UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF VETERANS AFFAIRS, MEDICAL CENTER, LEAVENWORTH, KANSAS Respondent and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, AFL-CIO, LOCAL 1765 Charging Party	Case No. DE-CA-20637

Lawrence E. Banks, Esquire
For the Respondent

Matthew Jarvinen, Esquire
For the General Counsel

Mr. Steven Hantzis
Phillip R. Kete, Esquire
On Brief
For the Charging Party

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 whether Respondent's examination of a probationary bargaining unit employee about her retention by a Nurse

1/ 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 7114(a)(2)(B) will be referred to, simply, as, "14(a)(2)(B)".

Professional Standards Board without permitting Union representation was contrary to § 14(a)(2)(B) of the Statute and violated §§ 16(a)(1) and (8) of the Statute.

This case was initiated by a charge filed on May 4, 1992 (G.C. Exh. 1(a)). The Complaint and Notice of Hearing issued on September 30, 1992 (G.C. Exh. 1(b)) and set the hearing for a date, time and location to be determined; and by Order dated November 19, 1992 (G.C. Exh. 1(d)), the hearing was set for January 14, 1993, in Leavenworth, Kansas, pursuant to which a hearing was duly held on January 14, 1993, in Leavenworth, Kansas, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, February 16, 1993, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended, on motion of the General Counsel, with which the other parties concurred, for good cause shown, to February 24, 1993. Charging Party, Respondent, and General Counsel each timely mailed an excellent brief received on, or before, March 1, 1993, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions.

Findings

1. The National Federation of Federal Employees, AFL-CIO, Local 1765 (hereinafter, "Union") is the certified exclusive representative of a bargaining unit of professional employees at the Department of Veterans Affairs, Medical Center, Leavenworth, Kansas (hereinafter, "Respondent"), including Title 38 Registered Nurses (G.C. Exhs. 1(b) and (3); Tr. 18, 19).

2. Ms. Arlene Wightman was employed by Respondent as a Registered Nurse (RN) until her separation, on February 21, 1992, in the last month of her probationary period (Tr. 30, 31). Ms. Wightman was a member of the bargaining unit and was a member of the Union (Tr. 31).

3. An incident report was filed on, or about, September 2, 1991, alleging that Ms. Wightman had abused a patient. Thereafter, there was an investigation, including an administrative investigation board, during which Ms. Wightman was represented by Ms. Sandy Bond, President of the Union (Tr. 23, 24); however, both Ms. Bond and Ms. Wightman stated Respondent had not furnished sufficient information to permit proper representation before the administrative board (Tr. 24, 25, 26, 27, 47, 49).

4. Ms. Wightman stated that she had first learned of the alleged patient abuse on, or about, September 2, 1991, when her Head Nurse, Cindy Roach, asked her to report for work on the day shift the next day, rather than the swing shift, because there had been an allegation of abuse. The next day, she learned from Ms. Roach's supervisor, Judy Moppin, that the allegation of patient abuse involved a charge that Ms. Wightman had thrown liquid Tylenol in a patient's face. Ms. Moppin also gave Ms. Wightman a copy of a Medical Center Policy Memorandum which indicated,

> The administrative penalty action for patient abuse is removal. However, a lesser penalty (admonishment, reprimand, suspension, or demotion) may be imposed when mitigating or extenuating circumstances clearly warrant such lesser penalty, or the nature of the abuse is minor. (G.C. Ex. 5; Tr. 31, 32, 33)

5. By letter dated October 29, 1991, addressed to Ms. Wightman, Ms. Mary Lee Driscoll, Chairperson of the Nurse Professional Standards Board (NPSB), advised Wightman that the NPSB would,

> ". . . conduct an impartial review of your service in order to make a recommendation to the Medical Center Director on your retention with the Department of Veterans Affairs. This review is being held as a result of allegations that you abused a patient who was entrusted to your direct care on Ward 3-East, during the evening tour of duty, September 1, 1991. The review will be on November 12, 1991 in the 4-East Conference Room, Building 91.
>
> You may appear in person before the board or submit a written statement in your behalf. . . .
>
> <u>Because this review is being conducted during your probationary period, you have no entitlement to legal or other representation</u>. However, you may request assistance in preparing your case from Richard B. Comer, Personnel Officer, extension 542.
>
> You will be given until November 8, 1991 to notify me of your desire to appear before the board or submit a written statement." (G.C. Exh. 2) (Emphasis supplied).

6. Notwithstanding the unequivocal statement in Ms. Driscoll's letter of October 29, 1991, that she

had, ". . . no entitlement to legal or other representation" (G.C. Exh. 2) (Emphasis supplied), Ms. Wightman, by handwritten letter dated November 8, 1991, specifically requested Union representation when she appeared before the NPSB (G.C. Exh. 8), which request Ms. Driscoll denied, by letter also dated November 8, 1991 (G.C. Exh. 9).

7. Ms. Wightman, after receipt of the letter of October 29, 1991, had sent an undated letter to Ms. Driscoll advising her that she intended to appear in person before the Board (G.C. Exh. 6), which Ms. Driscoll acknowledged by letter dated November 7, 1991 (G.C. Exh. 7). Ms. Wightman met with Ms. Bond to discuss the October 29, 1991, letter. Ms. Bond, by handwritten letter dated November 7, 1991, to Ms. Driscoll requested permission to appear and to represent Ms. Wightman, ". . . as she has requested union representation. . . . " (G.C. Exh. 3). Ms. Bond also requested that the date be re-established, ". . . so that we may have sufficient time to prepare prior to the meeting for appropriate union representation." (G.C. Exh. 3). Finally, Ms. Bond requested all documentation on Ms. Wightman (G.C. Exh. 3).

8. Mr. Richard B. Comer, Personnel Officer, responded to Ms. Bond's letter to Ms. Driscoll, also by letter dated November 7, 1991, as follows:

> "1. In accordance with the 'Department of Veterans Affairs Labor Relations Improvement Act of 1991' collective bargaining rights for Title 38 employees excludes 'any applicability to, any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review.'
>
> "2. However, I have already verbally advised Ms. Wightman of her personal right to appropriately sanitized information regarding the upcoming Professional Standards Board Summary Review.
>
> "3. In addition, the Board has decided not to reschedule and will meet with Ms. Wightman as scheduled at 10:00 a.m. on Tuesday, November 12." (G.C. Exh. 4).

9. Ms. Bond later met with Mr. Comer to discuss the matter of Union representation for Ms. Wightman. Mr. Comer indicated that Ms. Bond would not be permitted to attend the NSPB meeting on November 12. Although Mr. Comer could not specify how the provision of Union representation for Ms. Wightman would have been inconsistent with the Act, he

testified that management "interpreted" the Act to preclude Union representation during "peer review" conducted by the NPSB. At the same time, Mr. Comer acknowledged that Ms. Bond's presence at the NPSB's review would not have interfered in any way with management's right to remove Ms. Wightman. (Tr. 72, 73, 74, 75)

10. On November 12, Ms. Wightman appeared without Union representation before the NPSB, which consisted of Ms. Driscoll, Ms. Audrey Hogan and Mr. Nelson Dean, each of whom was a Registered Nurse. Ms. Wightman was asked numerous questions, including general questions about her nursing preparation, educational background, experience and work history. (Tr. 39, 40) The Board also asked Ms. Wightman to describe the normal stress level on the floor where she worked as well as the stress level on the night of the incident of alleged patient abuse. The Board asked general questions about how she felt about working with "demented" patients, how she got along with her peers, and how she went about solving problems on the floor. The Board also made several specific inquiries concerning the incident of alleged patient abuse, including which hand she had the Tylenol in; where the Tylenol spilled on her and on the patient; and the location of the patient on the floor. The Board asked how she handled things on the floor when there were two RNs on the same shift, and asked about her philosophy of nursing and patient care. The Board also asked how she felt about the patient and his family and how much time was left in the shift at the time of the Tylenol incident. In all, the meeting lasted about one hour. Ms. Wightman estimated that about 30 minutes of the meeting was devoted by the Board asking her questions concerning the incident involving the Tylenol. (Tr. 40, 41, 42) In addition, the Board interviewed seven other Registered Nurses; two nursing assistants; and one Licensed Practical Nurse. Three of the ten witnesses had been requested by Ms. Wightman (Jt. Exh. 1).

11. On November 12, 1991, the NPSB filed VA Form 10-2543, entitled "Board Action", in which it recommended that Ms. Wightman be separated from service, citing, inter alia, "Ms. Wightman's sustained patient abuse charge . . ." (Jt. Exh. 1). After approval by the Central Office Nurse Professional Standards Board on January 30, 1992 (Jt. Exh. 1), Respondent's Medical Center Director, James H. Cuer, on February 21, 1992, notified Ms. Wightman that she was separated effective, "close of business February 21, 1992, from your employment as an R.N. with the Dwight D. Eisenhower VA Medical Center, Leavenworth, Kansas." (G.C. Exh. 10).

CONCLUSIONS

General Counsel contends that Respondent violated § 14(a)(2)(B) of the Statute by conducting the Nurse Professional Standards Board review concerning Ms. Arlene Wightman on November 12, 1991, without providing her Union representation. § 14(a)(2)(B) of the Statute provides,

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

General Counsel states,

"The undisputed facts establish the presence of all elements of a Weingarten violation. The October 29 letter to Wightman notifying her of the NPSB review expressly states that the review was held as a result of allegations of patient abuse. When considered in light of Wightman's knowledge that such allegations, if confirmed, could lead to administrative discipline up through removal, these facts establish Wightman's reasonable fear of discipline. The employee's request for Union representation is established by Wightman's and Bond's written requests that Wightman be afforded Union representation at the November 12 NPSB review. Further, the Respondent, through NPSB Chairperson Mary Lee Driscoll and Personnel Officer Richard Comer explicitly refused to permit Union representation. That the NPSB members repeatedly questioned Wightman about the incident of alleged patient abuse confirm that the November 12 meeting constituted an "examination in connection with an investigation." Finally, Wightman's testimony that she was a member of the NFFE bargaining unit at the time of the NPSB review was uncontroverted, and the Respondent's Answer admits that Driscoll was a management representative.

"The Respondent's sole defense is that the Authority lacks jurisdiction over this matter by reason of the Department of Veterans Affairs Labor Relations Improvement Act of 1991. . . . " (General Counsel's Brief, pp. 11-12).

The Charging Party asserts, in part, that,

> "B. CONGRESS DID NOT INTEND TO ALLOW THE DEPARTMENT OF VETERANS AFFAIRS TO BAR UNION REPRESENTATION AT PROFESSIONAL STANDARDS BOARD HEARINGS.
>
> "As the chairman of the Senate committee explained, the overall purpose of the 1991 amendment included ensuring that Title 38 employees had the same fundamental rights as other employees:
>
> > The need for these provisions is essentially two-fold: To ensure that title 38 employees are afforded the same fundamental rights as other Government employees in terms of their employee-management relations, while protecting the special professional nature of title 38 employment; and to provide VA with an important tool in its ongoing efforts to recruit and retain qualified health-care personnel.
>
> 137 Cong. Rec. § 4543 (April 17, 1991) (Statement of Sen. Cranston).
>
> "Consistent with this, the exclusions are limited to matters which require professional medical judgment to be applied:
>
> > The exclusion from collective bargaining of matters concerning professional conduct or competence is designed to be limited to those matters that involve the manner in which health care is provided.
>
> 137 Cong. Rec. § 4544 (April 17, 1991) (Statement of Sen. Cranston).
>
> "Further light on the congressional intent is shed by the chairman's explanation for having the merits of discharge cases involving professional conduct decided by special review boards:
>
> > Disciplinary Appeals Boards would be comprised of three VA employees, . . . at least two of

> whom would be required to be employed in the same category of position as the employee. The latter requirement is included in light of the fact that the Boards would be evaluating the issues of clinical competence and direct patient care, for which a knowledge of the specific profession would be needed.

"This congressional purpose hardly translates into a direction that the VA use Star Chamber procedures in cases like these. Indeed, the VA properly refrains from identifying any benefit that the United States would gain from the unfair procedures used in this particular case (footnote omitted) and thus it is impossible to even infer a possible congressional intent that favors the agency.

"In short, 5 U.S.C. § 7114(a)(2)(B) facially applies, and nothing in Title 38 clearly withdraws this benefit." (Charging Party's Brief, pp. 11-12)

Respondent contends, inter alia, that,

"A. The Authority has no jurisdiction over a probationary employee of the Respondent. 38 U.S.C. 7403 provides that appointments of health care professionals, under this chapter, do not have to comply with civil service requirements. However, said appointments shall be for a probationary period of two years.

"The statute further provides at 38 U.S.C. 7403(b)(2) 'The record of each person serving under such an appointment in the medical, dental, and nursing services shall be reviewed from time to time by a board appointed in accordance with regulations fixed by the Secretary. If such board finds that such person is not fully qualified and satisfactory, such person shall be separated from the service.'

"The probationary period is an extension of the appointment process wherein the appointee can be observed during actual job performance for professional abilities, conduct and general traits of character and work habits . . .

"Separation of the probationary employee is not an adverse action. . . ." (Respondent's Brief [pages are not numbered; but this is the third page and, for identification, I have numbered the pages in pencil).

. . .

"B. The Authority has no jurisdiction over professional conduct, competence, or peer review.

"In the case of Colorado Nurses Association v. FLRA 851 F2d 1486 (D.C. Cir 1988), the Court in interpreting 38 U.S.C. 4101 et seq. in pari mataria with the Federal Labor Relations statute found that Congress granted the administrator exclusive discretion to establish regulations concerning the working conditions of its medical employees. . . .

"Congress restated its position in 38 U.S.C. 7421 (1991) which states as follows:

> '(a) Notwithstanding any law, Executive order, or regulation, the Secretary shall prescribe by regulation the hours and conditions of employment and leaves of absence of employees appointed under any provision of this chapter in positions in the Veterans Health Administration listed in subsection (b).
>
> '(b) Subsection (a) refers to the following positions:
>
> (1) Physicians.
> (2) Dentists.
> (3) Podiatrists.
> (4) Optometrists.
> (5) Registered nurses.
> (6) Physician assistants.
> (7) Expanded-duty dental auxiliaries.'

"While Congress did allow some collective bargaining by the Department's professional employees, where not excluded, it further provided at 38 U.S.C. 7422 (July 1991) as follows:

> '(a) Except as otherwise specifically provided in this title, the authority of the Secretary to prescribe regulations under section 7421 of this title is subject to the right of Federal employees to engage in collective bargaining with respect to conditions of employment through representatives chosen by them in accordance with chapter 71 of title 5 (relating to labor-management relations).
>
> '(b) Such collective bargaining (and any grievance procedures provided under a collective bargaining agreement) in the case of employees described in section 7421(b) of this title may not cover, or have any applicability to, any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or

adjustment of employee compensation under this title.

'(c) For purposes of this section, the term "professional conduct or competence" means any of the following:

(1) Direct patient care.

(2) Clinical competence.

'(d) An issue of whether a matter or question concerns or arises out of (1) professional conduct or competence, (2) peer review, of (3) the establishment, determination, or adjustment of employee compensation under this title shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency.

'(e) A petition for judicial review or petition for enforcement under section 7123 of title 5 in any case involving employees described in section 7421(b) of this title or arising out of the applicability of chapter 71 of title 5 to employees in those positions, shall be taken only in the United States Court of Appeals for the District of Columbia Circuit.'

"Thus, a cursory examination of the statute indicates that for professional conduct, competence, or peer review, as in this case, that the matter is not subject to collective bargaining and is not reviewable by any other agency. In fact, even the issue of whether a matter arises out of or concerns these matters is the exclusive domain of the Secretary.

". . . since the denial of union representation was for a peer review process dealing with a clinical matter there is clearly no jurisdiction or authority for any other agency to review.

. . .

"Finally, no other provision of the law relating to Title 5 or other law pertaining to the Civil Service system overrides 38 U.S.C. 7306 et seq. or any provision relating to that chapter. See 38 U.S.C. 7425, which states as follows:

'(a) Physicians, dentists, nurses, and other health-care professionals employed by the Administration and appointed under section 7306, 7401(1), 7405 or 7406 of this chapter are not subject to the following provisions of law:

(1) Section 413 of the Civil Service Reform Act of 1798.
(2) Subchapter II of chapter 31 of title 5.
(3) Subchapter VIII of chapter 33 of title 5.
(4) Subchapter V of chapter 35 of title 5.
(5) Subchapter II of chapter 43 of title 5.
(6) Section 4507 of title 5.
(7) Subchapter VIII of chapter 53 of title 5.
(8) Subchapter V of chapter 75 of title 5.
'(b) Notwithstanding any other provision of law, no provision of title 5 or any other law pertaining to the civil service system which is inconsistent with any provision of section 7306 of this title or this chapter shall be considered to supersede, override, or otherwise modify such provision of that section or this chapter except to the extent that such provision of title 5 or of such other law specifically provides, by specific reference to a provision of this chapter, or such provision to be superseded, overridden, or otherwise modified.'

"Therefore, there is no jurisdiction by statute . . . which grants any jurisdiction over the Respondent's probationary professional employees or over the professional conduct, competence, or peer review process. Accordingly, the complaint in this case should be dismissed." (Respondent's Brief, page 5-9)

The Authority, on October 29, 1992, issued its decision in Department of Veterans Affairs, Veterans Affairs Medical Center, Jackson, Mississippi, and National Federation of Federal Employees, Local 589, 48 FLRA No. 83, 48 FLRA 787 (1993) (hereinafter, "VA, Jackson"), which, although the facts are slightly different, addresses all the contentions Respondent raises in this case and is fully controlling and dispositive herein.

With respect to Respondent's reliance on 38 U.S.C. § 7422(d), Respondent's Brief, pages 6 and 7, the Authority in VA, Jackson, stated,

"At the outset we reject the . . . contentions that the Authority does not have jurisdiction to determine whether the Respondent failed to comply with section 7114(a)(2)(B) and thereby violated section 7116(a)(1) and (8). In this connection, we find that the Respondent's reliance on 38 U.S.C. § 7422(d) is misplaced.

"38 U.S.C. § 7422, entitled "Collective bargaining," states that the "the authority of the Secretary to prescribe regulations . . . is subject to the right of Federal employees to engage in collective bargaining with respect to conditions of employment." See 38 U.S.C. § 7422(a). See also, National Association of Government Employees, Local R1-109 and U.S. Department of Veterans Affairs, Medical Center, Newington, Connecticut, 44 FLRA 356, 364 (1992)(VAMC, Newington), petition for review filed sub nom. U.S. Department of Veterans Affairs v. FLRA, No. 92-1213 (D.C. Cir. May 12, 1992). 38 U.S.C. § 7422(b) prohibits collective bargaining over matters or questions concerning or arising out of professional conduct or competence, or peer review, and section 7422(d) gives the Secretary the exclusive authority to determine, whether a matter arises out of the prohibited subjects. See, for example, Wisconsin Federation of Nurses and Health Professionals, Veterans Administration Staff Nurses Council, Local 5032 and U.S. Department of Veterans Affairs, Clement J. Zablocki Medical Center, Milwaukee, Wisconsin, 47 FLRA 910, 913-14 (1993).

"However, the rights contained in section 7114(a)(2)(B) are not tied to collective bargaining. Indeed, there is no duty to bargain with any union representative who attends an investigatory interview. Weingarten, [420 U.S. 251(1975)] 420 U.S. 259. The purpose of section 7114(a)(B) is to create representational rights for Federal employees similar to the rights provided to private sector employees by the National Labor Relations Board (NLRB) in interpreting the National Labor Relations Act and the Supreme Court's decision in Weingarten. See 124 Cong. Rec. 29184 (1978), reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, H.R. Comm. Print No. 7, 96th Cong., 1st Sess. 926 (1979) (Legislative History), where Congressman Udall explained that the purpose of the House bill provisions which led to the enactment of section 7114(a)(2)(B) was to re-elect the Supreme Court's decision in Weingarten. See also United States Department of Justice, Bureau of Prisons, Safford, Arizona, 35 FLRA 431, 439 (1990) (Safford).

"We also reject the Respondent's assertion that section 7114()(2)(B) is inconsistent with title 38.

There is nothing in title 38 which indicates that employees are excluded from coverage of the representation rights under section 7114(a)(2)(B). Further, the Respondent has not demonstrated how section 7114(a)(2)(B) is inconsistent with its authority under 38 U.S.C. § 7403 to terminate probationary employees. . . ." (48 FLRA at 793-794)

. . .

"Moreover, the representation rights created by section 7114(a)(2)(B) do not interfere with the Respondent's ability, pursuant to 38 U.S.C. § 7403, to summarily terminate probationary employees through peer reviews. The Supreme Court in Weingarten recognized that union representation at investigatory interviews or examinations could contribute to preventing unjust discipline. See Weingarten, 420 U.S. at 260-61. The Court stated 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.' Id. at 262-63. The Court concluded that '[a] knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.' Id. at 263 . . . whether or not a union representative participates in the proceeding, management remains free to terminate the employment of a probationer for whatever reason it deems appropriate. In our view, therefore, the representation rights found in section 7114(a)(2)(B) are compatible with the purpose of the probationary peer reviews at issue in this case." (id. at 794-795)

With respect to Respondent's argument that, "The probationary period is an extension of the appointment process. . . .", supra, and/or that "Separation of the probationary employee is not an adverse action." (supra), the Authority in VA, Jackson, supra, stated,

"Whether or not a probationary separation is part of the appointment process, we find that section 7114(a)(2)(B) applies . . . In this regard, the intent of section 7114(a)(B) is to afford protection to an employee who is confronted by his or her employer at an examination in connection with

an investigation, when the employee reasonably believes that disciplinary action may result. See Charleston Naval Shipyard, 32 FLRA at 230.

"We find no basis on which to conclude that the employees' status as probationers affects their statutory rights as Federal employees under section 7114(a)(2)(B). Nothing in the Statute or legislative history indicates that the rights afforded by section 7114(a)(2)(B) are based on an employee's tenure status. Moreover, probationary employees are not deprived of other statutory rights which are available to Federal Employees, such as the right to challenge certain discriminatory actions, or the right to engage in union activity. See U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Detroit Teleservice Center, Detroit, Michigan, 42 FLRA 22, 54-55 (1991). Thus, we conclude that each of the employees was entitled to have the assistance of her Union representative, as requested." (id. at 797-798).

Accordingly, I find, for reasons fully stated by the Authority in VA, Jackson, supra, that Respondent by refusing to allow participation of a Union representative at a professional standards board proceeding for a probationary employee failed to comply with § 14(a)(2)(B) of the Statute and thereby violated §§ 16(a)(1) and (8) of the Statute.

Remedy

Charging Party, citing Vitarelli v. Seaton, 359 U.S. 535 (1959), asserts that Ms. Wightman's removal in violation of her procedural rights, i.e. the right to representation granted by § 14(a)(2)(B) of the Statute, was null and void and, therefore, that she, ". . . is entitled to the reinstatement . . ., subject, of course to any lawful exercise of the Secretary's authority hereafter to dismiss . . . [her] from employment. . . ." (359 U.S. at 545). General Counsel seeks, upon request of the Union and Ms. Wightman, a repeat of the NPSB review with the presence of the Union representation; reconsideration of the decision to terminate Ms. Wightman, and, if the decision to terminate is reversed, make Ms. Wightman whole for any loss of pay suffered. If this were a case of first impression as to the appropriate remedy for a "Winegarten" violation, Charging Party's contention would be more persuasive but, of course, it is not. Indeed, as the Authority stated in Department of the Navy, Charleston Naval

Shipyard, Charleston, South Carolina, 32 FLRA 222, 232 (1988) (hereinafter, "Charleston Naval Shipyard"), the National Labor Relations Board's policy, contrary to Charging Party's representation, Charging Party's Brief, pp. 14-15, is to grant a make whole remedy only when an employee is discharged or disciplined for engaging in union or other protected concerted activity. Thus, the Authority stated,

> ". . . In Taracorp Industries, 273 NLRB 221, 221-23 (1984), the NLRB discussed appropriate remedies for violations of the right to representation at investigatory interviews. The NLRB indicated that when an employee is discharged or disciplined for engaging in union or other protected concerted activity, a make whole remedy, such as reinstatement and backpay is appropriate in order to place the employee in its position enjoyed prior to the discriminatory conduct. Likewise, when an employee is discharged or disciplined as the result of an act that was, in itself, an unfair labor practice, a make whole remedy is appropriate. However, . . . when an employee is discharged or disciplined for misconduct or any other nondiscriminatory reason, a make whole remedy is not available under Section 10(c) of the NLRA or the general remedial framework of the NLRA. The NLRB further determined that, independent of these restrictions, make whole remedies for Weingarten violations would be inappropriate because 'there simply is not a sufficient nexus between the unfair labor practice committed (denial of representation at an investigatory interview) and the reason for the [disciplinary action] to justify a make whole remedy.' 273 NLRB 223. The NLRB, therefore, concluded that an employee who is discharged or disciplined for cause is not entitled to reinstatement and backpay simply because the employee's Weingarten rights were violated." (32 FLRA at 232-233).

The Authority in Charleston Naval Shipyard, supra, further stated,

> "We agree with the analysis and conclusion of the NLRB regarding remedies for Weingarten violations. We recognize, of course, that the Statute we administer does not contain a provision similar to Section 10(c) of the NLRA. However, we also are unable to 'justify the imposition of a make-whole remedy where the employer's only

violation is the denial of an employee's request for representation at an investigatory interview.' 273 NLRB 222. Therefore, in this and future cases, a make whole remedy will not be ordered where the disciplinary action taken relates solely to employee misconduct independent of the examination itself." (id. at 233).

In United States Department of Justice, Bureau of Prisons, Safford, Arizona, 35 FLRA 431 (1990), the Authority rejected the make-whole remedy recommended by the judge, id 444. There, the Authority stated, in part, as follows:

> ". . . where there has been a denial of representation rights under section 7114(a)(2)(B) and discipline has ensued, we believe that the policies of the Statute will be best effectuated by ordering the Respondent, upon request of the union and the employee, to repeat the investigatory interview and to afford the employee full rights to union representation. After repeating the investigative interview, the Respondent will reconsider the disciplinary action taken against the employee. If on reconsideration the Respondent concludes that the disciplinary action was unwarranted or that a mitigation of the penalty is warranted, the employee will be made whole for any losses suffered to the extent consistent with the Respondent's decision on reconsideration." (id at 447-448).

This was, of course, the remedy given in VA, Jackson, supra, and is the remedy that will ordered herein.

Having found that Respondent, contrary to § 14(a)(2)(B) of the Statute, unlawfully denied requested Union representation at the NPSB review of Ms. Arlene Wightman and thereby violated §§ 16(a)(1) and (8) of the Statute, it is recommended that the Authority adopt the following:

Order

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of the Regulations, 5 C.F.R. § 2423.29, it is hereby ordered that the Department of Veterans Affairs, Medical Center, Leavenworth, Kansas, shall:

1. Cease and desist from:

(a) Refusing to allow participation of a union representative at peer review or professional standards board proceedings for probationary employees where such representation has been requested by the employee, and where the employee reasonably believes that the proceedings may result in disciplinary action against him or her.

(b) 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 action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) On request of the National Federation of Federal Employees, AFL-CIO, Local 1765, and Ms. Arlene Wightman, repeat the NPSB review concerning Ms. Wightman, which occurred on November 12, 1991. In repeating the NPSB review of Ms. Wightman, afford her full right to Union representation. After repeating the NPSB review, Respondent will reconsider the disciplinary action taken against Ms. Wightman. If, on reconsideration, Respondent concludes that the disciplinary action was unwarranted or that a mitigation of the penalty is warranted, the employee will be made whole for any losses suffered to the extent consistent with Respondent's decision on reconsideration.

(b) Post at the Department of Veterans Affairs Medical Center, Leavenworth, Kansas, 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 Director of the Veterans Affairs Medical Center, 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.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.30, notify the Regional Director of the Denver Region, Federal Labor Relations

Authority, 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: January 26, 1994
Washington, DC

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to allow the Union representative of a probationary bargaining unit employee of the Department of Veterans Affairs, Medical Center, Leavenworth, Kansas, to participate in professional standards board peer review proceedings where such representation has been requested by the employee and the employee reasonably believes that the proceedings may result in disciplinary against him or her.

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

WE WILL, upon request of the National Federation of Federal Employees, AFL-CIO, Local 1765, the exclusive representative of our employees, and Ms. Arlene Wightman, repeat the Nurse Professional Standards Board (NPSB) review concerning Ms. Wightman which occurred on November 12, 1991. In repeating the NPSB review of Ms. Wightman, WE WILL afford her full right to Union representation. After repeating the NPSB review, WE WILL reconsider the disciplinary action taken against Ms. Wightman.

WE WILL, as appropriate, make Ms. Wightman whole for any loss suffered to the extent consistent with our decision on reconsideration.

_____
(Activity)

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 of the Federal Labor Relations Authority, Denver Region, whose address is 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204, and whose telephone number is: (303) 844-5224.