive Recognition.
>
> > "(e) . . . The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

Columbia Circuit has stated, "When an employer interviews an adverse witness rather than his own or even a neutral witness, common sense suggests that the situation carries a greater potential for intimidation or coercion." National Treasury Employees Union v. FLRA, 774 F.2d 1181, 1192 (D.C. Cir. 1985). Sharing fully the view later stated by the Court of Appeals, the National Labor Relations Board in 1964 had established safeguard to eliminate the possibility of coercive interrogation. Johnnie's Poultry Co., 146 NLRB 770, 55 LRRM 1403 (1964). The Authority, in Internal Revenue Service and Brookhaven Service Center, (Brookhaven), 9 FLRA 930 (1982), held that the interview of bargaining unit witnesses was not a formal discussion,

> "In the circumstances herein, the Authority concludes that the above-described meetings did not constitute formal discussions within the meaning of section 7114(a)(2)(A) of the Statute. Rather, they were fact-gathering sessions between a representative of the Respondent and a unit employee wherein management was merely seeking information to aid in the preparation of its cases . . . before a third-party neutral, in the same manner as an exclusive representative may gather the facts from employees prior to such proceedings . . . ." (9 FLRA at 933).

Although the Authority neither mentioned nor cited Johnnie's Poultry, supra, it did, nevertheless, impose the Johnnie's Poultry safeguards.

Brookhaven, supra, while different from the McClellan - South Carolina District, supra, position of the Assistant Secretary, was an attempt to reconcile the requirement of § 14(a)(2)(A) with the need for adequate and proper trial preparation. Brookhaven was, of course, applied and followed; however Bureau of Governmental Financial Operations, Headquarters, 13 FLRA 27 (1983), 15 FLRA 423 (1984) which had followed Brookhaven, supra, was reversed and remanded, sub nom. National Treasury Employees Union v. FLRA, 774 F.2d 1181 (D.C. Cir. 1985), on remand, 21 FLRA 512 (1986). The Court stated, in part, as follows:

> "While § 7135(b) does not bar the FLRA from reevaluating the decisions of the Assistant Secretary, § 7135(b) requires the FLRA to treat those decisions as being in full force until it undertakes

> such a reevaluation. Where, as here, the Congress adopted the provision in the Executive Order in virtually unchanged form and nothing in the legislative history suggests any congressional dissatisfaction with the prior application or interpretation of the provision, we would assume § 7135(b) requires the FLRA to treat the administrative precedent with the same deference as it would its own prior FLRA decisions. At a minimum, the FLRA must acknowledge the precedent and provide a reason for departure, just as it must when it reappraises its own precedent (774 F.2d at 1192) . . . In the present case, the FLRA disregarded its own precedent bearing on the important element of formality supplied by the fact that the Bureau interviewed an adverse witness . . . we therefore reverse the FLRA's decision to dismiss NTEU's unfair labor practice complaint and remand this case to the FLRA so that it may issue an appropriate order directing the Bureau . . . to cease and desist from its unfair labor practice." (774 F.2d at 1193).

Whether the Authority might have reevaluated the decisions of the Assistant Secretary and arrived at a different conclusion, it did not; but, to the contrary, the Authority has concluded that the interview of bargaining unit employees is a formal discussion within the meaning of § 14(a)(2)(A), if the elements of that subsection are found to exist. Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 29 FLRA 594 (1987); Department of the Air Force, F.E. Warren Air Force Base, Cheyenne, Wyoming, 31 FLRA 541 (1988).

In U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution (Ray Brook, New York), 29 FLRA 584 (1987), the Authority stated,

> ". . . Thus, in order for the section 7114 (a)(2)(A) right to exist, (1) there must be a discussion; (2) which is formal; (3) between one or more agency representatives and one or more unit employees or their

representatives; (4) concerning any grievance or personnel policy or practices or other general condition of employment. Furthermore, in examining each of these elements, we will be guided by that section's intent and purpose -- to provide the union with an opportunity to safeguard its interests and the interests of employees in the bargaining unit -- viewed in the context of a union's full range of responsibilities under the Statute." (29 FLRA at 588-589) (Emphasis supplied).

There is no doubt whatever that there was a discussion. Ms. Geffner talked to each employee from five minutes to an hour or more during which time she asked questions and they responded. There is no doubt that the discussion was between one or more agency representatives and eight bargaining unit employees. And there is no doubt that this discussion, which concerned an MSPB appeal, was, nevertheless, a discussion of a grievance within the meaning of § 14(a)(2)(A). National Treasury Employees Union v. FLRA, 774 F.2d 1181 (D.C. Cir. 1986); U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution (Ray Brook, New York), supra, 29 FLRA at 590; U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Chicago, Illinois, 32 FLRA 465, 471-472 (1988).

Respondent asserts that the discussion was not formal (Respondent's Brief, pp. 28-31). In determining whether a discussion is "formal" within the meaning of § 14(a)(2)(A) the Authority has stated that a number of factors are relevant,

". . . These are: (1) whether the individual who held the discussion is merely a first-level supervisor or is higher in the management hierarchy; (2) whether any other management representative attended; (3) where the individual meetings took place (i.e., in the supervisor's office, at each employee's desk, or elsewhere); (4) how long the meetings lasted; (5) how the meetings were called (i.e., with formal advance notice or more spontaneously and informally); (6) whether a formal agenda was established for the meetings; (7) whether each employee's attendance was mandatory; and (8) the manner in which the meetings were conducted

(i.e., whether the employee's identity and comments were noticed or transcribed) . . . this list is not exhaustive. Other factors may be identified and applied as appropriate in a particular case. Therefore, in determining formality, we consider the totality of the facts and circumstances presented." U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Chicago, Illinois, supra, 32 FLRA at 470; Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 14 FLRA 475, 477 (1984); Department of Health and Human Services, Social Security Administration, Bureau of Field Operations, San Francisco, California, 10 FLRA 115, 118 (1982).

In this case, all of the elements of formality were met. Thus: (1) The interviews were conducted by an attorney from the VA District Counsel's Office, a high level management official, not merely a first level supervisor; however, both the immediate supervisor and the second level supervisor of SPD employees played a part. (2) while no other management representative was present during the interviews, Ms. Simmons, Mr. Anthony's immediate supervisor, first approached Mr. Anthony and asked if he would be willing to testify about the Dekoekkoek case. Mr. Sakoda, the second level supervisor of the SPD employees,8/ told each SPD employee who wanted to talk to them (Mr. Geffner), the purpose of the interview, and he then called Ms. Geffner, and once he had her on the telephone, ". . . she asked me to leave, so I left -- you know, on the telephone. So I left the office . . . ." (Tr. 157) (3) the interview was of SPD employees took place in the office of the second level supervisor, Mr. Sakoda, except possibly Mr. Anthony (see, n. 3, supra); and the interview of Ms. Wolgamott took place in her supervisor's office. (4) The interviews ranged from five to ten minutes to an hour or more in duration, (5) The interviews were called by formal advance notice. There was nothing spontaneous about them. Mr. Sakoda, Assistant Chief of Supply Processing and Distribution, testified that Ms. Geffner called him and told him she wanted to talk to a list

---

8/ Ms. Nancy Wolgamott had transferred from SPD. She was told by her supervisor to call Ms. Geffner regarding a matter in SPD, which, she said she knew, meant about Gary Dekoekkoek. She went to her supervisor's office and called Ms. Geffner.

of named employees. Mr. Sakoda then informed Ms. Simmons, the immediate supervisor of SPD employees, who informed the employees. In Mr. Anthony's case, he was asked by Ms. Simmons several days in advance if he were willing to testify. After Ms. Smith had indicated she did not want to talk to Ms. Geffner and had returned to her work station, Mr. Sakoda went to her work station, got her, and took her to his office. (6) There was an agenda, namely, the interview of each employee concerning the Gary Dekoekkoek case. Each employee (except Ms. Wolgamott who "knew" when told to call about a matter in SPD that it had to concern Gary Dekoekkoek) was told who wanted to interview them and the purpose of the interview. (7) Attendance was mandatory. Ms. Smith was told by Mr. Sakoda that the interview was voluntary and she said she did not want to be questioned by Ms. Geffner. Mr. Sakoda said "Okay" and Ms. Smith returned to her work station. Sometime later, Mr. Sakoda came to her work station and took her to his office where he told her she had not choice, that she had to answer questions. (8) The identity of each employee interviewed was, of coarse, known, and noted, by Ms. Geffner. The questions asked by Ms. Geffner addressed the charges made by Respondent in the termination letter (indeed, Mr. Smith was told by Ms. Geffner if she later remembered the date Mr. Dekoekkoek cleaned the medical cart to notify Mr. Sakoda so that he could inform her), and the defenses raised by the Union, such as the personal animosity of the supervisor. Moreover, notes were obviously taken by Ms. Geffner at the interviews in order to prepare for the hearing. Although Ms. Geffner testified she did not deny that she had taken notes.

Moreover, Respondent interviewed by telephone, individually and at different times, not less than eight bargaining unit employees. In U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution (Raybrook, New York), supra, the Authority stated, ". . . in examining each of these elements, we will be guided by that section's intent and purpose -- to provide the union with an opportunity to safeguard its interests and the interests of the employees in the bargaining unit . . . ." (29 FLRA at 589). If the Authority's policy, that the interview of bargaining unit employees are formal discussions within the meaning of § 14(a)(2)(A), is to have meaningful effect it must include telephone interviews which meet all tests for formality. Otherwise, if an agency found notice to the union objectionable, it could avoid the requirement by the simple expedient of conducting the interviews by telephone, as Respondent did in this case. In addition, § 14(a)(2)(A) refers to "any formal discussion", not meeting, which

connotes a physical gathering or assembly, and is broad enough to include any form of discussion whether conducted in person or by telephone. The same potential for intimidation or coercion of an adverse employee witness, as noted by the Court in National Treasury Employees Union v. FLRA, supra, 774 F.2d at 1192, exists whether the employer conducts the interview "eyeball to eyeball" or by telephone. Further, the Union has an institutional role in being represented at a formal discussion in order, "to hear . . . about matters of interest to unit employees and be in a position to take appropriate action to safeguard those interests." Department of Defense, National Guard Bureau, Texas Adjutant General's Department, 149th TAC Fighter Group (ANG)(TAC), Kelly Air Force Base, 15 FLRA 529, 532 (1984); but, cf. Nuclear Regulatory Commission, 29 FLRA 660 (1988).

Because the discussion met all of the criteria of formality, as well as all of the elements of § 14(a)(2)(A), I conclude that the telephone interviews were formal discussions. In so concluding, I am aware that my brother, Judge William Naimark, in Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, Case Nos. 9-CA-70343, 9-CA-70376 (OALJ-89-04, October 13, 1988) (Case No. 9-CA-70343) ("Sacramento ALC"), on substantially like facts, held that the telephone interview of a bargaining unit employee was not a formal discussion within the meaning of § 14(a)(2)(A), because, ". . . I feel constrained to conclude that it was not formal within the meaning and intent of section 7114(a)(2)(A) of the Statute." Sacramento ALC, supra slip opinion, p.9. There are, of course, factual differences on the basis of which that case can be distinguished from the present case; but, essentially, Judge Naimark and I simply view the purpose and intent of § 14(a)(2)(A) and the circumstances in our respective cases differently. For example, Judge Naimark stated, ". . . While I recognize that the Union may have an interest in the discussion as the bargaining representative of a unit including this employee -- the statutory provision -- as interpreted by the Authority would seem to envisage more formality than a mere telephone conversations (sic). Cases wherein a formal discussion was found to have taken place have involved summoning of an employee by management to a meeting. Such meetings were held in an official's office. These two factors, if none other, lend an aura of formality to any discussion between management and an employee . . . ." Sacramento ALC, supra, slip opinion, p. 9. For reasons set forth above, I simply do not agree. Although the Authority has not previously decided whether a formal discussion may occur in the context of a telephone

discussion, I believe that application of the standards and criteria annunciated by the Authority demonstrate that a discussion, which meets the elements of § 14(a)(2)(A) and the standards found to demonstrate formality, is a "formal discussion" within the meaning of § 14(a)(2)(A), notwithstanding that the interviews are conducted by telephone.

This case involves two issues: First, whether the telephone interviews were conducted, ". . . without first affording the Union or the Local, on behalf of the Union, an opportunity to be present." (Complaint, G.C. Exh. 1(c), Par. 8(b); and Second, whether ". . . Respondent . . . interviewed one or more employees . . . without first assuring the employee that no reprisal would take place if the employee refused to participate and obtaining the employee's participation on a voluntary basis." (Complaint, G.C. Exh. 1(c), Par. 9). As to the first issue, I find that the interviews were conducted without first affording the Union an opportunity to be present; that Respondent failed or refused to comply with the provisions of § 14(a)(2)(A) of the Statute in that Respondent failed to give the exclusive representative an opportunity to be present at formal discussions; and that Respondent thereby violated §§ 16(a)(1) and (8) of the Statute.

As to the second issue, I find that Respondent did not commit a separate violation of § 16(a)(1) because it told one employee, Stella Smith, who stated that she did not wish to be interviewed and was then required to do so and/or that Respondent interviewed, ". . . one or more employees . . . without first assuring the employee that no reprisal would take place if the employee refused to participate, at obtaining the employee's participation on a voluntary basis." (Complaint, G.C. Exh. 1(c), Par. 9), in violation of § 16(a)(1). General Counsel asserts an independent violation of 16(a)(1) (General Counsel's Brief, pp. 14-16); Respondent asserts: "THE VETERANS ADMINISTRATION HAS THE LEGAL RIGHT OF IMPOSING AND ENFORCING A DUTY TO ACCOUNT, WHETHER GENERALLY OR IN DISCIPLINARY INVESTIGATIONS" (Respondent's Brief pp. 10-27). For reasons set forth hereinafter, I agree that the Statute does not create a right for an employee to remain silent; that an employee may be required to answer questions; and, if the Union is given the opportunity to be represented, it is not an unfair labor practice to compel an employee to be present and to answer questions on pain of discipline, including removal, for failure to comply. Accordingly, I recommend that the allegations of Paragraph 9 of the Complaint be dismissed.

Prior to Brookhaven, supra, employers could not interview bargaining unit employees without affording the union an opportunity to be present. In Brookhaven, supra, the Authority, in effect, held that the employer could interview bargaining unit employees in preparation for a hearing, i.e., without having to comply with § 14(a)(2)(A), provided, it was voluntary which was to be assured by giving and observing the Johnnie's Poultry, supra, safeguards. This was both necessary, to minimize the potential for intimidation or coercion, and proper, because it was the quid pro quo for exemption from 14(a)(2)(A). But when exemption from 14(a)(2)(A) is removed there is neither reason for the Johnnie's Poultry safeguards nor justification for them. Federal employees may not refuse to answer work-related questions so that an interview, pursuant to § 14(a)(2)(A), is not voluntary and the employee may be compelled to answer. The employee can be discharged for refusing to answer if he is adequately informed: (a) that he is subject to discharge for not answering; and (b) that his replies, and their fruits, can not be used against him in a criminal case. Gardner v. Broderick, 392 U.S. 273, 278 (1968); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280, 283, 284, 285 (1968); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation [Uniformed Sanitation Men II], 426 F.2d 619 (2d Cir. 1970, cert. denied, 406 U.S. 96 (1972); Kalkines v. The United States, 473 F.2d 1391, 1393 (Ct. Cl. 1973); Navy Public Works Center, Pearl Harbor, Hawaii v. FLRA (678 F.2d 9th Cir. 1982); Weston v. Department of Housing and Urban Development, 14 MSPR 321, 324 (1983); Gootee v. Veterans Administration, 36 MSPR 526 (1988); National Treasury Employees Union, 9 FLRA 983, 986 (1982).

Consequently, where the agency has afforded the Union the opportunity to be represented, an employee may be compelled to answer and the Johnnie's Poultry type of statement, that the interview in voluntary, is inappropriate. To the contrary, the only appropriate warning is that: (1) the refusal to answer may result in removal, and (2) any statement he may make will not be used against him in a criminal proceeding. Weston v. Department of Housing and Urban Development, supra. Moreover, the Regulations of the Veterans Administration also, specifically, require that employees answer questions respecting employment and disciplinary matters and that, ". . . Refusal to testify, concealment of material facts, or wilfully inaccurate testimony in connection with an investigation . . . may be ground for disciplinary action." 38 C.F.R. § 0.735-21(f).

I am aware that the Authority, in Department of the Air Force, F.E. Warren Air Force Base, Cheyenne, Wyoming, supra, may have implied that Brookhaven warnings continue to apply to 14(a)(2)(A) (e.g. 31 FLRA at 546); but I am also aware that the Authority found no violation of § 16(a)(1) even though the employee was not told that the interview was voluntary and that no reprisal would take place if he refused to respond (31 FLRA at 541). Consequently, I do not believe the Authority made a considered determination of the precise warning to be given; and I submit that the presence of the union,9/ or, more correctly, the right to be present, is the shield against coercion; that participation by the employee is not merely voluntary; and that the appropriate warning is, as set forth above, when, and if, an employee declines to answer, that the refusal to answer may result in removal and that any statement he, or she, may make will not be used against him, or her, in a criminal proceeding.

I have given careful consideration to each other defense asserted by Respondent and find each to be without merit. A recurring contention of Respondent is that compliance with § 14(a)(2)(A) in the interview of witnesses will prevent adequate trial preparation by prohibiting such interviews. Nothing could be further from the truth. Giving a union the opportunity to be present does not compromise in any manner the right to conduct such interviews.

Having found that Respondent violated §§ 16(a)(1) and (8) of the Statute by interviewing bargaining unit employees without affording the Union an opportunity to be present, I recommend that the Authority adopt the following:

ORDER

Pursuant to § 18 of the Statute, 5 U.S.C. § 7118, and § 2423.29 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.29, the Authority hereby orders that the Veterans Administration Medical Center, Long Beach, California, shall:

1. Cease and desist from:

(a) Conducting formal discussions by telephone with employees in the bargaining unit exclusively represented by the American Federation of Government

---

9/ In F.E. Warren, although given notice, the Union did not attend interview.

Employees, Local 1061, AFL-CIO, (hereinafter referred to as the "Union"), concerning grievances or any personnel policies or practices or other general conditions of employment, including interviews in preparation for third-party hearing such as Merit Systems Protection Board proceeding or arbitration proceedings, without first affording the Union prior notice and the opportunity to be represented at such formal discussions.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facility 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 Director and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region 8, Federal Labor Relations Authority, Room 370, 350 South Figueroa Street, Los Angeles, California 90071, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: June 15, 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 conduct formal discussions by telephone with employees in the bargaining unit exclusively represented by the American Federation of Government Employees, Local 1061, AFL-CIO (hereinafter referred to as the "Union"), concerning grievances on any personnel policies or practices or other general conditions of employment, including interviews in preparation for third-party hearings, such as Merit Systems Protection Board proceedings or arbitration proceedings, without first affording the Union prior notice and the opportunity to be represented at such formal discussions.

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

_____
(Agency or Activity)

Dated: _____ By: _____
(Signature)

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 VIII, whose address is: 350 South Figueroa Street, Room 370, Los Angeles, CA 90071, and whose telephone number is: (213) 894-3805.