

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF AGRICULTURE FOOD SAFETY AND INSPECTION SERVICE BOULDER DISTRICT BOULDER, COLORADO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL JOINT COUNCIL OF FOOD INSPECTION LOCALS Charging Party	Case Nos. DE-CA-02-0570 DE-CA-02-0571

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MARCH 29, 2004**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: February 26, 2004
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: February 26, 2004

TO: THE FEDERAL LABOR RELATIONS AUTHORITY

FROM: WILLIAM B. DEVANEY
ADMINISTRATIVE LAW JUDGE

SUBJECT: U.S. DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
BOULDER DISTRICT
BOULDER, COLORADO

Respondent

CA-02-0570 and Case Nos. DE-
DE-
CA-02-0571

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, NATIONAL JOINT COUNCIL
OF FOOD INSPECTION LOCALS

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the transmittal form sent to the parties, and the service sheet. Also enclosed are the pleadings, motions, exhibits and briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF AGRICULTURE FOOD SAFETY AND INSPECTION SERVICE BOULDER DISTRICT BOULDER, COLORADO <p style="text-align: center;">Respondent</p>	
<p style="text-align: center;">and</p> AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL JOINT COUNCIL OF FOOD INSPECTION LOCALS <p style="text-align: center;">Charging Party</p>	Case Nos. DE-CA-02-0570 DE-CA-02-0571

Ms. Cheryl R. Dunham
For the Respondent

Bruce E. Conant, 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: (a) whether Respondent on March 20, 2002, violated § 16(a)(1) of the Statute when, in response to employee Argo's request for union representation, it responded, ". . . if you want union representation, I will give you your union representation and this will become a formal meeting instead of an informal meeting, and there

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For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71", of the statutory reference, i.e., Section 7116(a)(2) will be referred to, simply, as, "\$ 16(a)(2)".

will be a formal investigation and possible charges." (G.C. Exh. 1(f), Complaint, Par. 33); (b) whether Respondent issued employee Argo, ". . . an Unacceptable Performance Memorandum . . . lowering his performance level to 'does not meet fully successful'" (id., Par. 34) in violation of §§ 16 (a) (1) and (2) of the Statute; and (c) whether Respondent reassigned employee Argo to Greeley, Colorado, in violation of §§ 16(a) (1) and (2) of the Statute.

These cases were initiated by a charge filed in Case No. DE-CA-02-0570 on July 8, 2002, which alleged violations of § 16(a) (1), (2), (5) and (8) (G.C. Exh. 1(a)), by a First Amended Charge filed on November 14, 2002, alleging violations of §§ 16(a) (1), (2) and (8) (G.C. Exh. 1(b)), and by a Second Amended Charge filed on February 20, 2003, which alleged violations of §§ 16(a) (1) and (2) (G.C. Exh. 1(c)); and by a charge filed in Case No. DE-CA-02-0571 on July 8, 2002, which alleged violations of §§ 16(a) (1), (2) and (5) (G.C. Exh. 1(d)) and a First Amended Charge, filed on November 14, 2002, alleging violations of §§ 16(a) (1) and (2) (G.C. Exh. 1(e)). The Consolidated Complaint and Notice of Hearing issued on November 29, 2002, and alleged violations of §§ 16(a) (1), (2) and (8) of the Statute and set the hearing for February 24, 2003, in Denver, Colorado, pursuant to which a hearing was duly held on February 24, 2003, in Denver, Colorado, before the undersigned. At the opening of the hearing, General Counsel deleted Paragraphs 25 through 32 and 41 through 42 of the Complaint (Tr. 8-9).

All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and at the close of the hearing, March 24, 2003, was fixed as the date for mailing post-hearing briefs which time subsequently was extended to April 2, 2003, and Respondent and General Counsel each timely mailed an excellent Brief, received on, or before, April 8, 2003, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions.

FINDINGS

1. The American Federation of Government Employees, Joint Council of Food Inspection Locals, AFL-CIO, (hereinafter, "AFGE") is the exclusive representative of a nation-wide appropriate unit of Food Safety and Inspection Service, U.S. Department of Agriculture (hereinafter, "FSIS"). AFGE and FSIS have a negotiated Agreement (Res. Exh. 1). The American Federation of Government Employees,

National Joint Council of Food Inspection Locals, Local 925, (hereinafter, "Union") is an agent of the National Joint Council for the representation of bargaining unit employees of Respondent's Boulder District, Boulder, Colorado.

2. This case involves food Inspectors employed by FSIS at a beef slaughter and processing plant in Fort Morgan, Colorado, operated by Excel Corporation. The Fort Morgan plant is a fast-kill plant with a single production line. There are about 2200 Excel employees and 37 FSIS employees at the plant. Excel's employees are supervised by their supervisors and FSIS employees by their own, separate, supervisors. Dr. Michael Sherman Finley is a Supervisory Veterinary Medical Officer and is the Inspector in Charge (IIC) of FSIS employees at Fort Morgan. There are 13 GS-5 or 7 positions [Inspectors] on each of two shifts; two off-line positions on each shift; two relief off-line positions (GS-9) on each shift; two Supervisory Veterinary Medical Officers (GS-11) on the day shift and one on the night shift (Tr. 116-117).

3. There is an inherent conflict between the interests of plant personnel to maximize production and the interests of FSIS to assure that the product is properly inspected and safe for consumption. Inspectors have the authority, by pressing a red "stop" button at their work stations, to halt the production line when necessary to perform their inspections. Mr. Gary Dahl, an Inspector in processing in Denver and President of the Union, said he had been told it costs the company. ". . . about \$3,000.00 per one minute of down time in a high speed chain" (Tr. 23), so, whatever the true cost, shutting down the line causes a substantial monetary loss to the company and brings immediate attention of supervisory personnel to resolve the problem.

4. On March 20, 2002, Mr. Richard Argo, a GS-7 Inspector, at some time in the morning was working hearts on 2nd pluck (G.C. Exh. 2, attachment) when he said Mr. Harold Ball, an Excel general foreman (a Blue Hat), was doing a snatch and grab, i.e. run in real fast, grab a beef liver and get out real fast (Tr. 49), and while Mr. Ball did not interfere as far as Mr. Argo's work, when Mr. Argo turned to the sink his knife almost stabbed Mr. Ball (Tr. 50). Mr. Argo remained at the 2^d pluck position until he was given a government break. When he returned, he rotated to the 3^d pluck position to let the Inspector there go on break. Mr. Ball was still in the area and Mr. Argo said he put his knife in his scabbard and tried to talk to Mr. Ball about the earlier incident and Mr. Ball said, "I'm not in your area" (Tr. 50-51). Mr. Argo said, ". . . after I had worked

the heart, then I put my knife in my scabbard, didn't even really have to take two steps. And, that's when he put his hand up in my face. . . . it [his hand] was like that . . . like four or five inches. . . . I immediately hit the stop button. . . . and . . . probably yelled at him, 'Harold, don't you ever put your hand in my face again.'" (Tr. 51).

On cross-examination, Mr. Argo further explained the palm [i.e. palm of Mr. Ball's hand] as follows: ". . . he's [Mr. Ball] standing right here in between second and third pluck, right there at the edge of the third pluck area (see, Mr. Argo's drawing, G.C. Exh. 2, attachment) . . . I walked up to him. . . . So, you walked into his hand? . . . I walked up and was met with the hand. The hand wasn't already out. . . . So, why did you walk up to him? . . . Trying to explain to him what the reason was that I didn't want him in my area, because he kept saying, 'I'm not in your area.'" (Tr. 85). Mr. Argo stopped the line and called the work place violence prevention hotline [in Washington, D.C.], whether before or after he and Mr. Ball went to Dr. Finley's office is uncertain,² ". . . Because there seemed to be -- and, I'm getting at also here that the palm in the hand (sic) wasn't a big issue. And, so I wanted to call and ask them whether me walking up and him putting his hand in my face was poor communication, or did they consider it a work place violence issue where this form needs to be filled out. They told me it was." and Mr. Argo did fill out a form [FSIS 4735-4] (Tr. 86).

5. After Mr. Argo shut down the line, he told Mr. Ball, "This is something we need to take up with Doc [Dr. Finley] (Tr. 52) and they repaired to Dr. Finley's office where Mr. Argo told Dr. Finley, "I'm not ever going to have a company employee put his hand in my face." (Tr. 52). Mr. Argo said Mr. Ball told Dr. Finley he had put his hand in Mr. Argo's face and he was sorry and apologized (Tr. 53). Mr. Argo stated that Dr. Finley said we're going to take care of this when everyone had cooled down and told me to go back to work (Tr. 53). The line was down five minutes or a little longer (Tr. 53).

6. On the same afternoon, March 20, 2002, at about 2:00 p.m., Mr. Argo was told to go to Dr. Finley's office.

²
Dr. Finley testified, "After I ascertained what happened . . . I asked Mr. Ball, . . . 'Will you stay out of Mr. Argo's area.' He said yes. I asked Mr. Argo, 'If he stays out of your area, will you let the line run.' He said, 'Yes, I will.' . . . they both went back upstairs, Mr. Argo turned the production line back on. . . ." (Tr. 139).

Mr. Leonard Hochnadel, Slaughter Manager for Excel and Mr. Ball's supervisor (Tr. 140, 179), and Mr. Ball were already there (Tr. 54, 140). Dr. Finley told Mr. Argo to take his apron and knives off and come in (Tr. 54, 140). Mr. Argo said that Dr. Finley stated, when he, Argo, got into the room, "This is a conflict resolution meeting, and I wanted to have this when everybody was calmer." Mr. Argo said he was still upset (Tr. 55). Mr. Argo said Dr. Finley continued, stating that this was a resolution meeting, told Mr. Ball not to talk to Mr. Argo and told Mr. Argo not to talk to Mr. Ball; that each of them was to speak to him, Dr. Finley (id.). Mr. Argo said ". . . I'd like to have union representation" (id.) and Dr. Finley replied, this is not a formal meeting. This is an informal meeting. I don't anticipate any disciplinary action (id.). Mr. Argo stood his ground and said again. "I'd like union representation" (id.). Dr. Finley said this is not a Weingarten meeting (id.) and Mr. Argo responded, "Well then, I don't have to answer any questions or make any statements." (Tr. 56). Mr. Argo stated that Dr. Finley was angered because he, Argo, wouldn't participate, and said,

"'. . . Well, you know, if you want your union representation, I'll give you your union representation, but I know there could be,' or there would be a full investigation and everything." (id.).

Dr. Finley stated,

". . . the day previous [March 20] -- I suppose I should have said this earlier. But, the day previous to that, when we finished the meeting, I told Mr. Argo that he would have his union representative there the next time that we met.

"But, I also tried to put him on notice that this -- this would then be a formal meeting.

"Q A Weingarten meeting --

"A Yes, ma'am. (Tr. 144)

Mr. Hochnadel stated as to the March 20 meeting,

"A Dr. Finley sort of laid out the ground rules. Each person would have their say, and they were not to be interrupted until that person was finished. And then questions could be asked.

"And, Inspector Argo just basically said, 'I'm not talking to anybody, unless I have union representation.'"

"Q . . . did the meeting conclude then at that time?

"A Yes, it did." (Tr. 183).

7. At about 2:30 p.m. the following day, March 21, 2002, Mr. Argo said that Mr. Jim McCafferty came and got him off the line and told me to go to Dr. Finley's office. Mr. Argo said he met Mr. Richard Dulaney³ on the way and they went in together (Tr. 58). Present in Dr. Finley's office were: Dr. Hansen, Circuit Supervisor and Dr. Finley's immediate supervisor, Mr. Hochnadel, Mr. Ball and Dr. Finley (Tr. 58). Mr. Argo stated, ". . . I did not know whether Mr. Dulaney was appointed or not as my representation, so I assumed that he was. And, there was no reason not to carry on. My request was fulfilled. Q . . . So, I would assume that everyone in that room thought Mr. Dulaney was the representative. Is that correct? "A. Yeah, that's what I would assume, too." (Tr. 87).

Mr. Ball and Mr. Argo each stated his recollection of what had happened on the morning of the day before. Dr. Finley stated,

". . . There was two or three things that came out at that meeting, and even prior to the second meeting, that concerned me.

"The first thing was that Mr. Argo's behavior of just refusing to -- to talk to the plant or interact and try to solve a problem

"The second thing was that Mr. Argo had -- and, this came out during the meeting -- Mr. Argo had taken this action [shutting down the line] when Mr. Ball was not even in his area.

"Mr. Ball had stepped into another inspector's area.

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Mr. Dulaney, now a GS-7 Inspector at the Swift plant in Greeley, until about March 2002, had been at the Excel plant in Fort Morgan. He became a union steward 7½ to 8 years ago and stopped being a steward when the Union abolished stewards in each plant (Tr. 99).

"And even if it was his area, he did not follow the procedures for encroachment that we had outlined in our -- in our letter of instruction for how to deal with presentation issues such as encroachment" (Tr. 144-145).

8. After Messrs. Hochnadel and Ball departed, Dr. Finley told Mr. Argo that his performance was not satisfactory and Mr. Argo said Dr. Finley told him he was lowering his rating (Tr. 60). Dr. Finley said, ". . . I gave him some pretty strong off target feedback verbally, and told him that, that this was . . . this sort of behavior was -- was not acceptable and that -- and that currently during the rating cycle, which we were just two or three weeks into the rating cycle, he would be -- he would be at an unacceptable level." (Tr. 146).

9. The following day, March 22, 2002, Dr. Finley wrote a memorandum, with a copy to Mr. Argo, "To: The Performance File of Richard Argo" The memorandum stated, in part, that,

"Inspector Argo was informed that because he had refused to participate in a meeting with plant management and because he had failed to follow written instructions in how to handle encroachment his performance was currently at the 'Do Not Meets' level. This is for the performance rating year 3/1/02-2/28/03.

"Inspector Argo's performance will be monitored closely and he will be routinely provided with written feedback as to his performance level until such time his performance is considered to be at the 'Fully Successful' level. . . ." (G.C. Exh. 3; see, also, Tr. 146-150).

10. On April 18, 2002, Mr. Argo filed a Form 4735-4 alleging threat and intimidation (Res. Exh. 3). This involved Excel employee Oscar Perez. Mr. Argo told Dr. Melvin Thomas Gore that he was afraid he might be attacked in the parking lot (Tr. 229-230). Although Excel's investigation did not show the allegations against Mr. Perez were warranted (Res. Exh. 3, attachments - statements by four of Mr. Argo's fellow Inspectors; Res. Exh. 4; Tr. 187-188), Excel, nevertheless, to avoid any further conflicts moved Mr. Perez to another part of the plant where he would have no contact with Mr. Argo (Tr. 189).

By letter dated June 13, 2002, Dr. Ronald Jones, District Manager of the Boulder District, which covers ten states and three territories (Tr. 232), wrote Mr. Argo

stating, in part, "This notice is a proposal to reassign you to a Food Inspector (Slaughter), GS-1863-7, position at Est. 969, in Greeley, Colorado. The effective date for reassignment will be no later than August 25, 2002. . . ." (G.C. Exh. 5). Although the notice gave Mr. Argo ten days to reply stating his reasons why the reassignment should not be effected, Mr. Argo did not challenge the reassignment, and General Counsel, in his Brief states, ". . . the employee chose to accept that transfer and has no desire to return to Fort Morgan." (General Counsel's Brief, p. 21)

In his letter, Dr. Jones stated,

"To ensure that this Agency's regulatory mission is effectively and efficiently carried out, it is vitally important that our inspection personnel perform their duties at all times and maintain an impartial and professional relationship with their fellow employees and personnel of the regulated establishment. Failure to maintain such a relationship has serious repercussions, including the adverse effect upon public confidence in the integrity of our employees and our inspection program.

"At present your duty station, Est. 86R, in Fort Morgan, CO, there appears that there are extensive personality conflicts between you and your supervisor and plant personnel, thereby diminishing your effectiveness as a Food Inspector. Therefore, since it appears that you can not maintain an impartial, professional and working relationship with your supervisor and plant personnel, it has been decided that the interest of the service will be best served by your reassignment to another duty station.

. . . ." (id.)

Dr. Jones made the decision to reassign Mr. Argo; but his decision was based on information he received from Dr. Finley, including Excel's responses to allegations of work place violence, etc. including Respondent Exhibit 4 (Perez) and General Counsel Exhibit 7 (Ball) in which Mr. Hochnadel stated, in part,

". . . Furthermore, when we set up a meeting to try and resolve this issue, Mr. Argo refused to work with the IIC to settle this matter." (G.C. Exh. 7).

CONCLUSIONS

A. Respondent violated § 16(a)(1) on March 20, 2002, by its response to Mr. Argo's request for Union representation.

Respondent, obviously, does not understand § 14(a)(2)(B) of the Statute. § 14(a)(2)(A) concerns a union's right to notice and an opportunity to be represented at any formal discussion concerning any grievance or personnel policy or practices or other general condition of employment.

§ 14(a)(2)(B) concerns wholly an employee's right to representation at any examination of an employee in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action and the employee requests representation. Here, there is no dispute that Mr. Argo was called for an examination in connection with an investigation. No matter that Dr. Finley called it a resolution meeting, the purpose was to examine and to investigate the events of the morning. When Mr. Argo arrived for the meeting to which he had been summoned, Mr. Ball, an Excel general foreman and the other party to the incident was already present, together with Mr. Hochnadel, Slaughter Manager and Mr. Ball's supervisor and Dr. Finley. True, Dr. Finley said, "This is an informal meeting. I don't anticipate any . . . disciplinary action." (Tr. 55; but the test is whether Mr. Argo reasonably believed that the examination might result in disciplinary action. The setting, with Messrs. Hochnadel, Ball and Dr. Finley, present, was ominous and Mr. Argo knew that he had not shut down the line at the time he asserted he had perceived encroachment by Mr. Ball at the second pluck position; but, to the contrary, he had not done so until after he had had a break and returned to relieve the inspector on the third pluck. Accordingly, Mr. Argo reasonably believed that the examination might result in disciplinary action against him and his request for representation was a right granted by the Statute and may not be denied because Respondent has adopted a conflict resolution program (Tr. 120). Representation pursuant to § 14(a)(2)(B) of the Statute is neither incompatible with a conflict resolution program nor a deterrent to its goal. Article XXX, Section C of the parties' now expired Agreement (Res. Exh. 1), which deals with "Informal Resolution of Minor Problems" states, in part, as follows:

"Supervisors shall bring during those instances of misconduct to the attention of the involved employee that could result in disciplinary action,

if continued. . . . A concerted effort will be made to resolve the matter on an informal basis" (id., pp. 172-173).

Resolution on an informal basis does not purport to deny an employee the right to representation, pursuant to § 14(a) (2)(B) of the Statute. To the contrary, Article XXX, Section C specifically recognizes that disciplinary action could result and, further, allows supervisors five (5) working days to take action which, by inference, provides time to make representation available.

Dr. Finley's response to Mr. Argo's request for representation was, according to Dr. Finley, "Okay, this meeting is completed for the day. We will get a union representative here." (Tr. 142); "I also tried to put him on notice that this -- this would then be a formal meeting. Q A Weingarten meeting -- A Yes, ma'am" (Tr. 144). According to Mr. Argo.

"I said, 'Well, I'd like to have union representation.'

"And he told me, 'Well, this is not a formal meeting. This is an informal meeting. I don't anticipate any,' oh, whatever you call it, disciplinary action.

. . . .

"A And . . . I just stood my ground. I said, you know, 'I'd like union representation.'

"He said, 'Well, this is not a Weingarten meeting.' And, I kind of understood what a Weingarten meeting was. And you know, I said, 'Well then, I don't have to answer any questions or make any statements.'

. . . .

"A . . . that's when he said, 'Well, you know, if you want your union representation, I'll give you your union representation, but I know there could be,' or there would be a full investigation and everything.

"And that's when I asked him, . . . 'Why are you threatening me, because I asked for representation.'

"It was the way he said it. He was grasping his chair. He was kind of leaning forward and just, you could tell he was very angry" (Tr. 55-56).

I conclude that, as alleged in Paragraph 33 of the Complaint (G.C. Exh. 1(f)), Dr. Finley responded to Mr. Argo's request for representation in words, in essence, as ". . . if you want union representation, I will give you your union representation and this will become a formal meeting instead of an informal meeting, and there will be a formal investigation and possible charges." This is what Mr. Argo credibly stated and which was essentially corroborated by Dr. Finley. The response threatened Mr. Argo with a formal investigation and possible charges because he requested representation at an investigation in which he reasonably believed could result in disciplinary action and violated § 16(a)(1), U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky, 49 FLRA 1020, 1034 (1953).

B. Respondent violated §§ 16(a)(2) and (1) of the Statute on, or about, March 22, 2002, by issuing Mr. Argo an unacceptable performance memorandum in retaliation for his exercise of his protected right to request union representation pursuant to § 14(a)(2)(B) of the Statute.

The memorandum placed in Mr. Argo's performance file, dated March 22, 2002, stated, in part, as follows:

"[On 3/20/02] . . . Inspector Argo first requested a union rep to be present. Although he was informed it was an informal conflict resolution meeting with no anticipated disciplinary action (thus there was no need for a union rep's presence), inspector Argo would not make any comments . . . with out a union rep being present. Therefore, the meeting ended after Harold ball (sic) told us his view of what had occurred.

"On 3/21/02 I again met with inspector Argo, Lenny Hochnadel, Harold Ball as well as Rich Dulaney (Est. 86R's shop steward) and Dr. Hansen. A conflict resolution meeting was held and inspector Argo did tell us his view of what had occurred. After the meeting with plant management concluded and plant management had left, inspector Argo was informed it was part of his job responsibility to meet with plant management and resolve issues between inspection and the regulated industry.

His refusal to do so yesterday was unacceptable because it is part of his job. I also advised him that by leaving the kill floor when dealing with an encroachment issue he did not follow the written procedure as outlined in the letter of instruction regarding presentation. Inspector Argo was informed that because he had refused to participate in a meeting with plant management and because he had failed to follow written instructions in how to handle encroachment his performance was currently at the 'Do Not Meets' level. This is for the performance rating year 3/1/02-2/28/03.

"Inspector Argo's performance will be monitored closely and he will be routinely provided with written feedback as to his performance level until such time his performance is considered to be at the 'Fully Successful' level." (G.C. Exh. 3).

Plainly, Respondent gave Mr. Argo the, "Do Not Meets" rating because, ". . . he had refused to participate in a meeting with plant management . . ." and ". . . Argo was informed it was part of his job responsibility to meet with plant management and resolve issues between inspection and the regulated industry. His refusal to do so yesterday [March 20, 2002] was unacceptable because it is part of his job. . . ." (G.C. Exh. 3). I do not doubt that it is part of Mr. Argo's job responsibility to meet with plant management and to resolve issues between inspection and the regulated industry; but when an inspector reasonably believes that the investigation may result in disciplinary action against him and he requests representation, then the meeting with plant management must be with the inspector's representative present.

Let there be no misunderstanding, Respondent did not offer immunity to Mr. Argo and when the parties met the following day [March 21, 2002] with Mr. Argo's representative present, Messrs. Ball and Argo set forth their respective statements of what had occurred on the morning of March 20, 2002. Although Dr. Finley described the March 21, 2002, meeting as a "conflict resolution meeting", he told Mr. Argo that, ". . . this sort of behavior was -- was not acceptable, and that -- and that currently during the rating cycle, which we were just two or three weeks into the rating cycle, . . . he would be at an unacceptable level" (Tr. 146) and the following day, March 22, 2002, he placed the does not meet memorandum in Mr. Argo's Performance file (G.C. Exh. 3), notwithstanding that on March 21, 2002, Messrs. Ball and Argo each

apologized, there was hand shaking and the issue seemed to have been resolved (Tr. 103, 200). Of course, Mr. Argo's concerns about possible disciplinary action against him were proven to be correct.⁴

It also is plain that Respondent gave Mr. Argo the "Do Not Meets" rating in part because of his failure to follow the procedures for encroachment (Tr. 145). As noted previously, the perceived encroachment occurred while Mr. Argo was working the second pluck position. He did not shut down the line until after he had taken a break and had returned to relieve the inspector on the third pluck position. He had left the line to accost Mr. Ball and when Mr. Ball raised his hand, Mr. Argo shut down the line. There is no assertion of encroachment at the third pluck position. As Dr. Finley stated, ". . . Mr. Argo had taken this action when Mr. Ball was not even in his area. . . ." (Tr. 145). General Counsel argues,

". . . Although the memo also criticizes Argo's handling of the encroachment issue with Ball, it can simply not credibly be argued that the incident with Ball, which Finley described as a 'small thing', would have led to a memo to Argo's performance file in the absence of his insistence on having a Union representative present prior to giving his side of the story in the investigation of the incident." (General Counsel's Brief, pp. 13-14).

I do not agree. Dr. Finley did not consider the encroachment issue a "small thing". Dr. Finley consistently, after the matter came out during the meeting (Tr. 145), was very much concerned about the encroachment issue. Moreover, Dr. Dale Hansen, Greeley, Colorado Circuit Supervisor (Tr. 193) and Dr. Finley's immediate supervisor, who sat in on the March 21, 2002, meeting, testified, in part, as follows:

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On June 27, 2002, Mr. Argo was given notice of a proposed five day suspension (G.C. Exh. 6). This action was grieved, is not an allegation of the complaint, is not before me, and I express no opinion about it. However, I am aware that Specification 1 states,

"On March 20, 2002, while you were working the third pluck position . . . you approached plant employee, Harry Ball, who raised his hand in front of your face. At that time you stopped the line and left your station without the appropriate authority." (id., p. 1).

"A Then Dr. Finley discussed with Inspector Argo and Mr. Dulaney the fact that he felt that Mr. Argo did not meet the standards for a portion of his performance rating, due to not discussing the encroachment issue on the previous day, and also not handling it in the fashion that Dr. Finley felt that he should, due to the protocol that was in place at the time.

"Q Did you agree with that assessment?

"A Yes, I did." (Tr. 196-197).

Finally, the encroachment issue was raised as Specification 1 of Respondent's June 27, 2002, notice of proposed suspension of Mr. Argo. At all levels, the encroachment issue was viewed as a very significant matter. I do not believe the record supports General Counsel's contention that, absent Mr. Argo's request for representation on March 20, 2002, Respondent would not have written a memorandum to Argo's performance file because of the encroachment issue.

General Counsel clearly established Respondent's violation of § 16(a)(2) of the Statute, having shown that,

"(1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity [here, the request, pursuant to § 14(a)(2)(B), for representation at an investigation where the employee reasonably believed the examination might result in disciplinary action against him]; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment." Letterkenny Army Depot, 35 FLRA 113, 118 (1990).

The fact that the employee violated established policy and procedures concerning the encroachment issue can not, and does not, absolve Respondent of its discriminatory action against Mr. Argo for his exercise of his protected right to request representation at an investigation when he reasonably believed that the examination might result in disciplinary action against him. Accordingly, I shall order the memorandum (G.C. Exh. 3) dated March 22, 2002, To: The Performance File of Richard Argo be withdrawn and rescinded and all copies be removed from any and all records. However, because the record strongly suggests that

Respondent would have issued a memorandum to Mr. Argo's performance file because of the encroachment issue alone, Respondent is not restrained from including a proper statement concerning the encroachment issue.

C. Respondent must remove from all documents concerning the directed reassignment of Inspector Argo from Fort Morgan to Greeley, Colorado, any mention or implication that the reassignment was due to performance deficiencies or reasons other than the needs of the agency.

General Counsel states that Mr. Argo has accepted the transfer to Greeley, Colorado, and has no desire to return to Fort Morgan. Although General Counsel asserts that Mr. Argo's reassignment from Fort Morgan to Greeley was in retaliation for Mr. Argo's engagement in protected activity, in view of Mr. Argo's acceptance of the reassignment, it is unnecessary to make a determination as to whether the transfer was, or was not, in violation of § 16(a)(2) of the Statute. Nevertheless, the language of the first two paragraphs of the June 13, 2002, letter to Mr. Argo of notice of proposed reassignment stem from Respondent's discriminatory reaction to Mr. Argo's request for union representation on March 20, 2002. Dr. Finley wrote a negative memorandum to Mr. Argo's performance file, labeling that action unacceptable performance. Dr. Finley testified that Argo's insistence on union representation was something that "really bothered" him. While Boulder District Manager Dr. Ronald Jones wrote the letter of June 13, 2002, he has under his supervision plants in ten states and three territories (Tr. 232) and, as he testified, he relied upon reports written by Dr. Finley. The language of the first two paragraphs was unnecessary to the transfer but highly detrimental to Mr. Argo; concerned largely Mr. Argo's request for representation on March 20, 2002; and must be removed to remedy the violation of §§ 16(a)(2) and (1) in penalizing Mr. Argo for the exercise of rights assured him by the Statute.

The penultimate paragraph does not strike me as detrimental to Mr. Argo. As a remedy, I shall order the letter of June 13, 2002 (G.C. Exh. 5) be removed and rescinded and a new letter written in its stead and make no reference for the reason of the transfer other than "the needs of the agency."

Having found that Respondent violated §§ 16(a)(1) and (2) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Federal Labor Relations Authority, 5 C.F.R. § 2423.41 (c), and § 18 of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7118, the U.S. Department of Agriculture, Food Safety and Inspection Service, Boulder District, Boulder, Colorado, shall:

1. Cease and desist from:

(a) Making statements to employees which interfere with, coerce, or discourage any employee from exercising the rights accorded by the Federal Service Labor-Management Relations Statute to request union representation during an examination in connection with an investigation by a representative of the agency.

(b) Discriminating against Richard Argo by unlawfully including a memorandum in his performance file stating that his performance was unsatisfactory because he had refused to participate in an investigation of an incident involving plant personnel without the presence of a representative of the American Federation of Government Employees, National Joint Council of Food Inspection Locals (the Union), the exclusive representative of its employees.

(c) By including detrimental comments about Mr. Argo in the notice of proposed transfer which reflected a continuation of the discrimination against Mr. Argo for exercising his protected right to request union representation pursuant to § 14(a)(2)(B) of the Statute.

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

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

(a) Rescind the memorandum entitled "Unacceptable Performance" and dated March 22, 2002, to the performance file of Richard Argo and remove all copies thereof from any and all records.

(b) Delete any mention or implication from any and all documents concerning the directed reassignment of Richard Argo from Fort Morgan, Colorado to Greeley, Colorado, that the reassignment was due to performance deficiencies or reasons other than the needs of the agency.

(c) Post at each facility of the U.S. Department of Agriculture, Food Safety and Inspection Service, Boulder District, 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 District Manager, 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.

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e) notify the Regional Director of the Denver Region, Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204-3581, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

—

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: February 26, 2004
Washington, DC

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Agriculture, Food Safety and Inspection Service, Boulder District, Boulder, Colorado, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT make statements to employees which interfere with, coerce, or discourage any employee from exercising the rights accorded by the Federal Service Labor-Management Relations Statute to request union representation during an examination in connection with an investigation by a representative of the agency.

WE WILL NOT discriminate against Richard Argo by unlawfully including a memorandum in his performance file stating that his performance was unsatisfactory because he had refused to participate in an investigation of an incident involving plant personnel without the presence of a representative of the American Federation of Government Employees, National Joint Council of Food Inspection Locals (the Union), the exclusive representative of its employees.

WE WILL NOT discriminate against Richard Argo by unlawfully directing his reassignment from Fort Morgan, Colorado to Greeley, Colorado in retaliation for his exercise of protected rights under the Statute.

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

WE WILL rescind the memorandum entitled "Unacceptable Performance" and dated March 22, 2002, to the performance file of Richard Argo and remove all copies thereof from any and all records.

WE WILL rescind and remove the notice of proposed transfer dated June 13, 2002, and will issue a new letter with the first two paragraphs of the June 13, 2002, letter removed and **WE WILL NOT** make any reference for the reason of the transfer other than, "for the need of the agency."

(Agency)

DATE: _____ 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, Denver Region, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204-3581, and whose telephone number is: 303-844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case Nos. DE-CA-02-0570 and DE-CA-02-0571, were sent to the following parties:

—

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

Bruce E. Conant, Esquire
3505

7000 1670 0000 1175

Federal Labor Relations Authority
1244 Speer Boulevard, Suite 100
Denver, CO 80204-3581

Ms. Cheryl R. Dunham
Agency Representative
USDA-FSIS-FO
230 Washington Avenue Extension
Albany, NY 12203

7000 1670 0000 1175 3512

REGULAR MAIL:

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Council President
AFGE Southwest Council of Food
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Van Buren, AR 72956

President
AFGE
80 F Street, NW
Washington, DC 20001

DATED: February 26, 2004
Washington, DC