



FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

OALJ 18-02

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

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, NATIONAL BORDER PATROL
COUNCIL, LOCAL 2455

CHARGING PARTY

Case Nos. DA-CA-16-0372
DA-CA-16-0373
DA-CA-16-0374

Zachary T. Wooley
For the General Counsel

Jennifer M. Sims
For the Respondent

Hector Garza
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

In April 2015, a Border Patrol Agent (BPA) allegedly pulled her firearm and Taser on Charles Mellado, a fellow agent. Although agency rules require employees to immediately report allegations of misconduct, Mellado waited more than seven months to report the incident. A bystander, BPA Henry Santana, did not immediately report the incident either, based on assurances from Mellado that he would report the incident. When Mellado did report the incident, he listed Santana and another agent, Ricardo Ruiz, as witnesses. Ruiz, however, maintains that he did not witness the incident.

Based on Mellado's report, the agency's Office of Professional Responsibility (OPR) opened an investigation into the matter and informed Mellado, Ruiz, and Santana that they would be interviewed as witnesses. Mellado and Santana were concerned that the OPR agents would ask them why they failed to immediately report the incident. In addition, all three employees feared that their differing accounts of what took place would lead OPR to determine that at least one of them was speaking untruthfully, another disciplinable offense.

On the day of the interviews, each agent requested union representation, and Travis Anderson, the lead OPR agent, denied each request. Anderson offered Santana immunity from discipline relating to the incident, but the offer did not protect Santana from discipline for making false statements during the interview. Resp. Ex. A at 3.

In determining whether these employees were entitled to union representation at their interviews, the crucial issue is whether they reasonably believed that the interviews might result in disciplinary action against them. Because Mellado and Santana reasonably believed that the examinations could involve questioning about their conduct during the incident and about why they failed to immediately report the incident; because all three agents reasonably believed that their differing accounts could lead OPR to suspect at least one of them was speaking untruthfully; and because the offer of immunity to Santana was too ambiguous and informal to offer Santana any real guarantee of protection, I find that all three agents reasonably believed that the interviews might result in disciplinary action against them.

STATEMENT OF THE CASE

This is an unfair labor practice (ULP) proceeding under the Federal Service Labor-Management Relations Statute (the Statute), Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On June 21, 2016, the American Federation of Government Employees, National Border Patrol Council, Local 2455 (the Union) filed three ULP charges against the Department of Homeland Security, U.S. Customs and Border Protection, Laredo, Texas (the Agency or Respondent). After investigating the charges, the Regional Director of the FLRA's Dallas Region issued a Consolidated Complaint and Notice of Hearing on January 31, 2017, on behalf of the General Counsel (GC), alleging that the Agency refused to allow a union representative to be present at three employee examinations, in violation of §§ 7114(a)(2)(B) and 7116(a)(1) and (8) of the Statute. On February 27, 2017, the Respondent filed its Answer to the Complaint. Respondent admitted that there was an examination of three bargaining unit employees; that they were examined by a management official; that the examinations were in connection with an investigation; that the three employees requested representation for the examinations; and that it denied their requests. Answer ¶¶ 8-11, 13-14. However, the Respondent denied that the employees reasonably believed that the examinations might result in disciplinary action, and it therefore insisted that it did not violate the Statute. *Id.* ¶¶ 12, 15 & 16.

Subsequently, the GC filed a Motion for Summary Judgment and a memorandum in support thereof (GC Brief), arguing that there were no material facts in dispute and that the GC was therefore entitled to judgment in its favor, as a matter of law. The Respondent filed a response to the GC's motion as well as a Cross Motion for Summary Judgment (Respondent Brief), agreeing that there were no material facts in dispute and asking that judgment be entered in Respondent's favor. The GC filed an Opposition to Respondent's Cross Motion for Summary Judgment (GC Opposition). Both the GC and Respondent attached affidavits and other documents in support of their positions. Based on these pleadings, I determined that there were no issues of material fact in dispute, and I issued an Order Cancelling Hearing, advising the parties that the cases would be decided on summary judgment. The GC and the Respondent then filed supplemental briefs in support of their motions, which included additional affidavits.¹

DISCUSSION OF MOTIONS FOR SUMMARY JUDGMENT

The Authority has held that motions for summary judgment, filed under § 2423.27 of its Regulations, 5 C.F.R. § 2423.27, serve the same purpose, and are governed by the same principles, as motions filed in United States District Courts under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995).² Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Inferences drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1987).

The evidence does reveal one factual dispute, but as I will explain, it is not material. Special Agent Anderson asserts that he offered Santana limited immunity (Agency Ex. A at ¶ 25, Anderson's May 31 Declaration at ¶¶ 8-10), but Santana and his Union representative deny that any offer of immunity was made (GC Exs. 1, 2, 10, 11). Do I need to hold a hearing to resolve this dispute? Yes, if the existence of an immunity offer is going to be determinative of whether Santana had a reasonable fear of being disciplined; but no, if either side would prevail even if this fact were assumed in the other side's favor. The existence of an immunity offer is relevant to our central legal dispute, as it might reduce (if not eliminate

¹ Since there was no hearing, there is no transcript. The findings of fact in this decision are based on the parties' pleadings and the exhibits attached thereto. Specifically, General Counsel Exhibits 1 through 6 were attached to the GC Brief; General Counsel Exhibits 7 through 9 were attached to the GC Opposition; General Counsel Exhibits 10 and 11 were attached to the GC Supplemental Brief; Agency Exhibits A and A-1 through A-3 were attached to the Respondent Brief; and the Declaration of Special Agent Travis Anderson, dated May 31, 2017 (actually, his second declaration), was filed separately by Respondent.

² The Respondent objects to the use of certain evidence by the GC as failing to comply with the requirements of Rule 56. Resp. Br. at 2 n.1. I address that objection in my Analysis and Conclusions below.

altogether) the likelihood of Santana being disciplined. Each side, however, argues that it is entitled to summary judgment in its favor, even if the question of an immunity offer were resolved in favor of the other. Thus the GC argues that even if Santana had been offered immunity, he still had a reasonable fear of discipline; the Respondent argues that even if Santana had not been offered immunity, his fears of discipline were still unreasonable.

I agree with the General Counsel. I will assume, for purposes of ruling on the motions for summary judgment, that Anderson offered Santana limited immunity, and that Anderson said he could do so only verbally, not in writing. As I will explain in more detail in my Analysis and Conclusions, I do not believe that this appreciably reduced Santana's reasonable concerns that he could still face disciplinary action. But as a threshold matter, this means that the GC is entitled to summary judgment, regardless of whether Santana was offered immunity or not. It means that the factual dispute between Anderson and Santana is not material, and that a hearing is not required to resolve this dispute. Accordingly, I find that there is no genuine issue of material fact, and it is appropriate to decide the case on the parties' motions. I will summarize the material facts and make the following conclusions of law and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The American Federation of Government Employees, National Border Patrol Council (the Council), is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of a unit of the Respondent's employees. The Union is an agent of the Council for the purpose of representing bargaining unit employees employed at the Agency.

On April 10, 2015, a Border Patrol Agent (whom I will call "the suspect") allegedly drew her firearm and her Taser on BPA Charles Mellado in the Laredo South Station processing room. (I will refer to this as "the incident.") GC Ex. 3 at 1; Resp. Ex. A at 1. At least on its face, it appears that the suspect's alleged act violated the U.S. Customs and Border Protection's (CBP) Standards of Conduct. *See* GC Ex. 8 at 7 (prohibiting violence in the workplace); GC Ex. 9 at 2-3 (listing penalties for disruptive behavior, including "dangerous horseplay"); *id.* at 5 (listing penalties for inappropriate use of a weapon).

Although the Standards of Conduct require employees to "immediately report allegations of misconduct," and although an employee's "[f]ailure to report information concerning violation of any law, policy, or procedure by a CBP employee" can result in discipline ranging from a fourteen-day suspension to removal, Mellado did not immediately tell his supervisors (or anyone else in CBP hierarchy) about what happened, based on his fear that his supervisors would "favor the other agent's story over mine." GC Ex. 3 at 1, GC Ex. 8 at 3, GC Ex. 9 at 11. A bystander, BPA Henry Santana, saw the incident but did not immediately report it, because Mellado told him that he would do so. GC Ex. 2 at 1-2. A few months after the incident, Mellado consulted a Union steward about "the best way to report the incident," but he still did not report it. GC Ex. 3 at 1. Several months after that, in

December 2015, Mellado finally reported the incident to the Federal Protective Service. *Id.* In his report, Mellado stated that Santana and another BPA, Ricardo Ruiz, witnessed the incident. Resp. Ex. A at 1. Ultimately, the matter was forwarded to the Agency and to CBP's Office of Professional Responsibility, which investigates alleged misconduct of CBP employees nationwide. GC Ex. 1 at 1-2, GC Ex. 3 at 1-2, GC Ex. 5 at 2.

At the direction of their supervisors, Mellado, Ruiz, and Santana (the agents) submitted memos about their knowledge of the incident to the Agency. GC Ex. 2 at 2, GC Ex. 3 at 2, GC Ex. 5 at 1-2. OPR assigned Special Agents Travis Anderson and John Banken to investigate the matter. GC Ex. 5 at 2; Resp. Ex. A at 1.

Anderson issued a Notice to Appear to the agents, which the Agency delivered on April 21 and 22, 2016. The notices informed the employees that they were required to appear at an OPR office in Laredo on April 27, 2016, where they would be interviewed as witnesses and provide sworn testimony about the incident. Resp. Exs. A-1, A-2 & A-3. The notices for Mellado and Santana (but not for Ruiz) stated: "If you are in a bargaining unit, you have a right to Union representation." Resp. Exs. A-2 & A-3.

The agents were expected to speak truthfully during their interviews, and there were penalties for failing to do so. Specifically, under the Standards of Conduct, employees are required to abstain from making false statements.³ GC Ex. 8 at 5. If an employee makes "careless misstatements or misrepresentations," or "[f]ail[s] to provide honest and complete information to investigators or display[s] lack of candor in any official inquiry," the employee can receive discipline ranging from a written reprimand to removal. GC Ex. 9 at 4. In addition, an employee who is found to have engaged in "[m]aterial and intentional falsification" can be removed from the Agency. *Id.*

After receiving the notices, Mellado, Santana, and Ruiz talked with each other and discovered that there would be "a lot of conflicting stor[ies]" about the incident, Union President Hector Garza stated in his affidavit for this case. GC Ex. 1 at 2. For example, while Mellado reported that Ruiz and Santana witnessed the incident, Ruiz maintained that he "did not recall seeing anything." GC Ex. 1 at 4, GC Ex. 5 at 2. They also worried that

³ In this regard, CBP's Standards of Conduct states:

6.4 FALSE STATEMENTS.

6.4.1 Employees will not knowingly make false, misleading, incomplete, or ambiguous statements, whether oral or written, in connection with any matter of official interest.

6.4.2 When directed by proper authority, employees must truthfully and fully testify, provide information, and respond to questions (under oath when required) concerning matters of official interest that are being pursued administratively.

there would be “discrepancies” because the incident happened “so long ago.” GC Ex. 1 at 2. The agents were well aware that they could be disciplined if they were found to have spoken untruthfully during their interviews, and they worried that their differing accounts would raise suspicions that at least one of them was lying. *Id.* All three agents asked Garza to represent them at their interviews. *Id.*

The interviews took place as scheduled, on April 27, 2016, at the OPR office in Laredo, away from the agents’ workplace. *See* GC Ex. 1 at 2, GC Ex. 2 at 3, GC Ex. 5 at 2. Ruiz arrived at the OPR office with Garza around 8:00 a.m., where they met Anderson and Banken. GC Ex. 1 at 2; Resp. Ex. A at 2. Anderson stated that he would not allow Ruiz to have a union representative present during the interview “unless BPA Ruiz could articulate a reason why he felt that he might face disciplinary action based on the statements he would provide in his witness interview.” Resp. Ex. A at 2. According to Anderson, Ruiz replied only that he might face disciplinary action “because he was being interviewed by OPR,” while Garza “expressed generalized concerns about the potential for conflicting statements” among the BPAs and the “lapse of time” between the interviews and the incident. *Id.* In his affidavit for this case, Ruiz indicated that “another BPA [Mellado] said I saw the incident, but I did not recall seeing anything,” and that he was “worried that they would think the other agent was telling the truth and I was lying[]” and that “if I said the wrong thing they would think that I was covering something up because I did not remember seeing anything.” GC Ex. 5 at 2.

After listening to Ruiz and Garza, Anderson stated that Ruiz “did not demonstrate a reasonable belief that BPA Ruiz might face disciplinary action for his statements.” Resp. Ex. A at 2. Accordingly, Anderson told Garza that he would not be allowed to be in the room during Ruiz’s interview. Anderson told Garza that he could wait outside and return if during the interview Ruiz “reported a reasonable belief that disciplinary action may result from his responses” *Id.* Garza left the room, and the interview began.

During the interview, which lasted thirty to forty minutes, the OPR agents questioned Ruiz about the incident. GC Ex. 5 at 2, 3. When the agents were done questioning Ruiz, they typed up an affidavit summarizing his answers and had Ruiz sign it. Banken left the room to print the affidavit, and Anderson asked Ruiz some questions that Anderson said were “off the record.” According to Ruiz, Anderson asked questions that were “a little more personal” about the BPAs involved in the incident. *Id.* at 3. Before ending the interview, Anderson told Ruiz that there were “conflicting statements from the BPAs.” *Id.*

Mellado and Garza met with Anderson and Banken at the OPR office next, at around 10:00 a.m. Resp. Ex. A at 2. Just as with Ruiz, Anderson explained that he would not allow Mellado to have a union representative present during the interview unless Mellado could explain why he felt his answers might result in disciplinary action. *Id.* According to Anderson, Mellado stated only that he might face disciplinary action “because he was being interviewed by OPR,” while Garza “expressed generalized concerns about the potential for conflicting statements” among the BPAs being interviewed and the “lapse of time” since the

incident occurred. *Id.* Mellado indicated in his affidavit for this case that he was also worried that he might “get in trouble for not timely reporting the incident.” GC Ex. 3 at 3. In addition, Mellado stated that he was “worried about conflicting stories with other witnesses and [Anderson] might think I was lying during a sworn statement.” *Id.*

Upon hearing Mellado’s and Garza’s explanations, Anderson stated that Mellado “did not demonstrate a reasonable belief that [he] might face disciplinary action for his statements.” Resp. Ex. A at 2. Accordingly, Anderson told Garza that he would not be allowed to be present during the interview. *Id.* at 3. Anderson added that if Mellado reported a reasonable belief of discipline during the interview, Anderson would stop the interview and permit Garza to attend. *Id.* Garza left the room, and the interview began. GC Ex. 3 at 3.

Anderson asked Mellado about the incident during the interview. *Id.* According to Mellado, Anderson recorded the interview for about an hour and a half, then turned off the recorder and stated that he had enough information to start drafting the affidavit. *Id.* Although the recorder was off, Anderson continued to ask Mellado questions for another half hour or so. *Id.* Anderson then had Mellado sign the affidavit summarizing his answers from the interview.

Santana arrived at the OPR office with Garza around 2:00 p.m. Resp. Ex. A at 3; GC Ex. 2 at 2. Anderson stated that he would not allow Santana to have a union representative present unless Santana could explain why he felt his interview statements might lead to disciplinary action against him. Resp. Ex. A at 3. Anticipating this, Santana read a statement that he and Garza had typed up earlier. *Id.*; GC Ex. 1 at 4 & GC Ex. 6. In his statement, Santana asserted that the interview could result in disciplinary action because he “[did] not know the type of questions” he would be asked, and “[e]ven though I am listed as a witness in this investigation, the agency can at any time decide to list me and identify me as a subject of this investigation.” GC Ex. 6.

According to Anderson, Santana asserted that he might face disciplinary action “because he was being interviewed by OPR,” and Santana “expressed concern about the potential for conflicting statements among” the agents and about being disciplined for failing to timely report the incident. Resp. Ex. A at 3, ¶23. Santana similarly stated in his affidavit for this case that he knew there could be conflicting accounts of what took place and he did not want the OPR agents to think that he was “giving a false statement.” GC Ex. 2 at 2.

After hearing Santana’s explanation, Anderson stated that Santana had not demonstrated a reasonable belief that he might face disciplinary action for his interview statements. Resp. Ex. A at 3. According to Anderson, Garza then asked him if he would offer Santana immunity. Anderson May 31 Decl. at 2, ¶ 8. Anderson replied that he would offer Santana “immunity from any potential disciplinary action . . . with the limited exception of making false statements during the interview.” *Id.* at ¶ 9. According to Anderson, Garza

“may have questioned my authority to grant immunity” and “may have requested something in writing that documented the granting of immunity” for Santana. *Id.* at ¶ 10. Anderson told Garza that he could “only offer a grant of immunity verbally.” *Id.* Anderson noted in his affidavit that OPR “has no written form to grant immunity in administrative investigations” *Id.*

Anderson told Garza that he could not be in the room during the interview and added that if Santana had a reasonable fear of discipline during the interview, he would stop the interview and allow Garza to join them. Resp. Ex. A at 3. In his affidavit, Santana stated that the OPR agents asked him what he remembered about the incident. GC Ex. 2 at 2. Toward the end of the interview, the OPR agents went “off the record” and asked him “if what I told them really happened.” Santana felt that the agents were “trying to get me to tell them some extra information.” *Id.* Santana added: “These types of questions made me uncomfortable and I felt like the agents were trying to get me to say things that could get me in trouble. I was also worried about how they were trying to lead me to specific answers.” *Id.* at 3-4. The meeting ended with Santana signing an affidavit summarizing what he said in the interview.

The Agency did not propose any disciplinary action against Mellado, Ruiz, or Santana as a result of the investigation. Resp. Ex. A at 2-3.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel asserts that the Respondent violated §§ 7114(a)(2)(B) and 7116(a)(1) and (8) of the Statute by denying Ruiz, Mellado, and Santana their right to union representation. Noting that the Respondent has admitted that all but one of the required elements were met to entitle the three agents to union representation, the GC focuses its argument on the one disputed element: whether the agents reasonably believed that the examination might result in disciplinary action against them. GC Br. at 7-8. In this regard, the GC argues that the determination of whether an employee’s belief is reasonable rests on objective factors and is based on the facts and circumstances surrounding the investigation. *Id.* at 8 (citing *Dep’t of the Navy, Charleston Naval Shipyard, Charleston, S.C.*, 32 FLRA 222, 229 (1988)). An employee can reasonably believe an interview may result in discipline even if the employee is being interviewed as a witness. GC Br. at 9 (citing *Internal Revenue Serv., Wash., D.C.*, 4 FLRA 237, 250-51 (1980) (*IRS*), *aff’d sub nom. IRS, Wash., D.C. v. FLRA*, 671 F.2d 560 (D.C. Cir. 1982)). The GC asserts that an offer of immunity does not automatically negate an employee’s reasonable belief that an interview might result in disciplinary action, especially where the offer lacks formality or procedural regularity. GC Br. at 9 & GC Supp. Br. at 6-7 (citing *AFGE, Local 2544 v. FLRA*, 779 F.2d 719, 725-27 (D.C. Cir. 1985) (as amended Feb. 14, 1986) (*Local 2544*)).

The General Counsel contends that Mellado and Santana reasonably believed their interviews might result in disciplinary action against them because they failed to immediately report the incident. Further, Ruiz reasonably believed his interview might result in disciplinary action against him because the OPR agents might think he was lying if he claimed, contrary to Mellado, that he did not witness the incident. GC Br. at 11.

The General Counsel argues that additional factors – the Agency’s notices to Mellado and Santana stated that they were “entitled to Union representation” at their interviews; each BPA was interviewed by two OPR agents; the interviews pertained to an allegation of serious misconduct; the interviews were conducted at an OPR office, away from the BPAs’ workplace; the BPAs had to sign sworn statements at the end of their interviews; and the interviews took place about a year after the incident – support the conclusion that the BPAs reasonably believed the interviews might result in disciplinary action against them. GC Br. at 11-12; *see also id.* at 9 (citing *U.S. Dep’t of Justice, Office of the Inspector Gen., Wash., D.C., 47 FLRA 1254, 1281-82 (1993) (DOJ)*).

The General Counsel contends that Anderson’s offer of immunity did not negate Santana’s reasonable belief that his interview might result in disciplinary action against him, because the offer: (1) did not protect Santana from discipline for making a false statement during the interview; (2) lacked formality and was not made pursuant to official procedure; and (3) was unclear as to whether the OPR agents were authorized to offer immunity or whether it was binding on the Agency. GC Opp’n at 4, 8, GC Supp. Br. at 8-9, 12.

Moreover, the General Counsel argues that by requiring each BPA to justify his request for representation, Anderson asked each agent “to essentially incriminate himself.” GC Opp’n at 5. Further, the GC argues that it was wrong for Anderson to require the agents to explain to his satisfaction why they feared discipline, since an employee’s reasonable belief that an interview might result in discipline is based on objective factors and not on the subjective beliefs of the interviewer or interviewee. *Id.*

With respect to the Respondent’s objections to the GC’s evidence, the GC asserts that General Counsel Exhibit 6, the written statement Santana read to Anderson, is admissible because it was drafted “right before his scheduled interview” with Anderson “at the time that [Santana’s] reasonable fear of discipline existed.” *Id.* at 4 (citing Fed. R. Evid. 803(1)).⁴ In addition, the GC asserts that the Respondent says nothing in its pleadings to contradict General Counsel Exhibit 6. *Id.* Finally, the GC cites 5 C.F.R. § 2423.31(b), which provides that the “[r]ules of evidence shall not be strictly followed.”

⁴ Rule 803 sets forth statements that are not excluded by the rule against hearsay. As relevant here, it states: “(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.”

Respondent

The Respondent insists that it did not violate the Statute. Specifically, it asserts that Ruiz, Mellado, and Santana were not entitled to union representation at their examinations, because none of them had a reasonable belief that disciplinary action might result. Resp. Br. at 7. A determination as to whether an employee reasonably believes an examination might result in disciplinary action is based on “case-specific facts,” and that such a determination “must be founded on more than the . . . standard characteristics of an investigative interview.” *Id.* at 4-5, 6 (citing *DOJ*, 47 FLRA at 1261-62). In this regard, the concerns cited by the BPAs and Garza were insufficient because they pertained to matters such as being punished for inconsistent statements, that would apply in “any witness interview” Resp. Br. at 4.

Respondent asserts that Anderson listened carefully to the fears of discipline articulated by the BPAs and concluded properly that their concerns were not reasonable. *Id.* It is common for witness statements to differ and for witnesses to have difficulties recalling details, but these factors do not reasonably subject a witness to discipline. *Id.* Further, the Agency was already aware of the timeline of the events and the reporting of the incident, but had not charged any of these BPAs with any impropriety. Resp. Supp. Br. at 5. Santana’s concern was particularly unreasonable here, because the Agency is contractually obligated to bring disciplinary charges “at the earliest practicable time.” *Id.* at 2, 5.

With respect to Anderson’s offer of immunity to Santana, the Respondent asserts that it is normal to exclude prospective acts, including false statements, from offers of immunity, and that any GC argument to the contrary shows that the GC is seeking to “establish[] a right to representation for the purpose of facilitating misconduct, i.e. an employee’s false or misleading statement.” *Id.* at 3-4. The Respondent adds that the fact that Anderson made an offer of immunity to Santana “without excessive formality” simply “reflects that the fear of discipline was not reasonable in the first place.” *Id.* at 5-6.

Finally, the Respondent asserts that the General Counsel’s motion for summary judgment is partially based on evidence that is not “competent” under Rule 56 of the Federal Rules of Civil Procedure, which provides that an affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated. Fed. R. Civ. P. 56(c)(4). Specifically, the Respondent claims that General Counsel Exhibit 6 is an “unauthenticated, unsworn-to hearsay document.” Resp. Br. at 2 n.1. In addition, Respondent asserts that the witness affidavits submitted by the GC, which were not made under penalty of perjury, do not comply with 28 U.S.C. § 1746, which concerns unsworn declarations made under penalty of perjury.

ANALYSIS AND CONCLUSIONS

Section 7114(a)(2) of the Statute states:

An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at –

....

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if – (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation.

Section 7114(a)(2)(B) is a statutory codification of the right enjoyed by private sector employees, based on the Supreme Court’s decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (*Weingarten*). See *Headquarters, NASA, Wash., D.C.*, 50 FLRA 601, 606 (1995), *enforced*, *FLRA v. NASA*, 120 F.3d 1208 (11th Cir. 1997), *aff’d*, 527 U.S. 229 (1999). In *Weingarten*, the Court recognized that an employee who is questioned during an investigatory interview that may result in discipline “may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors[.]” and that a union representative might allay such fears and help elicit useful information. 420 U.S. at 263.

As noted above, the parties dispute only whether Mellado, Ruiz, and Santana reasonably believed that their examinations might result in disciplinary action against them. The determination of whether an employee’s belief was reasonable rests on objective factors and is based on the facts and circumstances surrounding the examination. *U.S. Dep’t of the Interior, Bureau of Land Mgmt., Eugene Dist., Portland, Or.*, 68 FLRA 178, 181 (2015). The relevant inquiry is whether, in light of external evidence, a reasonable person would decide that disciplinary action might result from the examination, not the employee’s subjective feelings. *Local 2544*, 779 F.2d at 724. The possibility, rather than the inevitability, of future discipline determines the employee’s right to union representation. *Id.* at 723. An employee may reasonably fear discipline, even if he is not the subject of the investigation. *IRS*, 4 FLRA at 250-51.

While an offer of immunity might make it unreasonable for an employee to fear that an investigatory interview will result in disciplinary action against the employee, such a determination depends on the specific facts and circumstances surrounding the offer. See *Local 2544*, 779 F.2d at 724-25. In *Local 2544*, the court rejected the Authority’s determination that a grant of immunity negated the employee’s fear of discipline and concluded instead that the employee could reasonably doubt the effectiveness of the alleged grant of immunity to fully shield him from disciplinary action. The court based its conclusion on a number of factors, including: (1) the employee and the union president had never heard of the immunity; (2) there was no evidence that the grant of immunity was made

pursuant to a formal policy or procedure; (3) the immunity was granted in an ad hoc manner, revealing a lack of procedural regularity; (4) employees had not been advised in advance of any policy of granting administrative immunity; and (5) immunity was offered without sufficiently explaining its scope. *Id.* at 725-27. Since the court's decision in *Local 2544*, the Authority has had nothing definitive to say about the effect of an offer of immunity on an interviewee's concern of discipline.

The facts and circumstances in this case show that the BPAs reasonably believed that their interviews might result in disciplinary action against them. When one Border Patrol Agent draws her weapon and points it at a fellow agent, any reasonable investigator is going to ask, "why?" Was there any sort of provocation committed by other employees? In other words, while the person pointing the weapon may well have committed misconduct, other people in the area may also have committed misconduct, and it is reasonable to expect that an investigator is going to look into the words and actions of everyone there. Thus, while the suspect may have been the focus of the investigators' attention, all employees at the scene of the incident were potentially at risk of discipline, including Mellado, Santana, and even Ruiz.

Additionally, even if the three agents did nothing wrong during the incident, they were at risk of being disciplined because they failed to immediately report it. In his affidavit, Santana said he told the OPR agents, "We recently had training on failure to report and I know the agency is focused on it." GC Ex. 2 at 2. While an employee's subjective beliefs are not relevant to whether he had a reasonable concern of being disciplined, Santana's statement is an indication of what employees would have reasonably understood concerning the Agency's enforcement of its disciplinary policies. It was likely that the OPR investigators would ask Mellado and Santana why they failed to immediately report the incident, and any answer Mellado and Santana provided could have been used to support disciplinary action against them in this regard. *See DOJ*, 47 FLRA at 1281-82, 1285 (noting that a witness being examined could fear discipline for failing to report misconduct). Accordingly, it is clear that Mellado and Santana reasonably believed that their interviews might result in disciplinary action against them.

In addition, Ruiz was almost certainly going to be asked about his claim that he didn't witness the incident, and to explain his claim in light of Mellado's (and possibly Santana's) assertion that Ruiz did witness the incident. It is possible the OPR agents would find Ruiz's answers on this point to be unconvincing, and that they would conclude he was lying, a disciplinable offense. Moreover, if the OPR agents believed Ruiz witnessed the incident, they would also want to inquire as to why he did not report it.

The differing accounts among the BPAs could also result in discipline for all three of them. For example, if the OPR agents believed Ruiz's claim that he did not witness the incident, then the OPR agents might conclude that Mellado was lying when he claimed that Ruiz witnessed the incident. And of course, Santana also could be accused of lying if his claims paralleled Mellado's in this regard. In sum, all three BPAs had reason to believe that their differing accounts might raise suspicions of dishonesty that could result in them being disciplined. That the BPAs were being asked to recall events that happened a year earlier

further increased the chance that there would be significant and possibly suspicious differences between their accounts. While Anderson and the Respondent assert that OPR recognizes that employees will describe events differently, and that it does not punish employees for this, employees have no way of knowing the Agency's practices on such matters. Consequently, the fear of discipline expressed by the BPAs here was perfectly reasonable.

Moreover, because Anderson's offer of immunity did not protect Santana from being disciplined for making false statements during the interview, Anderson's offer did not negate Santana's reasonable belief that the interview might result in disciplinary action against him. The reasonableness of Santana's fear is bolstered by the informal and ad hoc nature of Anderson's offer, which was made verbally and in an impromptu manner, was not in writing, lacked clarity with respect to the scope of the offer, lacked clarity (at least to Garza) with respect to Anderson's authority to make the offer, and was apparently made without a basis in a specific regulation or policy.⁵ See *Local 2544*, 779 F.2d at 724-27. Further, while the Respondent might be correct in asserting that offers of immunity generally provide no protection for subsequent false statements, and that no agency should be expected to provide employees a license to lie, those factors are not directly relevant to whether an employee has a reasonable fear of being disciplined. While there may be sound reasons not to offer employees full immunity, the fact remains that Anderson's offer left Santana vulnerable to discipline, if his account of the incident differed significantly from other employees' accounts. The three BPAs had a reasonable basis for fearing just this possibility, because they had discussed their recollections already and realized their accounts differed. Contrary to the Respondent's arguments, Santana's desire for representation does not mean he would speak falsely, or that his representative was trying to facilitate misconduct. It simply means that Santana wanted representation to ensure that his truthful statements were not misconstrued and his legal rights protected.

It is also clear that the interviews were nothing like the "run-of-the-mill shop floor conversation" that the *Weingarten* court and the Statute sought to exclude from the right to union representation. *IRS*, 4 FLRA at 251 (quoting *Weingarten*, 420 U.S. at 257-58) (internal quotation marks omitted). Rather, the interviews took place at an OPR office away from the employees' regular workplace, were preceded by the unusual demand that each BPA justify his request for representation, and involved questioning that pitted two OPR agents against a solitary BPA. While I do not suggest that every investigatory interview conducted by the OPR would lead an employee to fear discipline, the circumstances of this case confirm that it was reasonable for the BPAs to believe that the interviews might result in disciplinary action against them. See *DOJ*, 47 FLRA at 1261-62, 1281-82.

⁵ Let me emphasize that either of these two factors would suffice to demonstrate that Santana had a reasonable fear of being disciplined: the limited scope of the immunity and the insubstantial, unreliable manner in which it was offered.

The reasonableness of the BPAs' fears is also confirmed by the dubious techniques employed by Anderson when dealing with them. First, Anderson insisted that each agent articulate why he believed the interview might result in disciplinary action against him. By doing this, Anderson essentially invited each agent to confess to having committed a disciplinable act. It was especially odd that Anderson required Mellado and Santana to do this, since he had already sent them notices indicating that they had "a right to Union representation" at their interviews. Resp. Exs. A-2 & A-3. Second, Anderson ended each interview with a seemingly informal period, one in which he either stopped the recorder while continuing to ask questions or invited the agent to speak "off the record." As Santana noted, this tactic could reasonably be interpreted as an attempt by Anderson to lull the agents into divulging extra information and "say things that could get [them] into trouble." GC Ex. 2 at 2. And it is quite possible that Anderson's tactic could have led to discipline, even if it did not result in an employee confessing to wrongdoing. For instance, if an agent revealed additional information to Anderson during the "off the record" portion of the interview, he could possibly be disciplined for having failed to be forthcoming during the "on the record" portion of the interview. See GC Ex. 9 at 4. It is beyond my authority to tell OPR investigators how to conduct examinations, but I am certain that § 7116(a)(2)(B)'s right to union representation was established in part to help employees from falling into such traps.

For all of these reasons, I find that Mellado, Ruiz, and Santana reasonably believed that the interviews might result in disciplinary action against them. As shown above, and contrary to the Respondent's claim, this conclusion is not based on generalized terms such as suspect and witness, but rather on the specific, objective facts established in this case.

The Respondent's remaining arguments are also unavailing. It contends that the BPAs could not have reasonably feared discipline for failing to immediately report the incident, because the Agency was contractually obligated to bring disciplinary charges at the earliest practicable date, and the agents had not been disciplined in the year since the incident. Resp. Supplemental Br. at 2, 5; see also Resp. Ex. A at 2-3. It is virtually impossible to evaluate this argument, however, because the contractual provision has not been submitted into the record.⁶ And even if the contractual provision has the meaning described by Respondent, it is not at all clear that the Agency would violate the provision by bringing charges against Mellado and Santana now, especially since these two agents were arguably responsible for any delay in bringing charges. See *DHS*, 70 FLRA at 76 (arbitrator noted disagreement among other arbitrators as to the meaning of "the earliest practicable date"). Moreover, these nuanced legal arguments offer do not alleviate the reasonable, objective fears of an employee faced with this impending investigation. As long as the Agency was investigating the suspect for possible misconduct, other employees (even Mellado, who reported the suspect) involved in that incident could reasonably fear disciplinary action.

⁶ The Authority apparently discussed this provision in passing in *U.S. Dep't of Homeland Security, U.S. Customs & Border Protection*, 70 FLRA 73, 75-76 (2016) (*DHS*), but the Authority did not quote the provision (which had actually been interpreted by an arbitrator) or definitively describe its meaning.

The Respondent suggests that Anderson was entitled to condition the agents' requests for representation on their ability to explain to Anderson's satisfaction why they needed representation. However, the Respondent cites no case law to support this claim. *See* Resp. Br. at 4, 7. As the General Counsel correctly points out, this effectively creates a burden of proof on each employee, something the Authority has never imposed. Such a burden could logically (and unfairly) entitle one employee to a representative but not a second one in exactly the same position, simply because one employee is more articulate than the other. An employee seeking representation is only required to ask for it, and that request need not be made in a particularly articulate way. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 394 (1999) (employee asked for an attorney and said, "I want somebody to talk to"); *U.S. Dep't of Justice, Bureau of Prisons, Metro. Corr. Ctr., N.Y., N.Y.*, 27 FLRA 874, 879-80 (1987) (employee said "maybe I need to see a union rep"). That Anderson required the BPAs to articulate their fears is especially troubling, since § 7114(a)(2)(B) is designed to protect employees who, like these BPAs, might be "too fearful or inarticulate" to explain themselves. *Weingarten*, 420 U.S. at 263.

As for the Respondent's challenge to General Counsel Exhibit 6, the statements of Santana, Garza, and Anderson all support the authenticity of the document. GC Ex. 1 at 4, GC Ex. 2 at 2; Resp. Ex. A at 3. Moreover, documents like General Counsel Exhibit 6 and the affidavits submitted by the General Counsel are commonly admitted in ULP proceedings, even if, for example, those documents contain hearsay statements or are not made under penalty of perjury. *See* 5 U.S.C. § 7118(a)(6) (parties in a ULP hearing "shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court"); 5 C.F.R. § 2423.31(b) (the rules of evidence "shall not be strictly followed"). Accordingly, the Respondent's challenge is unfounded.

REMEDY

The remedy for this type of unfair labor practice is to require the Agency to post a notice, informing employees that it will cease and desist its unlawful activity. Since none of the BPAs here were disciplined, there is no need to order the Agency to offer them new examinations. The Respondent rightly objects to the language of the final paragraph of the notice proposed by the GC (*see* Resp. Br. at 4-5), as it fails to specify that an employee has the right to a union representative only when he reasonably believes that the examination might result in disciplinary action against him. The remedial order and notice will be worded to make this point clear.

Based on the foregoing, I recommend that the Authority grant the General Counsel's Motion for Summary Judgment, deny the Respondent's Cross Motion for Summary Judgment, and issue the following order:

ORDER

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

1. Cease and desist from:

(a) Interfering with the right of employees represented by the American Federation of Government Employees, National Border Patrol Council, Local 2455 (Union), to Union representation at examinations in connection with investigations.

(b) Requiring Ricardo Ruiz, Charles Mellado, and Henry Santana, or any other bargaining unit employee, to take part in any examination in connection with an investigation, whether as a subject or a witness, without Union representation when such representation has been requested by the employee and the employee reasonably believes that the examination might result in disciplinary action.

(c) 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 action 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 Federal Labor Relations Authority. Upon receipt, they shall be signed by the Laredo Sector Chief Patrol Agent, and shall be posted and maintained for sixty (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) In addition to physical posting of paper notices, the Notices shall be distributed electronically, on the same day as the physical posting, through email, posting on an intranet or internet site, or other electronic means, if such are customarily used to communicate with bargaining unit employees.

(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 thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., October 17, 2017



RICHARD A. PEARSON
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, Laredo, Texas, has violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE WILL, in any examination in connection with an investigation of a bargaining unit employee where the employee reasonably believes that the examination may result in disciplinary action, permit the employee, upon his or her request, to have a representative of the American Federation of Government Employees, National Border Patrol Council, Local 2455 (Union), represent the employee.

WE WILL NOT require Ricardo Ruiz, Charles Mellado, Henry Santana, or any other bargaining unit employee, to take part in any examination in connection with an investigation, whether as a subject or a witness, without Union representation when representation has been requested by the employee and the employee reasonably believes that the examination may result in disciplinary action.

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.

U.S. Customs and Border Protection, Laredo Sector

Date: _____ By: _____
(Signature) (Title)

This Notice must remain posted for sixty (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 Region, Federal Labor Relations Authority, whose address is: 525 S. Griffin Street, Suite 926, Dallas, TX 75202, and whose telephone number is: (214) 767-6266.