



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

OALJ 15-24

DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
DEL RIO, TEXAS

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, NATIONAL BORDER
PATROL COUNCIL, LOCAL 2366

CHARGING PARTY

Case No. DA-CA-12-0534

Carmen Byrd
For the General Counsel

Robert H. Moore
For the Respondent

Casey Little
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On March 28, 2013, the Regional Director of the Dallas Regional of the FLRA issued a Complaint and Notice of Hearing in the above case alleging that the Department of Homeland Security, U.S. Customs and Boarder Protection, Del Rio, Texas (Respondent) violated 5 U.S.C. § 7114(a)(2)(B) and 5 U.S.C. § 7116(a)(1) and (8) of the Statute when it

removed a representative of the American Federation of Government Employees, AFL-CIO, National Border Patrol Council, Local 2366 (Charging Party/Union) from representing a bargaining unit member during an investigation and continued the interview without the representative present, thereby committing an unfair labor practice (ULP). The Respondent filed its Answer to the complaint on April 4, 2013, denying that it had impermissibly removed the Union representative and denying that it had refused to allow the representative to actively participate in the examination.

On June 7, 2013, the parties filed a joint motion for a decision based upon a stipulated record, attaching a Joint Stipulation of Undisputed Facts (Stip.) along with joint exhibits 1 through 4. (Jt. Exs. 1, 2, 3, 4). In response to the joint motion, the scheduled hearing was indefinitely postponed. On July 8 and 10, 2013, the parties filed timely briefs that were fully considered and pursuant to 5 C.F.R. § 2423.26; this decision is issued without a hearing. Based upon the stipulated record and attached exhibits, I find that the Respondent violated § 7114 (a)(2)(B) and § 7116(a)(1) and (8) of the Statute when it ejected the Union representative from the investigatory examination, failed to allow the Union representative to actively participate in the investigatory examination, and continued the examination without union representation present. I make the following findings of fact, conclusions and recommendations in support of that determination.

FINDINGS OF FACT

1. The Department of Homeland Security, U.S. Customs and Border Protection, Del Rio, Texas (Respondent), is an agency under 5 U.S.C. § 7103(a)(3). (Stip.).
2. The Department of Homeland Security, U.S. Customs and Border Protection, Office of Internal Affairs is an agency under 5 U.S.C. § 7103(a)(3). (Stip.).
3. The American Federation of Government Employees, AFL-CIO, National Border Patrol Council (Council) is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative for all United States Border Patrol employees assigned to Border Patrol Sectors except professionals and those excluded from coverage by the Civil Service Reform Act. (Stip.).
4. The American Federation of Government Employees, AFL-CIO, National Border Patrol Council, Local 2366 (Union or Local 2366) is an agent of the Council for the purpose of representing employees of Respondent within the unit described in paragraph 3. (Stip.).
5. The charge in this case was filed by the Union with the Dallas Regional Director on September 19, 2012. A copy of the charge was served on Respondent. (Stip.).

6. Laura Bermea is an employee under 5 U.S.C. § 7103(a)(2), and is in the bargaining unit described in paragraph 3. Casey Little is an employee under 5 U.S.C. § 7103(a)(2), and is in the bargaining unit described in paragraph 3, and is a Steward for Local 2366. (Stip.).
7. CBP is the largest uniformed law enforcement agency in the United States. The mission of CBP is to protect the United States from threats related to terrorism, illegal border crossings, and contraband; to patrol the borders for any other threats, foreign or domestic, that may arise; and to facilitate legitimate travel and commerce. The Border Patrol is a component of CBP. The Border Patrol is divided into geographic sectors. One of these is the Del Rio Sector, which covers stations located in Abilene, Brackettville, Carrizo Springs, Comstock, Del Rio, Eagle Pass, Rocksprings, San Angelo, and Uvalde, Texas. There are over 1200 bargaining unit members in the Del Rio sector, with more than 1000 Border Patrol Agents assigned to cover 41 counties of Texas. The Uvalde, Texas Station is responsible for approximately 3,000 square miles of South Texas. The station operates a permanent traffic checkpoint and conducts freight train check operations. (Stip.).
8. The CBP Office of Internal Affairs (IA) is a component of CBP. IA has oversight authority for all aspects of CBP operations, personnel, and facilities. IA is responsible for ensuring compliance with all CBP-wide programs and policies relating to corruption, misconduct, or mismanagement, and for executing the internal security, integrity, and management inspections program. IA screens potential CBP employees for suitability, which includes conducting polygraph examinations and background investigations for all CBP job applicants, and conducting periodic reinvestigations of CBP employees. CBP maintains a cadre of IA agents assigned to headquarters and 22 Internal Affairs field offices located throughout the United States who investigate CBP employees suspected of administrative and criminal misconduct. The information obtained during an IA investigation of a CBP employee may be released to, and used by, other components of CBP to support administrative or disciplinary actions against CBP employees. IA educates CBP employees concerning ethical standards and integrity responsibilities; evaluates physical security threats to CBP employees, facilities, and sensitive information; and inspects CBP operations and processes for managerial effectiveness and improvements. (Stip.).
9. At all times material to the complaint, the persons listed below occupied the positions opposite their names:
- | | |
|------------------|--|
| i. George Dreyer | Office of Internal Affairs Special Agent |
| ii. Corbin Slack | Office of Internal Affairs Special Agent |

(Stip.).

10. At all times material to the complaint, Dreyer and Slack were conducting an investigation which, if misconduct was later found to be substantiated, would be reviewed by management officials within the CBP to determine whether disciplinary action was appropriate against Border Patrol Agent Laura Bermea. (Stip.).
11. At all times material to the complaint, Dreyer and Slack were acting on behalf of the CBP Office of Internal Affairs. (Stip.).
12. On August 14, 2012, Bermea's second-line supervisor, Field Operations Supervisor Jason Penney, provided Bermea with a notice to appear, which ordered her to appear at the Uvalde Border Patrol Station at 10:00 a.m. on August 21, 2012, before Special Agent George Dreyer. The notice to appear indicated that Bermea was the subject of the investigation, and that she would be questioned concerning her knowledge of alleged misconduct relating to a violation of CBP policy. The notice to appear stated that Bermea's willful refusal to appear and provide sworn testimony may be construed to be insubordination, which in and of itself could result in disciplinary action against her, up to and including removal from CBP. (Stip.).
13. On August 21, 2012, at the time of the interview, Dreyer informed Bermea that she was the subject of an investigation into the violation of service policy and that she was being investigated concerning an allegation that she acted inappropriately at her child's school on May 22, 2012. Little was present at the examination as Bermea's Union representative. (Stip.).
14. Prior to asking Bermea questions related to the events that occurred on May 22, 2012, Dreyer advised Bermea that she was participating in an official investigation being conducted by the CBP Office of Internal Affairs, that she was required to truthfully and completely answer all questions related to the incident under investigation, and that knowingly providing fictitious or false information could subject her to criminal prosecution under 18 U.S.C. § 1001, or administrative discipline, up to and including dismissal from CBP. (Stip.).
15. Agents Dreyer and Slack asked Bermea questions relating to what actions she took at her child's school after she learned that her son had fallen at school on May 22, 2012, on what she said was his broken arm. (Stip.).
16. During the examination, Little commented that Bermea could not defend the actions of statement of the teachers at Bermea's school, and that Bermea had answered the questions asked by the agents. In response, Dreyer stated that he would ask Bermea the question again and directed Little to stay out of the conversation for a minute. Bermea continued with the examination and answered the agent's questions. (Stip.).

17. During the examination, Agent Corbin asked Bermea why the teacher did not answer Bermea's question when Bermea asked her about the incident involving her son, inquiring if Bermea's demeanor was as calm as she claimed it was on May 22, 2012. In the course of so doing, this exchange between the Agents, Little, and Bermea took place:
- a. Little to Agent Slack, "Would you consider your demeanor now?"
 - b. Agent Slack: "I'm asking her a direct question."
 - c. Little: "I understand that."
 - d. Agent Slack: "I'm not here to play word games with Union personnel. I'm asking her right now."
 - e. Little: "I may be Union personnel, but she is my client."
 - f. Agent Slack: "And you know what, we will conduct our investigations how we see fit."
 - g. Little: "That's fine. But if you want to get into a screaming match that's"
 - h. Agent Slack: "I'm not screaming and I'm not raising my voice."
 - i. Little: "Your voice is elevated. You are turning red."
 - j. Agent Slack: "These teachers are saying she was raising her voice that day"
 - k. Little: "Okay, well you are raising your voice to her now."
 - l. Agent Slack: ". . . in an armed presence."
 - m. Agent Dreyer: "Mr. Little, you need to stop."
 - n. Little: "If you guys want to continue your investigation, that's fine."
 - o. Agent Dreyer: "If you want to continue to be in this room, you need to stop. You know your rules as a Union rep."
 - p. Little: "Well, you don't need to be hollering at her. You don't need to be raising your voice to her."
 - q. Agent Dreyer: "We can do it any which way we want to. It's our interview."
 - r. Little: "Okay. I know the guidelines as well."
 - s. Agent Dreyer: "If you even know the guidelines, then you know that now is the right time to stop, or you can step out. It's your choice."
 - t. Agent Slack: "Nobody is yelling at anybody in this room."
 - u. Little: "You're raising your voice, Sir."
 - v. Agent Slack: "My voice may be getting a little elevated. I want a straight answer out of her."
 - w. Little: "Well, it's an investigation. You guys are trying to do your investigation."
 - x. Agent Slack: "I'm asking her, not you."
 - y. Little: "I understand that. And I am asking you to lower your voice."
 - z. Agent Dreyer: "Mr. Little, step out now. You need to leave the room."

- aa. Agent Slack: "You need to step out."
- bb. Little (to Laura Bermea): "If you don't want to continue this, you don't have to . . ."
- cc. Agent Dreyer: "That is correct."
- dd. Little (to Laura Bermea): ". . . without union representation."
- ee. Laura Bermea: "All right. I'm done."
- ff. Agent Slack (to Laura Bermea): "So you are terminating the interview now at this point."
- gg. Laura Bermea: Well, I don't have Union representation."
- hh. Agent Slack: "Mr. Little, you have been asked to step out. Shut the door."
- ii. DOOR CLOSES
- jj. Agent Slack (to Laura Bermea): "Are you terminating this interview?"
- kk. Laura Bermea: "I don't have Union representation."
- ll. Agent Slack: "Are you terminating this interview?"
- mm. Laura Bermea: "Yes, I am."
- nn. Agent Dreyer: "Okay. Just understand that it is going to be documented that you did not comply with the rules of your job. The interview is concluded. The time is now 10:44 a.m." (Stip.).

- 18. After the interview was concluded, Little and Bermea stood in the hall outside of the examination room as they attempted to contact Lead Union Steward Jesse Esparza by phone. (Stip.).
- 19. Within minutes of leaving the examination, Bermea returned to the examination room without her Union representative present and the interview resumed at 11:08 a.m. Agent Dreyer asked Bermea: "Miss[.] Bermea, is it your request to continue the interview to finish it?" Bermea stated: "Yes." Bermea was not specifically asked if she waived her right to have a Union representative present during the remainder of the examination. Agents Dreyer and Slack continued to question Bermea without her Union representative present, asking her more questions about the events on May 22, 2012. At no time did Bermea verbally rescind her request for Union representation. (Stip.).
- 20. Towards the end of the interview, Agent Dreyer asked: "If you would like Mr. Little to come back in and review your statement with you, I will print it out and you all can look over it, and make any corrections you find necessary." Bermea replied: "Okay." Agent Slack then stated: "If you feel any need to go back on tape again for your benefit or for the benefit of the investigation, we will." Bermea replied: "Okay." The examination concluded at 11:15 a.m. (Stip.).
- 21. Little and Bermea reviewed Bermea's written statement before signing it and submitting it to the Special Agents. (Stip.).

22. Dreyer and Slack used the Department of Homeland Security, U.S. Customs and Border Protection, Office of Internal Affairs, Investigative Operations Guidebook to guide their conduct during the examination of Bermea. (Stip.).
23. According to the Investigative Operations Guidebook, "If the bargaining unit representative is being an obstructionist the interviewer may ask the employee whether he wants to continue the interview without the bargaining unit representative or terminate the interview. Terminating the interview would most likely result in the employee's statement remaining unfinished and may result in disciplinary action. Should the employee choose to continue the interview without representation, the fact that the employee waived the right to bargaining unit representation must be clearly documented as voluntary not coerced." (Jt. Ex. 4 at 42).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) argues that the Respondent violated § 7114(a)(2)(B) and § 7116(a)(1) and (8) of the Statute by failing to allow the Union representative to actively participate in the employee's interview. The GC further argues that the Respondent violated the Statute by continuing to interview the employee without Union representation present after the Respondent ejected the original Union representative.

The GC submits that an agency has a limited right to regulate the role of a union representative in an investigatory interview. However, the GC contends that the right is intended to prevent an adversarial exchange between the investigator and the union representative. Consequently, the GC asserts that investigators should expect some interruptions by the union representative in the course of an investigatory interview. Accordingly, the GC asserts that the Union representative acted within his rights when he interrupted the special agents during the employee's interview. The GC argues that the Union representative's request that the agents lower their voices was reasonable and the representative was neither verbally abusive nor arrogantly insulting during the interview in a manner sufficient to warrant removal.

Finally, the GC argues that the employee did not waive her right to union representation during the remainder of her examination. According the GC, in order to waive her right to representation, the employee would have had to do so in a manner that was clear and unmistakable. Because the employee did not verbally rescind her right, the GC argues that she did not clearly and unmistakably rescind her right. Furthermore, the GC argues that the employee was coerced into continuing her interview after the special agents involved indicated they would document that she failed to comply with the rules of her job.

As a remedy, the GC seeks a "Notice to All Employees," signed by the Chief Border Patrol Agent of the Department of Homeland Security, U.S. Customs and Border Protection, Del Rio Sector, to be emailed to all employees in the Del Rio Sector and posted on bulletin boards in the Del Rio Sector.

Respondent

The Respondent argues that the Union's representative impermissibly engaged in a relentless adversarial posture. According to the Respondent, a union representative may provide advice and assist a bargaining unit member in presenting information during an interview. However, the representative may not engage in adversarial conduct or impede an investigatory interview. The Respondent contends that the Union representative's interruptions during Bermea's interview were confrontational, designed to insult and belittle the agents conducting the interview. The Respondent characterizes the representative's actions as an effort to mock the Special Agent conducting the interview.

The Respondent also argues that the Union representative unreasonably argued with the special agents over their tone, interfering with the interview. The Respondent goes on to state that the Union's representative was removed from the interview because he refused to allow the interview to be completed.

The Respondent submits that it was proper to continue interviewing the employee after the Union's representative left because the employee implicitly waived her right to union representation when she returned to the interview after leaving earlier. The Respondent further supports this conclusion by arguing that because the Union's representative was permitted to proofread her written statement with her before she signed it, the employee was not deprived of her Weingarten rights and the complaint should be dismissed.

The Respondent requests that paragraph 16 of the Stipulation not be used in finding whether a ULP was committed because the related conversation was not mentioned in the General Counsel's complaint.

The Respondent argues that if a ULP is found to have been committed, then the U.S. Border Patrol (USBP) should only be required to take minimal corrective action. The Respondent asserts that the Office of the Internal Affairs (OIA), which conducted the interview, is a component of the U.S. Customs and Border Patrol (CBP) and is separate from the USBP. The Respondent notes that the USBP has no control over OIA investigations and that information obtained by the OIA may be used by components of CBP.

Finally, the Respondent argues that the General Counsel's request to have postings at every USBP station in the Del Rio Sector is too broad and extensive. According to the Respondent, any posting should be limited to the Uvalde station, where the complaint arose from because there is no evidence of a sector-wide problem.

DISCUSSION

Under the Statute, “[a]n exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at . . . any examination of an employee in the unit by a representative of the agency in connection with an investigation if . . . the employee reasonably believes that the examination may result in disciplinary action against the employee; and . . . the employee requests representation.” 5 U.S.C. § 7114(a)(2)(B)(i)(ii).

“The purpose of [§] 7114(a)(2)(B) is to create representational rights for [f]ederal employees similar to rights provided by the [NLRB] in interpreting the [NLRA]” *U.S. Dep’t of VA Med. Ctr., Fort Wayne, Ind.*, 39 FLRA 717, 720 (1991). As such, counsel for the Respondent correctly notes that NLRB case law is an appropriate source of precedent for determining compliance with the Statute. *See U.S. DOJ, Fed. BOP, OIA, Wash., D.C.*, 55 FLRA 388, 393 (1999) (*DOJ*). However, the Authority has established its own substantial body of case law regarding representation rights, which is often more expansive than the NLRB’s. *Compare e.g., Montgomery Ward & Co.*, 273 NLRB 1226, 1227 (1984) (allowing an employer to deny a request for representation and not postpone an interview) *with Norfolk Naval Shipyard Portsmouth, Va.*, 35 FLRA 1069, 1077 (1990) (*Norfolk Naval*) (requiring an employer to either grant a request for representation, discontinue the interview, or offer the employee options).

“The Authority has held that the ‘purpose underlying [§] 7114(a)(2)(B) can be achieved only by allowing a union representative to take an active role in assisting a unit employee in presenting facts’” *U.S. Nuclear Regulatory Comm’n*, 65 FLRA 79, 84 (2010) (*NRC*). Explaining the rationale behind permitting representation, the Supreme Court wrote that a “single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors.” *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 262-63 (1975) (*Weingarten*). This right is of particular importance during interviews that are particularly aggressive. *See Headquarters, Nat’l Aeronautics & Space Admin., Wash., D.C.*, 50 FLRA 601, 607 (1995) (*NASA*) (recognizing the Authority’s longstanding position finding an investigator’s unduly aggressive and intimidating behavior during an investigative interview to be unlawful).

An employer “is free to insist that he is only interested, at that time, in hearing the employee’s own account of the matter under investigation.” *Weingarten*, 420 U.S. at 260. However, “[t]he principle that the employer may regulate the role of the union representative ‘does not state that the employer may bar the union representative from any participation.’” *NRC*, 65 FLRA at 85. Any limitation on a union representative’s role cannot prevent the representative from effectively representing the employee being interviewed. *See, e.g., id.* at 85 (noting that prohibiting note passing would impermissibly circumscribe the effectiveness of representation).

Limitations on representatives are permitted only insofar as they prevent a confrontation between the investigators and the representative. *Id.* See also *NASA*, 50 FLRA at 607 (“[T]he Authority has recognized that a union’s representational rights under [§] 7114(a)(2)(B) may not interfere with an employer’s legitimate interest and prerogative in achieving the objective of the examination or compromise its integrity.”). Delineating between permissible and impermissible conduct, the Authority has found that “where a union representative disrupts an interview by engaging in interruptions that are ‘verbally abusive’ and ‘arrogantly insulting,’ an employer does not violate *Weingarten* rights by limiting the representative’s participation.” *NRC*, 65 FLRA at 84.

If a representative’s conduct becomes arrogantly insulting and verbally abusive, the agency may request that the representative leave the interview. However, the agency is then obligated to either find a suitable replacement representative for the employee or discontinue the interview until a replacement is found. See *DOJ*, 55 FLRA at 394 (concluding that the by proceeding with an interview without according the employee representation, the respondent foreclosed on further discussions to clarify whether the employee requested union representative and therefore violated the Statute).

The Statute “allows a union representative to ‘take an active role in *assisting a unit employee in presenting facts* in his or her defense.’” *NRC*, 65 FLRA at 85 (quoting *BOP, Office of Internal Affairs, Wash., D.C.*, 52 FLRA 421, 432 (1996) (*BOP*)). “A union representative’s right to take an ‘active role’ includes not only the right to assist the employee in presenting facts but also the right to consult with the employee.” *BOP*, 52 FLRA at 432-33. “[T]he Authority has rejected the position that an employer is entitled to question an employee without *any* interruptions or intervention by the union representative.” *NRC*, 65 FLRA at 84. Indeed, comments on the form of a question, or statements as to possible infringement of employee rights should be expected. *Id.*

In this case, the Union representative acted within his bounds. In deciding *Weingarten*, the Supreme Court noted that “[a] single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors.” *Weingarten*, 420 U.S. at 262-63. The representative’s role is to help the employee through the investigatory process or interview. Consequently, the Union representative was within his right to ask the Respondent’s special agents to consider their tone of voice. See also *NRC*, 65 FLRA at 84 (citing that comments on the form of a question to an employee, or statements by the representative as to possible infringement of an employee’s rights should be expected).

The Union representative’s behavior did not rise to the level of “arrogantly insulting” and “verbally abusive.” The Union representative also did not impede or obstruct the interview. The Union representative never took a hostile tone with the Respondent’s agents and neither threatened them nor swore at them. At no time did the Union representative instruct the employee to not answer a question posed by the agents. To the contrary, the

Union representative encouraged the Respondent's agents to continue their interview. Stip. at 5. The representative only asked that the agents reduce the tone of their voice. It requires a stretch of one's imagination to find, as the Respondent argues, that the Union representative's request amounted to an adversarial posture, one designed to mock and belittle the Respondent's agents.

Finally, the Respondent's agents did not comply with its own Guidebook for the Office of Internal Affairs, Investigative Operations Division. The Guidebook states:

If the bargaining unit representative is being an obstructionist the interviewer may ask the employee whether he wants to continue the interview without the bargaining unit representative or terminate the interview Should the employee choose to continue the interview without representation, the fact that the employee waived the right to bargaining unit representation must be clearly documented as voluntary and not coerced.

Jt. Ex. 4 at 42.

In contradiction to the Guidebook's policy, the Respondent's agents did not ask the employee whether she wanted to either continue the interview without her Union representative or terminate the interview. Stip. at 6, 7. Instead, they unilaterally ejected the Union representative, preventing him from actively participating in the interview.

As stated above, an employee is entitled to representation when she reasonably believes that she may be disciplined *and* requests representation. *See* § 7114(a)(2)(B) (emphasis added). "The adequacy of a request for representation depends on the facts of each case." *DOJ*, 55 FLRA at 394. "[A] request need not be made in any specific form to be valid." *Id.* The Authority has determined that requests for representation do not have to be verbal. *See Norfolk Naval*, 35 FLRA at 1083 (concluding that nonverbal conduct may constitute a valid request for union representation). Rather, "[t]o be valid, a request need not be made in a specific form. Instead, a request for union representation must be sufficient to put the respondent on notice of the employee's desire for representation." *Id.* at 1074. *See also DOJ*, 55 FLRA at 394 ("The Authority . . . looks to see whether, in all the circumstances, the request for representation was sufficient to put the respondent on notice of the employee's desire for representation."). A valid request for representation gives an agency 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. *Norfolk Naval*, 35 FLRA at 1077.

Although the employee in this case did not specifically request Union representation, she nonetheless put the Respondent's special agents on notice that she wanted representation. The employee terminated her interview immediately after her Union representative was ejected from the interview room. Stip. at 6. The special agents involved then asked the employee three times if she was terminating the interview. Stip. at 6, 7. Responding to the

first two queries, the employee replied, "I don't have union representation." *Id.* On the third query, the employee said that she was terminating the interview. *Id.* at 7. When the employee returned to finish the interview, the agents did not ask if she waived her right to representation; instead, the agents only asked "is it your request to continue the interview [and] finish it." *Id.*

The events leading up to this case are similar to those in *U.S. DOJ, BOP, Metro. Corr. Ctr., N.Y., N.Y.*, 27 FLRA 874 (1987). There, the plaintiff's supervisor continued an examination after the plaintiff stated, "[M]aybe I need to see a union rep." *Id.* at 880, 892. The Authority found that the plaintiff's statement put management on notice that he desired union representation. *Id.* at 879. In the current case, after her representative was ejected, the employee clearly indicated to the Respondent's special agents that the reason she terminated the interview was because she did not have union representation. *Stip.* at 6, 7. Therefore, I find that Respondent was put on notice of the employee's desire for representation.

The Respondent did not offer or attempt to find a replacement representative for the employee when she returned to the interview. *Stip.* at 7. The Respondent simply continued with the interview. *Id.* As such, the Respondent failed in its duty to either: (1) provide representation; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview without representation or having no interview. *See Norfolk Naval*, 35 FLRA at 1077.

The Respondent argues that after ejecting the employee's original Union representative, it was not required to postpone its interview until another union representative arrived. *R. Br.* at 8. Arguing that the Union representative's "misbehavior did not entitle the union to demand that the agency cease its interview until a replacement representative could arrive." The Respondent also argues that it is the Union which holds the right to representation, not the employee under investigation. *Id.* at 9. The Respondent's contentions are incorrect. Weingarten rights belong to unions and to employees. *See generally Weingarten*, 420 U.S. at 262. The actions of a Union representative do not modify an employee's individual right to representation in an investigative setting. Once an employee asserts his or her Weingarten rights, continuing an investigatory interview without either providing representation or receiving a clear and unmistakable waiver of his or her right is a violation of the Statute. *See DOJ*, 55 FLRA at 393 (finding that the agency violated the Statute when it continued its examination of an employee that had sufficiently requested representation).

In order for an employee to waive her Weingarten rights, "the waiver must be clear and unmistakable." *Norfolk Naval*, 35 FLRA at 1077. The Authority does not recognize a constructive or implied waiver of representation rights. *See id.* at 1069 ("we express reservations about a finding that silence alone could constitute a clear and unmistakable waiver.").

The Respondent explicitly conceded that the employee never rescinded her request for Union representation. Following its description of the employee resuming her interview, paragraph 19 of the Stipulation states that, “[a]t no time did Bermea verbally rescind her request for Union representation.” Stip. at 7. Although Respondent argues that the employee implicitly waived her right to representation when she returned to finish the interview, the Authority does not recognize implicit waivers. *See Norfolk Naval*, 35 FLRA at 1069. The Authority, like the Respondent’s own Guidebook, requires that a waiver be clear. Respondent’s Guidebook adds that the waiver must be clearly documented as voluntary and not coerced. Jt. Ex. 4 at 42. The employee never rescinded her request for Union representation, nor did she clearly and unmistakably waive her right to representation. Having been put on notice for her desire for union representation, the Respondent violated the Statute when it continued to interview the employee without Union representation present.

CONCLUSION

I find that the Respondent violated § 7114(a)(2)(B) and § 7116(a)(1) and (8) of the Statute when it impermissibly prevented the Union representative from actively participating in Laura Bermea’s investigatory interview by ejecting the representative from the interview, and by continuing to interview Laura Bermea without representation present.

Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Authority’s Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of Homeland Security, U.S. Customs and Border Protection, Del Rio, Texas, shall:

1. Cease and desist from:

(a) Requiring any bargaining unit employee of the Department of Homeland Security, U.S. Customs and Border Protection, Del Rio, Texas, to take part in an examination in connection with an investigation without allowing the designated representative of the American Federation of Government Employees, AFL-CIO, National Border Patrol Council, Local 2366, the exclusive representative of a unit of employees, to actively participate in such examination, where representation has been requested by the employee and the employee reasonably believes that the examination may result in disciplinary action against him or her.

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

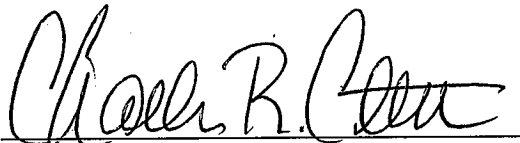
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Chief Border Patrol Agent, Del Rio Sector, Department of Homeland Security, 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 ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Disseminate a copy of the Notice signed by the Chief Border Patrol Agent through the Respondent's email system to all bargaining unit employees in the Del Rio Sector. This Notice will be sent on the same day that the Notice is physically posted.

(c) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Dallas Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., April 2, 2015



CHARLES R. CENTER
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Homeland Security, U.S. Customs and Border Protection, Del Rio, Texas, violated the Federal Service Labor-Management Relations Statute (Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT require bargaining unit employees to take part in an examination in connection with an investigation without allowing the designated representative of the American Federation of Government Employees, AFL-CIO, National Border Patrol Council, Local 2366 (Union) to actively participate in such examination, where representation has been requested by the employee and the employee reasonably believes that the examination may result in disciplinary action against him/her.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

WE WILL allow the designated Union representative to actively participate in any investigatory examination conducted pursuant to § 7114(a)(2)(B) of the Statute.

(Agency/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 its provisions, they may communicate directly with the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, whose address is: 525 S. Griffin Street, Suite 926, Dallas, TX 75202, and whose telephone number is: (214) 767-6266.