

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

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BUREAU OF PRISONS
U.S. PENITENTIARY,
LEAVENWORTH, KANSAS

Respondent

and

OFFICE OF INSPECTOR GENERAL,
U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C.

Respondent

and

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 919

Charging Party

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Scott David Cooper, Esquire
Jennifer Levin, Esquire
For the Respondents

Jim Evans
For the Charging Party

Michael Farley, Esquire
For the General Counsel

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-
Management Relations Statute, Chapter 71 of Title 5 of the

U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to an amended charge first filed on March 25, 1991, by American Federation of Government Employees, Local 919 (hereinafter called the Union or Charging Party), a Complaint and Notice of Hearing was issued on August 30, 1991, by the Regional Director for the Denver Regional Office of the Federal Labor Relations Authority, Denver, Colorado. The Complaint alleges that the Bureau of Prisons, U.S. Penitentiary, Leavenworth, Kansas (hereinafter called the Respondent Leavenworth), and the Office of Inspector General, U.S. Department of Justice, Washington, D.C. (hereinafter called Respondent OIG), violated Sections 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (hereinafter called the Statute), by virtue of the actions of their agents in denying a unit employee's request for union representation at an examination in connection with an investigation which could result in disciplinary action against the employee.

A hearing was held in the captioned matter on November 20, 1991, in Kansas City, Missouri. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The Respondents and the General Counsel submitted post-hearing briefs on December 20, 1991, which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions, and recommendations.

Findings of Fact

The Council of Prison Locals, American Federation of Government Employees (AFGE) is the exclusive representative of a nation-wide bargaining unit of employees within the Department of Justice, Bureau of Prisons, including certain employees who work at the U.S. Penitentiary, Leavenworth, Kansas. The Union is an agent of the Council of Prison Locals, AFGE, at the Leavenworth Penitentiary.

Mr. Larry Raney, a bargaining unit employee, has worked at the Leavenworth Penitentiary for approximately nine years. On January 24, 1991 Mr. Raney was required to testify in U.S. District Court in connection with the

prosecution of Mr. John O'Brien, a former employee at Leavenworth Penitentiary. Mr. O'Brien was on trial for allegedly falsifying his job application and for providing false statements during an interview. Mr. Raney, testifying on behalf of Mr. O'Brien, stated at the trial that there were employees other than Mr. O'Brien who had provided false or incomplete information on their job applications and that Mr. O'Brien was the only employee, to his knowledge, who had ever been prosecuted for such actions. Mr. Raney further testified that the other employees had been given an opportunity to correct or clarify incomplete information on their job applications and that no action had been taken against them. During his testimony in the U.S. District Court, Mr. Raney did not identify the "other employees" by name.

The indictment of Mr. John O'Brien was based upon an investigation which had been conducted by Mr. Joseph Rivera, Special Agent for the U.S. Department of Justice, Office of the Inspector General (OIG). As a Special Agent for the Department of Justice, OIG, Mr. Rivera investigates both criminal and non-criminal allegations of wrong doing by Department of Justice employees. Although the results of Mr. Rivera's investigations, which are primarily criminal and for purposes of determining whether a criminal prosecution against an employee should be pursued, the Department of Justice component to which the employee being investigated is assigned may also pursue an independent investigation and administrative action against the employee based on information disclosed by Mr. Rivera's investigation.

Mr. Rivera was in the District Court on January 24, 1991, and heard Mr. Raney's testimony about other employees at Leavenworth Penitentiary having given false or misleading information on their job applications.^{1/} Mr. Rivera then discussed the matter with Assistant U.S. Attorney Gregory Huff and they concluded that an investigation should be conducted to determine whether Mr. Raney had falsified his own application or had aided or abetted other employees in falsifying their job applications.

^{1/} According to Mr. Raney, following his testimony and just when he was about to leave the courtroom, Mr. Rivera approached him and said "I'll be seeing you later". Mr. Rivera denies speaking to Mr. Raney following his testimony.

On March 12, 1991, Mr. Rivera telephoned Mr. Bill Thomas,^{2/} Special Investigative Agent, (SIA), at the Leavenworth Penitentiary and advised him that he, Mr. Rivera, was conducting a criminal investigation and that he wanted to interview Mr. Raney concerning the testimony that he, Mr. Raney, had given in the trial of Mr. O'Brien. Mr. Rivera also asked Mr. Thomas to secure a room for the interview and to arrange for his entry into the Prison.

On March 13, 1991, Mr. Thomas telephoned Mr. Raney and instructed him to report to his, Mr. Thomas, office at the Leavenworth Penitentiary. Mr. Thomas informed Mr. Raney that an OIG representative wanted to talk to him. Following the telephone conversation with Mr. Thomas, Mr. Raney immediately contacted Mr. Robert Rainwater, a co-worker at the Leavenworth Penitentiary who, at the time, was President of the Union, and asked Mr. Rainwater to act as his Union representative during the upcoming meeting with the OIG scheduled for Mr. Thomas' office. Mr. Rainwater agreed to represent Mr. Raney and told him that he would meet him at Mr. Thomas' office.

Mr. Rainwater arrived at Mr. Thomas' office ahead of Mr. Raney. Upon arrival he was met by Mr. Thomas who inquired as to why he was there. When Mr. Rainwater informed him that he was there as Mr. Raney's Union representative, Mr. Thomas told him that he would not be permitted to be present during the questioning of Mr. Raney since it was a criminal investigation.^{3/} Mr. Rainwater then

^{2/} Mr. Thomas works for the Bureau of Prisons and is stationed at the U.S. Penitentiary in Leavenworth, Kansas. His duties include investigations of alleged wrong-doing by employees and inmates at the Penitentiary. Investigations pursued by Mr. Thomas may be based upon alleged violations of the Bureau of Prisons' Code of Conduct for employees. Such allegations, if substantiated, could result in administrative penalties ranging from reprimand to removal.

^{3/} According to Mr. Rainwater, Mr. Thomas told him that he would not be permitted to attend the examination since it was not relevant to the institution or the Union. According to Mr. Thomas and Mr. Rivera, he was told that he could not attend because it was a criminal investigation.

left Mr. Thomas' office and met Mr. Raney in the hallway. Mr. Rainwater informed Mr. Raney that Mr. Thomas had prohibited him from attending the meeting. Mr. Raney then entered Mr. Thomas' office alone where he was introduced to Mr. Rivera, who showed him his OIG credentials.

They then went into the adjoining office where Mr. Thomas informed Mr. Raney that he, Mr. Thomas, was going to be present at the interview solely as a witness.^{4/} Mr. Rivera then gave Mr. Raney his "Miranda" rights, Thus, he told Mr. Raney that he had the right to remain silent, that any thing that he said could be used against him, that he was not in custody, that he did not have to answer any questions, that he could leave at any time, and that he had the right to an attorney. Mr. Raney responded to the "Miranda" rights warning by requesting a Union representative. Mr. Rivera, denied the request and again informed Mr. Raney that he had the right to an attorney and that he would postpone the examination for as much time as Mr. Raney needed to obtain an attorney. Mr. Raney then asked Mr. Rivera if he could suggest an attorney and was informed by Mr. Rivera that he was not authorized to recommend an attorney. Mr. Raney then volunteered to proceed with the interview without an attorney.

According to Mr. Thomas and Mr. Rivera, Mr. Rivera then proceeded to question Mr. Raney with respect to his knowledge of employees who had falsified their respective employment applications. Mr. Raney freely answered the questions. The interview lasted approximately 10 to 20 minutes and terminated with Mr. Raney agreeing to supply, at a later date, the names of several employees, who at the time he could not remember, might have submitted inaccurate employment applications.

Contrary to the testimony of Mr. Raney, Mr. Thomas and Mr. Rivera deny that they at any time made any statements that implied that Mr. Raney was under an obligation to

^{4/} According to Mr. Rivera, he had not come directly from his office and was without the forms which he normally has a witness sign indicating that he, the witness, has been given his "Miranda" rights, so he asked Mr. Thomas to sit in on the interview for purposes of witnessing the fact that he had in fact given Mr. Raney his "Miranda" rights.

answer the questions being propounded by Mr. Rivera.^{5/} Mr. Rivera denies making any reference to the Bureau of Prison's Code of Conduct during the interview in an attempt to convince Mr. Raney that he was obligated to answer his questions. In this connection, Mr. Rivera denied having any knowledge of the Bureau of Prison's Code of Conduct. Finally, according to Mr. Rivera and Mr. Thomas, Mr. Rivera made it clear during the interview that Mr. Raney was under no obligation to answer any question.

The record further reveals that the entire interrogation of Mr. Raney was conducted by Mr. Rivera. Mr. Thomas did, however, on one occasion attempt to restate or explain a question propounded by Mr. Rivera to Mr. Raney.

Following the interview Mr. Rivera prepared a report which was submitted to the United States Attorney who had been involved in the O'Brien trial and who had authorized the examination of Mr. Raney. Mr. Rivera did not provide the Bureau of Prisons with a copy of his report.

The record reveals that no administrative action was either proposed or taken by the Bureau of Prisons against Mr. Raney as a result of the examination by Mr. Rivera. According to Mr. Thomas, in order for administrative action to be taken by the Bureau of Prisons against Mr. Raney a separate administrative hearing or examination would have been required since they could not have relied upon the examination by the Inspector General.

Discussion and Conclusions

The General Counsel, relying on a credibility determination favoring Mr. Raney, takes the position that the Respondents violated Sections 7116(a)(1) and (8) of the Statute by virtue of the actions of Mr. Thomas and Mr. Rivera

^{5/} Mr. Raney, who denies that he was ever given his "Miranda" rights, claims that he was continually denied the right to representation and that Mr. Rivera pointed out to him that the Bureau of Prisons Code of Conduct required him, Mr. Raney, to inform the Bureau of Prisons of any wrongs committed by the staff employees. Mr. Raney further testified that in response to his request for an attorney, Mr. Rivera pushed a telephone towards him and told him that he had ten minutes to call one.

in denying Mr. Raney's request for union representation during the investigative examination. Department of the Treasury, Internal Revenue Service, Jacksonville District, et al., 23 FLRA 876; Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina, 32 FLRA 222. According to the General Counsel, irrespective of the fact that the Office of Inspector General and the Union are not parties to an exclusive bargaining relationship, the Office of Inspector General is a proper Respondent herein since both it and the Bureau of Prisons are components of the Department of Justice. Department of Defense, Defense Criminal Investigative Service, Defense Logistics Agency, and Defense Contract Administration Services Region, New York, 28 FLRA 1145, (DCIS); aff'd sub nom. DCIS v. FLRA, 835 F.2d 92. The General Counsel would find the Bureau of Prisons liable since, by virtue of Mr. Thomas' presence, the Bureau benefited from the Office of Inspector General's examination. Further, the General Counsel, again on the basis of a credibility determination in Mr. Raney's favor, would find that the Respondent never gave Mr. Raney his "Miranda" rights. Finally, the General Counsel would find that even if it is concluded that Mr. Raney was given his "Miranda" rights, the record evidence supports the conclusion that Respondents by their actions in citing the Bureau's Code of Conduct, etc., coerced Mr. Raney into surrendering his right to remain silent after being refused representation.

Respondents, on the other hand, relying on credibility determination favoring Mr. Thomas and Mr. Rivera, take the position that neither of the Respondents violated the Statute by virtue of the actions of Mr. Thomas and Mr. Rivera in denying Mr. Raney union representation at an investigative examination that could possibly lead to discipline. According to Respondents in order for the interview to be violative of the Statute it must be shown that Mr. Raney was somehow compelled against his will to participate in the interview. Inasmuch as the testimony of Mr. Thomas and Mr. Rivera establishes that Mr. Raney was informed prior to the investigative examination that he could remain silent and that he was free to go etc., according to Respondents it is obvious that Mr. Raney waived his "Weingarten" rights and voluntarily participated in the examination. Alternatively, Respondents' contend that the Complaint against the Inspector General should be dismissed since the Inspector General was not conducting the interview as a representative of the agency as defined in Section 7114(a)(2)(B) of the Statute. With respect to the Bureau of Prisons the Respondents contend that the Complaint should be dismissed

since the record indicates that the interview or examination was conducted by the Inspector General and that Mr. Thomas participated solely as a witness. Finally, Respondent disagrees with the Authority's holding in DCIS.

A reading of the above stated positions of the parties makes it clear that resolution of the instant complaint turns on a credibility determination. It is also clear that although Respondents disagree with the Authority's decision in DCIS the parties are in agreement with respect to the status of the law.

Having observed Mr. Raney, Mr. Thomas and Mr. Rivera while on the witness stand, and analyzed their respective testimony, I credit the mutually corroborative testimony of Mr. Thomas and Mr. Rivera. Accordingly, I find that after denying Mr. Raney's request for Union representation and prior to proceeding with the investigative examination, Mr. Rivera did inform Mr. Raney that he had the right to remain silent, that he was not in custody, that he did not have to answer any questions and that he could leave at any time. Thereafter, Mr. Raney voluntarily participated in the investigative examination and answered, to the best of his knowledge, all of Mr. Rivera's questions. I further find, contrary to the testimony of Mr. Raney, that neither Mr. Thomas nor Mr. Rivera put any pressure upon Mr. Raney to abandon his right to remain silent and/or not to participate in the examination.

In U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas, 42 FLRA 834, the Authority made it clear that when an employee is required by an agency to submit to an interview, which the employee reasonably believes could result in disciplinary action, the employee has a right to request union representation at that interview. When a valid employee request has been made, the agency is permitted one of three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview without representation or having no interview at all.

In the instant case, after denying Mr. Raney's request for union representation, Mr. Rivera, as noted above, made it clear that he, Mr. Raney, was not in custody, that he did not have to answer any questions and that he was free to leave at any time. I find such statements to be tantamount to offering Mr. Raney "the choice between continuing the


interview without representation or having no interview at all". Accordingly, having given Mr. Raney his rights and in the absence of any probative evidence that he was coerced into abandoning such rights, I find that Respondents did not violate Sections 7116(a)(1) and (8) of the Statute when they continued the investigative interview of Mr. Raney without union representation.

Accordingly, it is hereby recommended that the Authority adopt the following order dismissing the complaint in its entirety.

ORDER

It is hereby Ordered that the Complaint should be, and hereby is, dismissed in its entirety.

Issued, Washington, DC, April 20, 1992



BURTON S. STERNBURG
Administrative Law Judge