

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

.
UNITED STATES IMMIGRATION .
AND NATURALIZATION SERVICE .
UNITED STATES BORDER PATROL, .
DEL RIO, TEXAS .
Respondent .
and . Case No. 6-CA-10868
AMERICAN FEDERATION OF .
GOVERNMENT EMPLOYEES, .
NATIONAL BORDER PATROL .
COUNCIL, LOCAL 2366, AFL-CIO .
Charging Party .
.

Elizabeth Ann Tunnell
Richard Linnemann
Representatives of the Respondent

Luis E. Solis
Representative of the Charging Party

Joseph T. Merli
Kerry Simpson (On the Brief)
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that one of Respondent's supervisors denied the requests of bargaining unit employees for union representation at an examination which the employees believed could result in disciplinary action against them. Accordingly, the complaint charges that Respondent violated section 7116(a)(1) and (8) of the

Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1) and (8), by failing to comply with section 7114(a)(2)(B) of the Statute which provides for such representation.

Respondent's answer admitted the allegations as to Respondent, the Union, and the charge, but denied any violation of the Statute.

A hearing was held in Del Rio, Texas. The Respondent, the Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact^{1/}, conclusions of law, and recommendations.

Findings of Fact

The American Federation of Government Employees, National Border Patrol Council, AFL-CIO (NBPC) is the certified exclusive representative of a nationwide consolidated unit of employees appropriate for collective bargaining at the United States Immigration and Naturalization Service (INS), United States Border Patrol, including employees located at Del Rio, Texas. The Del Rio Sector of the United States Border Patrol has ten stations, including one at Del Rio, Texas. The Charging Party (Union) is an agent of NBPC for the purpose of representing unit employees at Respondent's Del Rio, Texas facility.

James Van Gorkom, Jeffery Whitlow, and J. Crowther are Border Patrol Agents (BPAs or agents) and are in the bargaining unit.

On May 3, 1991 an illegal alien escaped from the custody of the Del Rio Border Patrol Station while he and other aliens were being processed and interviewed by BPAs James Van Gorkom, Jeffrey Whitlow, J. Crowther and special agents of the Anti-Smuggling Unit.

^{1/} In agreement with Respondent, I have not considered the General Counsel's evidence concerning Article 31 of the collective bargaining agreement to be relevant to a determination of the issues herein.

After an extensive, but unsuccessful, effort was made to locate the prisoner, BPAs Van Gorkom, Whitlow, and Crowther were called to the office of their first line supervisor, Supervisory Border Patrol Agent Thomas W. De Fee. De Fee asked the BPAs to each write an operational memorandum concerning the escape. He wanted to know who saw the prisoner last, who was in charge of processing him, and where each agent was at the time the alien escaped. De Fee testified that he simply said, "Guys, explain it -- who, what, when, how -- as best you can; we owe an explanation -- all of us." De Fee added that the employees were not entitled to Union representation "based on the Weingarten rule" because he was only asking for operational memoranda.

The BPAs departed for their squad room. BPAs Whitlow and Crowther began to type their memoranda while BPA Van Gorkom researched the question of whether they were entitled to Union representation. Shortly thereafter BPA Van Gorkom advised the other two agents of the results of his research into "the Weingarten rule." He also stated that, based on what had happened -- a Federal prisoner escape -- they could receive disciplinary action. He stated he felt he was entitled to Union representation and was going to request it. According to Van Gorkom, Whitlow and Crowther said that they agreed with him and wanted it too.

The three agents went back to Supervisor De Fee's office and sat down to discuss the matter with him. Agent Van Gorkom told Supervisor De Fee that they did not agree with his interpretation of Weingarten and asked whether the memoranda could later on be used as evidence against them. Supervisor De Fee responded that he wasn't anticipating any disciplinary action. Van Gorkom replied that they weren't really concerned about the extent of his disciplinary action, but rather about having more severe disciplinary action imposed at a higher management level. Supervisor De Fee said that the memorandum could be used as a basis for disciplinary action, but that he did not anticipate any disciplinary action.^{2/}

Agent Van Gorkom told Supervisor De Fee, "I am officially requesting representation." Supervisor De Fee responded, "I am officially denying you Union representation."

^{2/} The record reflects that the ultimate decision concerning any disciplinary action would be made by the Deputy Chief Patrol Agent, Del Rio Sector.

Van Gorkom testified that he intended to be speaking for all three of the BPAs in making the request since they had gone back into De Fee's office for that purpose, but he did not know whether De Fee interpreted it that way. Supervisor De Fee did interpret it that way. He was asked during his testimony whether any of the agents requested Union representation and replied, "Yes, Ma'am, they did. . . . I told them I didn't think they needed Union representation." (Tr. 66; emphasis added.) Supervisor De Fee testified that he did not feel the agents were in jeopardy of disciplinary action.

The three BPAs proceeded to the squad room to type their memoranda. Supervisor De Fee did not accompany them, they were not sequestered from each other, and were not forbidden to discuss the matter with one another. Each individually prepared his memorandum on a Form G-2 which was simply titled, "Memorandum" with the Department of Justice seal. The agents gave the memoranda to Supervisor De Fee.

Memoranda concerning the escape were also prepared by an agent of the Anti-Smuggling Unit, Supervisor De Fee, and the Assistant Patrol Agent in Charge of the Del Rio Station. All of the memoranda were routed through the Watch Commander, the Patrol Agent in Charge of the Del Rio Station, the Assistant Chief Patrol Agent and the Deputy Chief Patrol Agent of the Del Rio Sector, to the Chief Patrol Agent of the Del Rio Sector.

The Deputy Chief Patrol Agent stated the following in transmitting the memoranda to the Chief Patrol Agent:

The attached memoranda delineate the circumstances of the escape of alien [name deleted] from the Del Rio Station on May 3, 1991.

The apparent cause of the escape was confusion on the part of agents involved in the processing of the alien, of who was controlling the activities of the alien.

Although I don't feel negligence on the part of any one agent caused the escape, it is obvious that physical security procedures were too loose.

I have directed immediate training be conducted and policies be reviewed to prevent a reoccurrence of this type of incident.

I recommend this incident be closed.

No disciplinary action has been taken as a result of the prisoner escape. The Respondent considers the matter closed.

Operational Memoranda

Respondent, pursuant to INS headquarters and Regional policy, requires an agent to write an operational memorandum whenever there is an occurrence of an unusual nature, such as a prisoner escape, shooting, narcotics seizure, or accident. The agent is expected to thoroughly explain what happened in the memorandum. BPA Van Gorkom was aware of this requirement and expected to be asked to write a memorandum as a result of the prisoner escape. An agent is required to obey the instruction of a first-line supervisor who implements this policy requirement. Failure to do so could result in a charge of insubordination.

Respondent uses the operational memoranda to find the facts. Respondent examines them, as was done in this case, to determine the cause of the occurrence, whether there was negligence on the part of the agents involved, or whether some adjustment in training or policy is required to avoid a recurrence. The memoranda are also used to report such an incident to other law enforcement agencies, if appropriate, and to the Region and INS headquarters so that the Commissioner and other appropriate officials will know the facts and be able to respond to public inquiries or a suit filed, sometimes months or years later, under the Federal Tort Claims Act.

If, after Respondent obtains an operational memorandum from an agent, it determines that all the facts are not there, it may conduct an examination of the agent at which time Respondent would afford the agent Union representation upon request. A proposal of disciplinary action would not normally be proposed until after the completion of an examination of the agent or an independent investigation by a supervisor or the Office of the Inspector General. Supervisor De Fee testified that in his 15 years of Border Patrol experience he has never known of an employee to be disciplined solely on the basis of an operational memorandum.

Discussion and Conclusions

Section 7114(a)(2) of the Statute 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.

In United States Department of Justice, Bureau of Prisons, Safford, Arizona, 35 FLRA 431, 438-40 (1990), the Authority reviewed the provisions, purposes, and benefits of section 7114(a)(2)(B). Fundamentally, however, "[F]our conditions must be met before a statutory right to union representation vests in a federal employee: (1) the meeting between the employee and management must be an examination; (2) the examination must be in connection with an investigation; (3) the employee must reasonably believe that disciplinary action may result from the meeting; and (4) the employee must request representation." American Federation of Government Employees, Local 1941 v. FLRA, 837 F.2d 495, 498 (D.C. Cir. 1988).

The requirement established by Respondent, and ordered implemented by Supervisory Border Patrol Agent De Fee, that the three Border Patrol Agents each prepare a written operational memorandum explaining the circumstances of a prisoner escape, including details of what the agent was doing at the time, constituted an "examination of an employee in the unit by a representative of the agency." The written memorandum was an examination as it was designed to elicit information and have the employee explain his conduct. Compare Department of the Treasury, Internal Revenue Service, 15 FLRA 360-61, 370-71 (1984). It is well established that requiring an employee to prepare a written memorandum in connection with an investigation, setting forth the employee's version of an incident, where the employee reasonably believes that such written memorandum may result in disciplinary action, constitutes an examination. U.S. Department of Justice, U.S. Immigration and Naturalization Service, U.S. Border Patrol, Washington, D.C., 41 FLRA 154, 187 (1991); United States Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, New York, 27 FLRA 874, 878-79 (1987).

The examination was "in connection with an investigation" as its purpose was to obtain the facts and determine the cause of the prisoner escape. Supervisor De Fee asked the agents to "explain it -- who, what, when, how -- as best you can." He wanted to know who saw the prisoner last, who was in charge of processing him, and where each agent was at the time of the escape. These questions were designed to elicit answers to a work-related matter and could result in discipline. As the Deputy Chief Patrol Agent stated, in part, in transmitting the memoranda to the Chief Patrol Agent, "The attached memoranda delineate the circumstances of the escape. . . . Although I don't feel negligence on the part of any one agent caused the escape, it is obvious that physical security procedures were too loose."

Respondent claims that the operational memoranda were "not for the purpose of eliciting facts for disciplinary purposes," but rather "for the purpose of simply establishing the facts" and calls attention to the duty of Government employees to account to their superiors for their actions. The duty of an employee to account for his actions does not require that he provide information without a Union representative present where appropriate under the Statute. Indeed, the Authority has stated, "the presence of a Union representative at an examination does not interfere with management's right to insist that the employee be responsive, or its right to decide the scope of the examination, or the extent of the Union's legitimate role as a representative." Department of the Treasury, Internal Revenue Service, Jacksonville District and Department of the Treasury, Internal Revenue Service, Southeast Regional Office of Inspection, 23 FLRA 876, 878-79 (1986).

Under section 7114(a)(2)(B) whether an employee has a reasonable belief that discipline may result from an examination is determined by an objective test. Internal Revenue Service v. FLRA, 671 F.2d 560, 563 (D.C. Cir. 1982).

The employees reasonably believed that the examination might result in disciplinary action against them. The employees were aware that the prisoner escaped while he was, at least partially, in their custody or control, and they might be held responsible. The escape was a serious matter. The agents were not assured that nothing they said in the operational memoranda could possibly lead to discipline against them. On the contrary, Supervisor De Fee told them that the memorandum could be used as a basis for disciplinary action. As noted, the Deputy Chief Patrol Agent reviewed the memoranda, in part, for any evidence of negligence on the part of the agents. The memorandum is thus the first

step in a formal effort by Respondent to find the facts and determine the cause of a prisoner escape as well as the first step in a formal process that could ultimately result in disciplinary action for the employees involved. If the agent omits facts, or if negligence or wrongdoing is found or admitted by an agent in a memorandum then the record reflects that an examination of the agent or an independent investigation would normally precede any proposal of disciplinary action. However, the Respondent would have the benefit of an employee's operational memorandum with which to conduct the examination, investigation, or further proceeding, and the employee would not have had the initial protective benefit of a Union representative to assist him or her to bring out all the facts, suggest other employees who may have knowledge of them, and make sure the employer does not initiate or impose disciplinary action unjustly. See NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689, 2692-93 (1975).

Consistent with section 7114(a)(2)(B), an employee must make a valid request for representation. It need not be made in a specific form, but must be sufficient to put the respondent on notice of the employee's desire for representation. Norfolk Naval Shipyard, Portsmouth, Virginia, 35 FLRA 1069, 1073-74 (1990).

There is no dispute that Agent Van Gorkom made a valid request for representation. I also conclude that Van Gorkom's specific request together with the conduct of Agents Whitlow and Crowther was also sufficient to put Respondent on notice of the desire of all three agents for representation. As set forth in more detail above, Whitlow and Crowther interrupted their preparation of the operational memoranda to accompany Van Gorkom to Supervisor De Fee's office. There Van Gorkom, acting as spokesman, told De Fee that they did not agree with his interpretation of Weingarten and asked whether the memorandum could later on be used against them. When the group was advised by De Fee that it could, but he did not anticipate disciplinary action, Van Gorkom requested representation. Van Gorkom candidly testified that he only said, "I am officially requesting representation," but intended to be speaking for himself and the other two agents. There is no doubt that Supervisor De Fee interpreted the request that way. When asked very specifically whether any of the agents requested representation, Supervisor De Fee forthrightly testified that "they did"; that he told them he "didn't think they need Union representation"; as he did not feel they were in jeopardy of disciplinary action.

It is concluded that Respondent's denial of Union representation to the three bargaining unit employees constituted a failure to comply with section 7114(a)(2)(B) of the Statute and unfair labor practices in violation of section 7116(a)(1) and (8) of the Statute as alleged.

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 United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas shall:

1. Cease and desist from:

(a) Denying the request of any bargaining unit employee for a representative of the American Federation of Government Employees, National Border Patrol Council, (Union), the exclusive representative of certain of its employees, to be present in connection with the preparation of an operational memorandum or other examination in connection with an investigation if the employee reasonably believes that the operational memorandum or other examination may result in disciplinary action against him or her.

(b) Requiring any bargaining unit employee to prepare an operational memorandum or take part in any other examination in connection with an investigation without affording the Union an opportunity to be represented if the employee reasonably believes that the operational memorandum or other examination may result in disciplinary action against him or her and requests representation.

(c) 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:

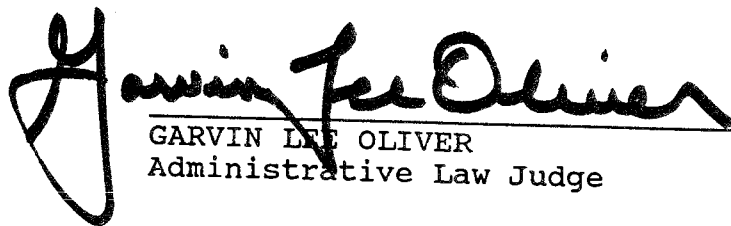
(a) Post at its facilities copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Chief Patrol Agent, Del Rio Sector and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous 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) Reproduce and deliver to all supervisory personnel signed copies of the attached Notice.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Dallas Regional Office, Federal Labor Relations Authority, Dallas, Texas, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, May 28, 1992


GARVIN LEE OLIVER
Administrative Law Judge

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 deny the request of any bargaining unit employee for a representative of the American Federation of Government Employees, National Border Patrol Council, (Union), the exclusive representative of certain of our employees, to be present in connection with the preparation of an operational memorandum or other examination in connection with an investigation if the employee reasonably believes that the operational memorandum or other examination may result in disciplinary action against him or her.

WE WILL NOT require any bargaining unit employee to prepare an operational memorandum or take part in any other examination in connection with an investigation without affording the Union an opportunity to be represented if the employee reasonably believes that the operational memorandum or other examination may result in disciplinary action against him or her and requests representation.

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, Dallas Regional Office, whose address is: 525 Griffin Street, Suite 926, LB-107, Dallas, TX 75202, and whose telephone number is: (214) 767-4996.