



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

OALJ 17-03

DEPARTMENT OF THE NAVY
PORTSMOUTH NAVAL SHIPYARD
PORTSMOUTH, NEW HAMPSHIRE

RESPONDENT

Case No. BN-CA-15-0229

AND

FEDERAL EMPLOYEES METAL TRADES
COUNCIL, AFL-CIO

CHARGING PARTY

William D. Kirsner
Neil P. Daly
For the General Counsel

Steven P. Stoer
Duane D. Lambert
For the Respondent

Gammon M. Johnson
For Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

This dispute started when the boom of a heavily loaded crane hit the roof of a six-story building at the Portsmouth Naval Shipyard. After the accident scene was secured, a high-level manager informed the members of the crane crew that they would be tested for illegal drug use. As the crew was walking to the clinic to be tested, one of the employees asked the manager, "[D]on't you think union representation should be here?" The manager replied, "It won't help you." The employee and his colleagues were tested later that evening, without a union representative present.

The parties dispute whether the employee was entitled, under § 7114(a)(2)(B) of the Statute, to have a union representative when he was tested. There are two key questions that must be answered.

The first is whether the drug test was an examination within the meaning of § 7114(a)(2)(B). Based on the plain meaning of the word "examination," the legislative history of § 7114(a)(2)(B), and case law of the Authority and the National Labor Relations Board, I conclude that the drug test was an examination.

The second question is whether the employee said enough to put the Agency on notice that he wanted a union representative at the drug test. Because the evidence strongly indicates that the employee included himself in his request for a representative, and that the manager understood the employee to be asking for a representative for himself, the answer to the second question is yes. Accordingly, the Agency committed an unfair labor practice when it conducted the testing without obtaining a union representative.

STATEMENT OF THE CASE

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

On March 24, 2015, the Federal Employees Metal Trades Council, AFL-CIO (the Council or Union) filed a ULP charge that was amended on October 23, 2015, against the Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire (the Agency, Respondent, or Shipyard). GC Exs. 1(a), 1(c). After investigating the charge, the Regional Director of the FLRA's Boston Region issued a Complaint and Notice of Hearing on October 30, 2015, on behalf of the FLRA's General Counsel (GC), alleging that the Respondent directed an employee to undergo a drug test and denied the employee's request for a union representative, in violation of §§ 7114(a)(2)(B) and 7116(a)(1) and (8) of the Statute. On November 23, 2015, the Respondent filed an Answer that was amended on January 14, 2016, denying that it violated the Statute. GC Exs. 1(f), 1(s).

A hearing was held in this matter on January 21 and 22, 2016, in Portsmouth, New Hampshire. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. Both the GC and Respondent filed excellent and helpful post-hearing briefs, which I have fully considered.

Based on the entire record, including my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The Council is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a bargaining unit of the Respondent's employees. GC Exs. 1(e), 1(f). A number of unions composed of specialty trades at the Shipyard are jointly represented by the Council, which has negotiated a collective bargaining agreement (CBA) with the Respondent. Tr. 152-53.

About 4500 people, both civilian and military, work at the Shipyard, which repairs and overhauls U.S. Navy ships and submarines. Tr. 19, 25-26, 229. The employees at the center of this case are riggers, who were erecting a framework to surround a submarine in dry dock, so that other employees could work on the submarine itself. Tr. 25-26. Their duties include lifting and handling heavy objects and connecting those objects to cranes. Tr. 229. Riggers and divers belong to Ironworkers Local 745, which is a member of the Council. Tr. 103. Crane operators, who belong to the operating engineers union of the Council, work together with riggers and divers on the dry dock in a department called Code 740. Tr. 172, 229.

The CBA between the Agency and the Council does not specifically address drug testing. Tr. 153. However, after negotiations with the Union and other labor organizations at the Shipyard, the Agency issued an instruction on drug testing, in 2008. Tr. 178, 291-92. The instruction requires that employees refrain from using illegal drugs both on and off duty. Employees may be disciplined for testing positive for illegal drug use, and may also be disciplined for refusing to undergo testing for illegal drug use. GC Ex. 6 at 3, 5 and Enclosure 1 at 16-17.

On March 11, 2015, a crane crew consisting of a crane operator and ten riggers was moving modular units from a pier into a dry dock, where the modular units would be combined to erect a structure around a submarine. Tr. 27, 29, 85, 104. The crane sat (and moved) on rails that form a horseshoe around the dry dock. Tr. 30. At about 6:00 p.m., the crane was going around a bend, carrying a 25-ton load, when its boom hit the roof of Building 343, a six-story building at the head of the dry dock. Tr. 26-27, 30-31, 231. Corey Guilmette, a rigger in the crew and the bargaining unit employee at the center of this case, was working in the dry dock when the crash occurred. Tr. 28.

Once the crane hit the building, Scott Holton, the riggers' first-line supervisor, called Michael Berube, the crane shop's general foreman, to notify him of the accident. Berube in turn called Trevor Thayer, the acting head of the Shipyard's Lifting and Handling Department. Tr. 220, 230, 299. (Thayer's regular position was Superintendent of Rigging and Operations.) Tr. 252. Thayer, who was at home when he received Berube's call, contacted the division head for quality assurance (QA), so that "inspectors and QA specialists" would come to the Shipyard and "see the scene while it was still preserved." Tr. 230-31, 255. He also contacted the chief engineer to ensure that electrical, mechanical, and rigging engineers would be present at the site. Tr. 231.

Thayer arrived at the Shipyard by around 7:00 p.m. Resp. Ex. 1 at 2. Police, firefighters, and an ambulance were already at the accident scene. Tr. 231. Thayer saw “[t]his massive 60-ton crane, the boom of it had just crumpled right into the edge of the roof combing,” while the load hanging from the crane’s hook dangled above an electrical substation. *Id.* He testified that it was “the worst crane accident of ours that I had seen at the Shipyard.” *Id.* While taking steps to ensure that the building was evacuated and that the crane was in a safe position, Thayer also surveyed the damage in an attempt to understand what went wrong, in part so that he could report his findings to his supervisors and to officials at Naval Reactors and the Navy Crane Center. Tr. 231-32, 234, 254.

Once he determined that the accident scene was stable, Thayer went to his office to consult the Shipyard’s instruction on drug testing, specifically with regard to the requirements for post-accident testing. Resp. Ex. 1 at 2. The instruction defines post-accident testing as “[testing] of employees, based on a police report, suspected of having caused or contributed to an accident if there is a death or personal injury resulting in hospitalization, or if there is property damage in excess of \$10,000.” GC Ex. 6, Enclosure 1 at 4, 10. Thayer then returned to the accident scene to determine if the criteria for post-accident testing had been met. A police officer confirmed that a police report on the accident would be made, and after discussing the extent of damages with other officials, Thayer satisfied himself that the \$10,000 threshold had been met. Tr. 234-36; Resp. Ex. 1 at 2.¹

Thayer then contacted William Banks, the Shipyard’s Executive Director, to obtain permission to order post-accident drug testing. Tr. 275, 293. Initially, Thayer asked for testing only for the crane operator. (Unlike the riggers, the crane operator was in a test-designated position and could be tested at any time. Tr. 178-79, 293.) Banks asked why the entire crane crew shouldn’t be tested, since they were “equally responsible to ensure that we safely conduct lifting and handling.” Tr. 293. Thayer then changed his mind and agreed that the entire crew should be tested. Tr. 275-77. At the hearing, he indicated that it was within management’s discretion to have the riggers tested. Tr. 277.

With this decision made, Banks contacted Raney Tromblee, the Agency’s Director of Classification and Compensation, and the manager of the Agency’s drug-free workplace program, at home and had him come in to oversee testing. Tr. 199-200, 212. Tromblee in turn contacted a collection agent, a contractor, to conduct the drug tests. Tr. 203, 211. Tromblee testified that the Agency conducts testing “as soon as practical in keeping with the Agency instruction.”² Tr. 203.

Meanwhile, Holton directed each rigger to write a statement detailing where they were and what they were doing at the time of the accident. The riggers submitted their statements to Holton. Tr. 33-35, 105-06, 138. The riggers were eventually relieved by another crew, but they were told to stay near the accident scene. Tr. 139. Guilmette testified

¹ It was later estimated that the cost of replacing the damaged materials was at least \$27,000. Tr. 239.

² The Agency’s instruction on drug testing provides that post-accident testing should occur, “[w]hen possible . . . on the same day as the incident giving rise to the test.” GC Ex. 6, Enclosure 1 at 12.

that at this point the riggers were “[s]itting around the accident area kind of reflecting on what had happened. There wasn’t really – no one was talking to us. . . . [W]e were kind of just put in the corner and, I don’t know, sort of timeout, if you will. Wasn’t a good feeling.” Tr. 36. At around 10:00 p.m., Thayer met with the riggers. Tr. 38. It was unusual for a high-ranking manager like Thayer to meet with riggers. Such meetings took place, Guilmette testified, only “if something either really good happens or something really bad happens.” Tr. 48.

Thayer told the group that due to the seriousness of the accident, the riggers would undergo urinalysis drug testing at the Shipyard’s clinic, Building H-1. Tr. 87-88, 236. Guilmette had expected Thayer to tell the riggers to go to a post-accident debriefing, known as a “fact finder,” and he felt that the order to undergo drug testing came “way out of left field.” Tr. 19-20, 39, 62; *see also* Tr. 202-03. Guilmette indicated that he had never been ordered to take a drug test in his six and a half years at the Shipyard. Tr. 19-20, 39. Guilmette and the other riggers testified that they understood testing to be mandatory, and that testing positive for drugs would likely result in termination. Tr. 67, 88, 123-24, 139.

Thayer, Holton, and the riggers began walking to the clinic.³ Holton walked near the front of the group. Tr. 302-03. Guilmette testified that he walked “about in the middle [of the group], right near [Thayer].” Tr. 44. It is likely that Thayer was walking at the rear of the group, though there is conflicting testimony on this point, which I set forth below. Tr. 90-91, 108, 121, 242, 302. There was about fifteen feet between the front and rear of the group. Tr. 44, 108, 300.

Describing the mood at the beginning of the walk, Guilmette testified, “Nobody really knew what to say or do, and [we were] very confused. You know, normally we get explained everything step by step and [that] just was not happening tonight. . . . I didn’t really understand what was going on.” Tr. 43. Guilmette continued:

You know, people were kind of . . . afraid, scared because we were being treated like criminals from the beginning. We had just like a pretty traumatic accident. No one said, “Are you okay?” You know, no one said, “Hey, it’s going to be all right. We’re going to get through this.” And, you know, normally . . . with a smaller accident people will come up to us and be like, “Well, as long as everyone’s okay, we’re all set.” Nobody seemed . . . to want us to be okay with this one.

Tr. 45-46. Adding to the stress was the fact that Guilmette and some of the other riggers usually worked the day shift and had volunteered to work the night shift on March 11, which ran from 3:00 p.m. to 11:30 p.m. *See* Tr. 24-25, 137.

³ The crane operator was driven to the clinic by Berube. Tr. 227.

Guilmette testified that during the walk, one or more of the riggers mentioned something about the Union. Tr. 46. Guilmette testified, "People [were] just, you know, whispering to each other, 'Man, I think the Union should be here.' Or 'What are we doing? This isn't right.'" Tr. 45. Guilmette noted that these questions weren't part of a "full conversation. It's not like I was looking face-to-face. We're walking, we're talking – well, not really talking but whispering, saying . . . 'I don't know what to do.'" Tr. 46. Guilmette was sure, however, that the whippers mentioned the Union because, he explained, "I'm not part of the Union. I don't think like that. So someone had to plant that idea in my head. I'm not someone to think 'I just had an accident, let's have the Union.'" Tr. 46-47.

Although the riggers were whispering about the Union, it seemed to Guilmette that they were hesitant to say anything to Thayer, in part because "we're taught not to question people of his stature." Tr. 47. But Guilmette said he is a person who feels that "if something needs to be asked, you ask it." Tr. 46. In this regard, Guilmette testified, "[A] lot of people started saying things about union or what do we do? . . . I was whispering. It's like, well, somebody's got to say something if they feel that way, and I said, okay, I'll do it." Tr. 43-44. What happened next is disputed, so I will describe the testimony from the different perspectives.

The Exchange between Guilmette and Thayer

Guilmette's Description

Guilmette testified that he asked Thayer, "Trevor, not to be rude, but don't you think union representation should be here?" Tr. 45. Thayer replied, "It won't help you." Tr. 52. Guilmette noted that in order to talk to Thayer, "I stayed in stride" and "kind of just had to turn my head and talk to him." Tr. 45. Guilmette interpreted Thayer's response as "[d]enying me of what I asked." Tr. 56. Guilmette insisted that at no point did Thayer tell him that he or the other employees were free to call the Union themselves. Tr. 53.

Guilmette testified that after the denial, Thayer "didn't really, you know, say much else, you know. Not much more than that. There wasn't much conversation going on. It was not a back and forth. It was a one question, one response. Not much more." Tr. 54-55.

Guilmette believed that the other riggers had heard the exchange, "[b]ecause we . . . talked about it after and, I mean, everyone was right there in earshot. There was not much going on." Tr. 48-49. He added that he "would have been in a perfect spot for everyone to hear me if I was speaking." Tr. 49.

The Other Riggers' Descriptions

One of the riggers, Nicholas Pouliot, testified that Guilmette was walking "[w]ithin arm's length" of him, and that Thayer was walking "[m]aybe 10 paces behind me, at most." Tr. 90. Pouliot asked Guilmette "if the Union should be involved," and Guilmette replied that he did not know. *Id.* Guilmette then went to the back of the group and asked Thayer "if the Union should be involved." *Id.* Pouliot could not recall the "exact words" of Thayer's response, but "I remember feeling that it wasn't going to matter." Tr. 90, 92. Asked whether it was Thayer who said that, Pouliot replied that he recalled that "somebody had said" that it wouldn't matter. Tr. 95.

Another rigger, Terence Morrison, testified that he was walking about four feet from Guilmette. Tr. 140. Some of the riggers were "grumbling" about how "we should have the Union," but Morrison could not recall which riggers were speaking, in part because "it was dark" and he "couldn't even make out people's faces." Tr. 140, 146. According to Morrison, Guilmette said "Trevor, not to be rude or anything, but can we – shouldn't we have union representation?" and Thayer responded, "It's not going to do you any good anyway." Tr. 141. With regard to Thayer's response, Morrison added, "At that point, you know, I took that as a no." *Id.*

Jonathan Mendes, another rigger, testified that Thayer was at the rear of the group on the walk to the clinic, but was "only behind us maybe a couple of feet." Tr. 121, 124. Asked whether the riggers had been talking among themselves, Mendes stated that they had not been, and that Guilmette was "the only one to initiate that topic." Tr. 130. According to Mendes, Guilmette asked, "Can we have union representation?" and Thayer replied, "It's not going to help." Tr. 124.

Finally, rigger John Goyarola testified that he was "a little bit ahead of the group" on the walk to the clinic and that Thayer and Guilmette were about ten to fifteen feet away from him. Tr. 108. Goyarola testified that Guilmette asked "if we could have union representation." *Id.* Thayer responded, "No, they're not going to help you at this time." *Id.* Goyarola added that "we [then] just continued walking up to [the clinic]." *Id.* Asked who was covered by Guilmette's request, Goyarola testified, "I guess all of us." Tr. 109.

Thayer's Description

Thayer testified that he was walking at the rear of the group. Tr. 242. Asked to describe his exchange with Guilmette, Thayer testified:

[Guilmette] came back behind the group with me and said, "Hey, Trevor, some of the guys are talking, you know, should there be a union rep?" And I said, "Corey, I don't have a problem with that. If somebody wants to call the

Union, I'm fine with it." And then he said, "It's not me asking. I just want to let you know that these guys are talking." I said, "Okay." And he went back to the group.

Tr. 240; *see also* Tr. 237.

Thayer denied telling Guilmette that the Union "won't do you any good now." Tr. 264. In this regard, Thayer stated, "I'm a big supporter of the unions, dues-paying ironworker for 13 years. Those words would not come out of my mouth." *Id.* Thayer also indicated that there wouldn't have been any harm in having a Union representative present during testing. Tr. 283. Thayer added that he "would have welcomed [Local 745 President Gammon Johnson's] presence" on the night of March 11. Tr. 243.

After the original ULP charge was filed, but prior to the hearing, an official in the Fleet Human Resources Office asked Thayer to provide a written statement concerning the events of March 11. Thayer submitted the statement by email on April 22, 2015. Tr. 259. Regarding his conversation with Guilmette, Thayer wrote, "During the walk up to the clinic one of the riggers came over to me and said some of the guys are asking if the union needs to be called. I said if they want to call the union I'm fine with that." Resp. Ex. 1 at 3.

On January 7, 2016 (two weeks before the hearing), Thayer submitted a supplemental statement to Human Resources about the events of the previous March. He wrote:

[O]ne of the riggers (I believe it was Corey Guilmette) dropped back from the group to talk to me. He said that some of the guys are asking if the union should be called. I told Corey to tell them to feel free to call the union; that I don't have a problem with that. Corey made it clear to me that it wasn't him that was asking. He came back to talk to me because of the question that some of the guys had. Corey headed back to the group.

GC Ex. 1(v), Attachment 6 at 22-23. At the hearing, Thayer was asked about the discrepancy between his first and second statement. He explained that in his first statement he made no mention of Guilmette making the request for others rather than for himself, because "[a]t the time I didn't think it was important. I did recall it." Tr. 262-63.

Holton's Description

Holton, who was called by the General Counsel as a rebuttal witness, testified that he was walking "towards the front of the group," about fifteen feet ahead of Thayer, and that he turned around and saw the exchange between Guilmette and Thayer. Tr. 302-03. Holton heard Guilmette ask Thayer, "Excuse me, Trevor, but shouldn't the Union be here for this?" Tr. 302. Holton testified that Thayer replied, "The Union can't help you now. There's nothing they can do for you." Tr. 303. According to Holton, Guilmette did not say that he

was asking for representation for others and not for himself. Tr. 304. Further, Holton testified that Thayer did not tell Guilmette or the others that they could contact the Union. Tr. 303.

After the Exchange between Guilmette and Thayer

Thayer testified that after the exchange, Guilmette "walked away back to the front of the group, and that's when I thought to myself, that's not a bad idea, and that's when I tried" to contact Gammon Johnson, the President of Local 745. Tr. 152, 243. Thayer noted at the hearing that he sent his phone number to Johnson's pager, because he "wanted to give him a heads up and, you know, just a courtesy call." Tr. 243. Thayer did not tell Guilmette that he had tried to page Johnson. *Id.* Days or weeks later, Thayer learned that the page he sent from his cell phone did not go through, because he had an out-of-date pager number for Johnson. Tr. 172-73, 240-41.

As the group walked to the clinic, they passed within a block or two of the Union office but didn't go there. Tr. 42, 57-58. After walking for about fifteen minutes, the group reached the clinic and headed to a waiting room, where they met Tromblee and another person. Tr. 40, 58, 110, 203-04, 237. According to Thayer, "[Tromblee] explained to me what the procedure was and I explained to the guys, you have to sign in." Tr. 237. Tromblee, who was responsible for "keep[ing] track of them or watch[ing] over them the whole time," signed in the crew members. Tr. 203-04. Goyarola testified that while the riggers waited to be tested, they were told, "if we delay [the drug test] we were found guilty." Tr. 118.

Guilmette testified that neither Thayer nor any testing official did or said anything to suggest that the employees could contact a union representative while at the clinic. Tr. 58. In addition, Tromblee testified that neither Thayer nor the riggers informed him that an employee had previously requested union representation. Tr. 208-09.

The riggers were tested one by one in a separate room nearby. Tr. 60. Those waiting to be tested sat in a small room across the hall or in the hallway. Tr. 110, 279. On a wall near where the riggers were waiting, there was a Shipyard telephone. Tr. 204. Thayer and Holton waited around the same area as the riggers. Tr. 278. As testing began, Guilmette testified, "[P]eople seemed to be loosened up a little bit. We were inside. We were kind of sitting down. People started asking questions" of the person who signed them in (most likely Tromblee). Tr. 59. "[T]hey didn't really want to answer any of those questions." Tr. 58. Guilmette testified that he "wasn't completely involved in everyone talking, but one [question] that I had, that stuck in my mind was, what if you have prescription drugs in your system that you know about? And they said, 'All questions will be answered after the urinalysis.'" Tr. 59. But, in fact, nobody answered the questions afterward. *Id.* According to Goyarola, the testing official responded to their questions rudely and failed to provide any answers. Tr. 113.

Around 11:00 p.m., Berube arrived at the clinic with the crane operator. Tr. 221. Thayer asked Berube to remind the crew to go right to the "fact finder" meeting after drug testing. Thayer left at some point between 11:00 and 11:30 p.m., after about half the riggers had been tested. Tr. 224, 237-38; Resp. Ex. 1 at 3. Like Tromblee, Berube testified that he had not been informed that any employee had requested union representation for the drug test. Tr. 225.

At least four riggers were tested before it was Guilmette's turn. Tr. 65. Asked to describe what happened, Guilmette testified:

They brought us into a room where another man was having us sign [a] document real quick. . . . I had a couple questions about where to put my stuff. He said, "[E]mpty your pockets." I said, "Where?" And he said, "Over there." And there was like a cabinet that was like half open. So I put it in there and [he] said, "Go in the bathroom and pee in this cup."

Tr. 61. Asked if he was briefed on the drug test protocol before the test was given, Guilmette testified, "That evening, no, there was not." Tr. 66.

Testing of the entire crane crew took about an hour and a half and ended around midnight. Tr. 59-60, 222-23. The riggers were required to sign out with Tromblee before leaving the clinic. *See* Tr. 62, 279. There were no union representatives present during drug testing. Tr. 68, 96, 114, 128. Guilmette was asked at the hearing whether Thayer or any other representative of the Shipyard informed him that they would contact the Union. Guilmette responded, "Nobody informed me of anything that day regarding the Union at all, besides they weren't coming." Tr. 67; *see also* Tr. 53.

Shortly after testing was completed, the crane crew assembled at a building near the dry dock for a brief "fact finder" meeting. The meeting was run by a QA specialist. The purpose of the meeting, a step in the overall "critique" process, was to establish a chronology of events and to determine what went wrong, so that similar accidents could be avoided in the future. Based in part on information gathered at the fact finder meeting, a QA specialist writes a report, which ultimately is submitted to senior management. Tr. 63-65, 79, 247-48, 255-56. In its report, the Agency determined that the cause of the accident was "improper operation and poor crane team performance execution or poor crane team execution," which was chargeable to the crane walker, the riggers, the management/supervision, and the operator. Tr. 286. The report did not refer to employee drug use. Thayer testified that it would not be "appropriate" to refer to employee drug use in the report, because the critique process is supposed to be separate from the disciplinary process. Tr. 287-88. Similarly, Guilmette testified that disciplinary action is not supposed to come about as a result of the critique process. Tr. 76.

Four members of the crane crew, plus the crane operator, tested positive for marijuana on March 11, and as a result, they were either terminated or retired. Tr. 79-80, 97-98, 114-15, 144, 204-05. Guilmette was told that he did not test positive for illegal drugs, though he did not receive any written documentation of the results. Tr. 73, 75. Guilmette did not receive any discipline with regard to the March 11 accident, and he is still employed by the Agency. Tr. 73, 76.

Issues Elaborated On at the Hearing

There was a significant amount of testimony about the exchange between Guilmette and Thayer, and counsel for the GC engaged Guilmette in a dialogue on what was said. Counsel for the GC began by asking Guilmette what he was "intending to do" when he talked to Thayer. Guilmette answered, "I was intending to get some clarity on the situation. I just happen to know that the Union is usually present for these things and I was wondering why they weren't there." Tr. 49. Counsel for the GC then asked, "[D]id you want a union rep?" Guilmette replied, "Absolutely. Yeah." *Id.* Guilmette was then asked whether he felt he was requesting representation for himself, and stated:

I thought I was just asking in general. I just wanted someone there to explain something to me, to everyone. Everyone had questions, clearly. I mean, people were pretty, you know, distraught by the whole situation. I mean, we had questions not just about going to the drug test; we had questions about the accident. We had questions about, like, life in general. Nobody was feeling good. We hadn't had lunch or much water or anything like that and – long day.

Tr. 50.

Next, counsel for the GC asked Guilmette, "[D]id you intend in part for the request to apply to you as an individual?" Guilmette replied: "Me and everyone else. I've always been one to kind of speak up for the group in most things. I've always tried to, you know, to help everyone out and, you know, try to be the stand-up kind of guy that keeps things going smooth." *Id.* Asked whether he intended to exclude himself from his request, Guilmette stated:

No. No. I mean, when one shows up there's – like I said, any situation I've been to, and I don't know that much about it, any situation I've been to I have known that there's a union rep there and that I can talk to them, as well as anyone else can. And they are there for me and for everyone else, even if I'm not a dues-paying member, per se.

Tr. 50-51. As for whether he was requesting representation specifically for the drug test, Guilmette stated, "I was generally requesting union representation for the entire situation. I probably wanted it way back when we were still at the crane, all the way through, until I was allowed to go home and sleep in my bed." Tr. 52.

With regard to Thayer's response ("It won't help you[,]") according to Guilmette), Guilmette stated, "I didn't realize I needed help. I thought I – we were, you know, just doing something normal protocol doing this." *Id.* Guilmette saw Thayer's response as a "general blanket statement[]" that applied to all of the riggers in the group, and he felt that it meant, "It's not going to help me. It's not going to help you. It's a general you, not a 'you, Corey,' or – you're not going to be helped." Tr. 54. Guilmette believed that Thayer "was speaking as general as possible because he did not want anyone else to talk. He kind of just wanted everyone to keep marching." *Id.*

There was also considerable testimony concerning the failure of Guilmette and others to ask for union representation at the clinic. Asked why he did not "re-ask" for a union representative at the clinic, Guilmette indicated that he believed that Thayer's response was final. "I try not to be too redundant with my questions when someone answers something like that." Tr. 66. Other riggers answered similarly. Pouliot stated, "I recall [Guilmette] asking out loud on the walk to the drug test, and then when I had felt like it wouldn't matter, there was no need for me to ask again." Tr. 93. Goyarola testified that he did not request a union representative because he "thought once they asked and they denied it, it was over." Tr. 110. Morrison testified that he did not try to contact the Union because Thayer's response indicated "it wasn't going to do me any good." Tr. 144. And Mendes stated, "[Guilmette] asked, that was enough. We all – or at least I heard, and if that's what [Thayer's] telling, that it's not going to help, I'm – I was fairly new; what was I to – how was I to dispute that?" Tr. 126. Mendes added, "[T]o my understanding, you know, I'm going to believe him. I mean, he's my superintendent. And my supervisor [Holton], as well, he looked at him and, okay, went along up to the clinic. It's not going to help." Tr. 125.

Another issue discussed was whether, and to what extent, management attempted to contact the Union. In this regard, Thayer acknowledged that other than attempting to page Johnson (Thayer did not have Johnson's phone number), he did not try to contact the Union. Tr. 264-65, 269. Thayer testified that he had the phone number of Union representative Frank Coleman, but he "didn't think to call Frank." Tr. 272. Thayer also testified that he had the phone numbers of "other union representatives," but he did not call any of them either. *Id.* Thayer acknowledged that he did not call or visit the Union hall, or permit riggers to visit the Union hall, to see if a representative was present. Thayer further acknowledged that he did not provide the riggers with contact information for the Union. Tr. 265, 273-74; *see also* Tr. 109.

As for others in management, Tromblee testified that while he had contact information for the Union, Guilmette did not ask him to contact the Union. Tr. 205-06, 209. Berube stated that he would have given his cell phone to riggers wanting to contact the Union, but none of the riggers asked him. Tr. 222-23. Holton testified that he had his cell phone on him and that he had phone numbers for Union representatives, including Johnson and Coleman, but he did not attempt to contact the Union, nor did Thayer ask him to do so. Tr. 301, 304-05.

For his part, Johnson testified that Thayer and others in management could have contacted the Union on the night of March 11, because the Agency had personal contact numbers for all employees, including Union representatives. Tr. 171, 176. He further stated that Local 745 posts a list of its stewards inside the building where Thayer works, and that the list is regularly provided to management. Tr. 162, 167. The General Counsel entered such a document as an exhibit. GC Ex. 5. Johnson noted that there is usually a representative at the Union hall during the evening shift, but he didn't know whether a representative was there on the night of March 11. Tr. 174-75, 177.

With regard to the riggers' ability to contact the Union on their own, Guilmette, Pouliot, Goyarola, Mendes, and Morrison testified that they did not have cell phones on them on the night of March 11. Tr. 68, 97, 114, 123, 141. Employees are prohibited from bringing camera-equipped phones into the Controlled Industrial Area of the Shipyard, where most work is performed. Tr. 68, 266. Acknowledging this fact, Thayer stated at the hearing that he "assume[d]" that Guilmette did not have a cell phone with him on the night of March 11, and that it was "entirely possible" the other riggers did not have cell phones with them that night. Tr. 266. As for the phones at the clinic, Guilmette stated that he wasn't looking for a phone there, and that in any event he didn't know the extension for the Union hall or individual officials of the Union. Tr. 58-59. Pouliot, Goyarola, and Mendes also did not know how to contact the Union. Tr. 101, 110, 125.

As for the actual drug testing that was performed on March 11, Banks testified that it was carried out in accordance with the Agency's policy on post-accident drug testing, with one exception: "I did not issue the letters to the employees prior to the testing. I did it a day, two days later." Tr. 294. In this regard, Guilmette testified that about three days after the drug test, he and the other employees "got a piece of paper . . . that said, 'You're about to be drug tested. Here's all the things that happen during a drug test.'"⁴ Tr. 68.

With regard to the role of a collection agent during testing, Tromblee testified that the agent is responsible for explaining "how the test, the drug test, is going to go. He walks them through from taking off their clothes, locking them up in a locker, just through the whole collection process." Tr. 211. Tromblee further testified that the collection agent is responsible for advising employees of testing procedures "before or during" the test, including a "step-by-step checklist that they all go through . . . and sign." Tr. 211-12. I asked Tromblee whether he had any knowledge as to what the collection agent verbally told employees on March 11, but he could not recall. Tr. 212. However, when I asked Tromblee whether the collection agent verbally explained the ramifications of taking prescription medications, Tromblee replied, "It was done. I know it was done to the first employee because he brought up, as he was talking to the collection agent, that he had prescription

⁴ The Agency's instruction on drug testing states, with respect to post-accident testing, that management "will notify the employee of the test and issue the specific written notice that the employee is being tested because of the accident or unsafe practice." GC Ex. 6, Enclosure 1 at 12. The employee "will be informed of the time and location of the test, directed to take appropriate photo identification, and escorted to the test site by the supervisor or other management official." *Id.*

drugs. And the collection agent explained it to him, the process.”⁵ Tr. 217-18. In this regard, Tromblee acknowledged that some prescription drugs, such as Tylenol 3, which has codeine in it, could show up on urinalysis as illegal drugs. Tr. 218. In addition, Tromblee acknowledged that an employee on prescription medications would be reasonably worried that he’d get fired simply because he’s taking a prescribed medication with codeine in it, and that it would be important for the employee to be properly advised by the collection agent as to the proper procedures. Tr. 218-19.

Guilmette testified that he was not satisfied with the testing process. Tr. 67. Asked why, he explained:

I don’t know much about drug tests, but the two men who showed up did not seem like they wanted to be there either. They looked like they had just been pulled out of bed or somewhere else, and kind of just seemed like, “Hey, here’s a cup. Here you go. Good luck.”

Id. In addition, Guilmette testified that he had concerns about being tested, because “[n]obody should have to take a drug test unless they’ve done something wrong or are a criminal or something to that effect. I don’t feel I personally did anything wrong to cause me to have to go and do a drug test.” Tr. 66-67.

Other riggers indicated that they found the testing process confusing. Pouliot testified that he was concerned about whether his prescription medications would result in testing positive for illegal drugs. Tr. 95-96. He asked about this and was told that his questions would be answered in private before taking the test. Tr. 93-94. Pouliot testified that the collection agent answered his questions, but only after he submitted his sample. Tr. 94. Goyarola testified that the collection agent had not asked him about prescription medications he was taking, and that the agent was rude and “[s]hrugged off” the questions he asked. Tr. 112-13. Goyarola noted that the paperwork he filled out with the collection agent did not include a list of his medications. Tr. 113, 115. Mendes testified that the collection agent “didn’t explain anything to me. Didn’t sign anything. And he handed me the urinalysis cup[.]” Tr. 126. Mendes didn’t receive paperwork, or any description of the test procedures, until after he submitted a sample. Tr. 128. As for whether the collection agent asked, or provided paperwork asking, whether he was on prescription medications, Mendes said, “I may have gotten the form, but he didn’t ask me.” Tr. 131. Mendes added that he had recently been in a major car accident and was on painkillers, but he “never put down those medications, and I didn’t come up positive for anything.” *Id.* Morrison testified that after he submitted his sample, the collection agent “handed me a paper and said, ‘Read this.’” Tr. 142. After following the agent’s subsequent instruction to sign the form, Morrison found later that “there was a backside to that paper that there was steps that I was supposed to be following and I was supposed to be watching him split my sample. And I mean, I didn’t know anything about that . . .” *Id.*

⁵ The first employee was probably Pouliot. Tr. 94.

Asked about the potential benefit of having the Union present during the testing, Guilmette testified that it would have helped, because “[t]hey can . . . explain the process that we’re going through right now. Because at our job, we don’t do anything without . . . signing three pieces of paper and then going to do it after it’s been fully explained to us. And we were doing things by the seat of our pants, in my opinion.” Tr. 65-66. Guilmette noted that a union representative would have told him and the other employees that they were supposed to receive notices about testing prior to the exam, “instead of getting it three days later.” Tr. 68; *see also* Tr. 294. Guilmette noted that he had not read the Agency’s instruction on drug testing since he had begun working at the Shipyard. Tr. 66. Other members of the crew also testified that a union representative would have been helpful for them on March 11. Pouliot stated, “I always want somebody that knows the rules better than I do there.” Tr. 93. He added that he “wasn’t familiar with the process of how it was going to happen[,]” and a Union representative “would have been able to explain things more clearly.” Tr. 96. Morrison wanted a union representative because he was “shaken up because it was kind of a traumatic event” and “nothing was being explained to me.” Tr. 142. Morrison believed a union representative “would have pointed out that there was a backside to the sheet, that I would have been aware of what the procedures were.” Tr. 143-44.

Johnson testified that if he or another representative of the Union had been present during the tests, “The Union would have insisted that the . . . drug instruction would have been enforced to its total degree which it is written, making [employees] very cognizant and aware of the policy and what their rights are under the policy.” Tr. 185. Johnson further testified that the riggers would not have been familiar with the procedures for drug testing, because in “all of the 33 years that I’ve been in the shop, the riggers have never been drug tested.” Tr. 184. Tromblee countered, however, that the presence of a Union representative at the drug testing would not have changed the drug test results, which “speak for themselves.” Tr. 205.

At least one of the Respondent’s witnesses stated that the testing of the riggers was not in connection with an investigation, but he did agree that the purpose of the March 11 drug tests was “to determine whether any of the employees involved in the accident were under the influence of illegal drugs at the time of the accident.” Tr. 215. Tromblee also described the fact-finding process that began the night of March 11, with the employees meeting and discussing the crane accident with managers. He testified:

[F]rom my understanding they work a fact-finding, they put a package all together to review all the facts and it flows right up . . . to the code department head. Basically, they document all the facts . . . [and then] proceed to the executive director of the Shipyard. They discuss it with him or her and the executive director of the Shipyard approves doing a post-accident test.

Tr. 202-03.

Finally, with regard to an employee's right to union representation under the Agency's instruction on drug testing, Johnson testified that the instruction provides for a union representative in connection with "reasonable suspicion" testing, which can be administered if an employee is acting like he or she is under the influence of drugs, but that the instruction is silent with regard to union representation during post-accident testing. Tr. 181-83; GC Ex. 6, Enclosure 1 at 9, 12.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel argues that the Respondent "denied Guilmette his statutory right to Union representation for an investigatory examination" and thereby violated §§ 7114(a)(2)(B) and 7116(a)(1) and (8) of the Statute. GC Br. at 37. The GC insists that all the requirements of § 7114(a)(2)(B) were met on March 11: specifically, the drug test was an examination of an employee by an Agency representative; it was in connection with an investigation; Guilmette reasonably believed that the examination might result in disciplinary action; and he requested representation.

With regard to the first statutory criterion, the GC acknowledges that the Authority has not expressly ruled on the question of whether a drug test is an "examination" within the meaning of § 7114(a)(2)(B). But the GC urges that the March 11 drug test was indeed an examination, based on the statutory text, Congress's intent in enacting this provision, Authority precedent interpreting it, and National Labor Relations Board precedent regarding drug testing.

Regarding the language of § 7114(a)(2)(B), the GC contends that since the word "examination" is undefined in the Statute, it should be understood by its ordinary meaning. Citing various dictionaries, the GC asserts that an examination is widely understood to mean something that involves "testing, trial, inspection, or scrutiny" and that the March 11 drug test clearly fits this definition. *Id.* at 22.

The General Counsel further cites the legislative history of § 7114(a)(2)(B) in support of its position. The House version of the provision had originally entitled employees to representation at an "investigatory interview," but this phrase was replaced in the Conference Committee with the term "examination." Representative William Ford, a chief sponsor of the Statute and a member of the Conference Committee, later explained that this change was made because examination was "a much broader term that will encompass more situations." *Id.* at 23-24 n.11; *see also Dep't of Justice, Bureau of Prisons*, 14 FLRA 334, 350-51 (1984) (*Prisons*).

Since the right to union representation under 7114(a)(2)(B) was derived from the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), the Authority has cited the *Weingarten* Court's belief that the presence of a union representative at an investigatory examination would promote a more equitable balance of power between labor and management and reduce the risk of unjust discipline and unwarranted grievances.

U.S. Dep't of Justice, Bureau of Prisons, Safford, Ariz., 35 FLRA 431, 439-40 (1990) (*BOP Safford*); GC Br. at 24-25. With these purposes in mind, the Authority considers the totality of circumstances in determining whether an examination has taken place. In *Dep't of the Treasury, IRS*, 15 FLRA 360, 361, 370 (1984) (*Treasury*), the Authority examined whether a meeting was designed (among other things) to "elicit additional information" from an employee regarding an incident, so that the agency could make a decision whether misconduct had occurred or discipline was warranted. Finding the March 11 drug test to be an examination would be consistent with Authority precedent, the GC asserts, because the drug test was used to elicit information as to whether Guilmette had used drugs in violation of the Agency's policy. GC Br. at 25. The GC further cites Authority precedent that an employee need not be verbally interviewed for an examination to occur. In this regard, the Authority has ruled that examinations may involve a request that an employee provide a written statement (*U.S. Immigration & Naturalization Serv., U.S. Border Patrol, Del Rio, Tex.*, 46 FLRA 363, 363-64 (1992) (*Border Patrol, Del Rio*)) or an audit of an employee's tax returns (*Internal Revenue Serv., L.A. Dist. Office*, 15 FLRA 626 (1984) (*IRS*)). GC Br. at 24-25.

The General Counsel also points to decisions of the National Labor Relations Board (NLRB), which has expressly held that an employer is required to honor an employee's request to have a union representative present during drug testing. *Manhattan Beer Distribs. LLC*, 362 NLRB No. 192 (2015) (*Manhattan Beer*); *Ralphs Grocery Co.*, 361 NLRB No. 9 (2014) (*Ralphs Grocery*). Since the Authority has previously found that NLRB decisions are an appropriate source of precedent for determining issues relating to § 7114(a)(2)(B), the GC urges that the Board's holdings in those cases be extended to the Statute, and that Guilmette's drug test be considered an examination. GC Br. at 26 (citing *Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 394 (1999) (*BOP, OIA*)).

The General Counsel further asserts that Guilmette had a reasonable belief that disciplinary action could result from the drug test. The Agency's drug policy allows the Agency to take disciplinary action based on a positive drug test; Guilmette and the other employees were concerned about the consequences of taking the drug test; and ultimately some employees were terminated based on the results of the testing. GC Br. at 28-29.

Next, the General Counsel alleges that the drug testing was conducted by representatives of the Agency (a fact that the Respondent appears to concede), and that it was conducted in connection with an investigation. GC Br. at 19-21. The GC posits that an investigation is an inquiry to determine whether an employee engaged in misconduct; the March 11 drug testing met this definition, because it was used to determine whether Guilmette (and the rest of the crane crew) violated the Agency's anti-drug policy. The Agency ordered testing as part of its effort to determine the causes of the March 11 crane accident, and the results of the tests were used as a basis for taking disciplinary action against those who failed the tests.

Regarding the most contentious issue at the hearing, the General Counsel insists that Guilmette requested union representation during the walk to the clinic, when he “used language along the lines of ‘don’t you think union representation should be here?’” *Id.* at 31. At least six witnesses, including Holton (a supervisor), understood that Guilmette was asking for a union representative. *Id.* at 30-31. Guilmette’s request was similar to other requests that have been found by the Authority to constitute valid requests for representation. *See BOP, OIA*, 55 FLRA at 394; *U.S. Dep’t of Justice, Metro. Corr. Ctr., N.Y., N.Y.*, 27 FLRA 874, 880 (1987) (*Metro. Corr.*). To the extent that Guilmette’s request was ambiguous, the GC asserts that it was incumbent on the Agency’s representative at the scene to seek clarification. GC Br. at 33. The GC argues that Guilmette did not lose his right to representation by failing to repeat the request at the clinic, since Thayer’s earlier response made it clear that this would be “an exercise in futility.” *Id.* And while Thayer testified that Guilmette excluded himself from his request – by saying that it was other employees, not himself, asking – the GC argues that Thayer’s account should not be credited, since no other witnesses corroborated Thayer on this point, and since Thayer did not cite that language when he gave a written statement of the event (Resp. Ex. 1) on April 22, 2015. *Id.* at 32.

Respondent

The Respondent makes two primary arguments as to why it did not violate the Statute. First, it insists that § 7114(a)(2)(B) does not give employees undergoing post-accident drug testing the right to union representation; second, it insists that Guilmette’s general comments to Thayer on March 11 did not adequately put Thayer or other Agency officials on notice of his desire for union representation.

The Respondent asserts that the March 11 drug tests were not an “examination” within the meaning of the Statute. Resp. Br. at 17. In this regard, the Respondent argues that the *Weingarten* decision, on which § 7114(a)(2)(B) is based, provided rights only for investigatory interviews, where the presence of a representative might help the employee articulate facts to help the employee and the investigation itself. *Id.* at 39-40. Here, Guilmette and the other employees were not being interviewed or asked any questions, so a representative could not have assisted them or the investigation. Respondent also makes a distinction between “reasonable suspicion” drug testing and “post-accident” testing: in the former type of testing, which was involved in the NLRB cases cited by the GC, a supervisor must base the decision to test an employee on the actions and behavior of the employee, and in such cases, a union representative may assist the employee by providing a “counter-perspective . . . regarding the employee’s appearance, eyes, and odor.” *Id.* at 41. But in post-accident testing, such as in our case, a union representative “could do nothing to eliminate the employer’s basis for conducting the testing, which was . . . based . . . on the mere presence of an accident.” *Id.* Therefore, the rationale for giving employees the right to a union representative that existed in *Weingarten*, *Manhattan Beer*, and *Ralphs Grocery* does not exist for post-accident drug testing.

The Agency also argues that its instruction on drug testing, which was negotiated with the Union and other labor organizations, should be interpreted as waiving the right to representation during post-accident testing. Because the instruction entitles employees to have a union representative during reasonable suspicion testing, but says nothing about union representation during post-accident testing, the unions consciously negotiated away that right. *Id.* at 41-42.

Even if the March 11 drug tests were an examination, the Respondent contends that Guilmette's inquiry to Thayer was not a personal request for representation that adequately put Thayer and the Agency on notice that Guilmette desired a representative. *Id.* at 11. In making this argument, Respondent relies first on Thayer's version of his exchange with Guilmette (*id.* at 24); however, even if Guilmette's account is credited, Respondent insists that Guilmette's "vague, general, and ambiguous inquiry" did not constitute a "valid, personal request for representation under section 7114(a)(2)(B)." *Id.* at 35.

The Respondent argues that Guilmette did not ask Thayer for a Union representative, at least not for himself. Rather, Thayer testified that Guilmette said, "It's not me asking. I just want to let you know that these guys are talking." *Id.* at 12 (citing Tr. 240). Thayer's testimony on this point is credible, the Respondent argues, because it is consistent with his April 22, 2015, statement (Resp. Ex. 1). It is also consistent with Guilmette's testimony that he talked to Thayer because "somebody's got to say something if they [the other riggers] feel that way," (Tr. 43-44), which in turn is consistent with Guilmette's self-characterization as the type of person to "speak up for the group" and "help everyone out." Tr. 50. Because Guilmette expressly excluded himself from the request, Thayer could not have realized that Guilmette actually wanted representation himself. Resp. Br. at 15. Further, the Respondent argues that Thayer had no motive to deny a request for Union representation; accordingly, the only plausible explanation for Thayer's failure to provide representation is Guilmette's failure to clearly request it. *Id.* at 15-16.

Guilmette's actions on March 11 further support the Respondent's position that he did not request representation for himself, because they were not the actions of a person who wanted a union representative. If Guilmette had wanted a representative, he would have clarified his request to Thayer, asked Berube for representation, asked Tromblee for representation, called the Union using a manager's phone or a landline at the clinic, or walked to the Union hall. *Id.* at 16-17, 20-23.

Respondent cites many reasons why Guilmette's testimony should not be credited. First, it argues that Guilmette's testimony regarding the walk to the clinic was inaccurate: while Guilmette testified that he and Thayer were walking and talking in the middle of the group on the walk to the clinic, numerous other witnesses testified that Guilmette moved from the middle of the group to the rear in order to talk to Thayer. *Id.* at 27. Respondent suggests that Guilmette may have testified this way to "make it appear more likely that the other members of the group fully overheard" his exchange with Thayer. *Id.* at 27-28. Moreover, Guilmette's testimony was internally inconsistent: he testified that he had concerns about testing, yet he also testified that he "didn't realize [he] needed help."

Id. at 29. Guilmette testified that he talked to Thayer specifically to request Union representation for the drug test, but he also testified that he talked to Thayer “to get some clarity” and learn about the situation “in general.” *Id.* at 30-31. The Respondent argues that Guilmette’s testimony was affected by his sympathy for the crew members who were terminated. *Id.* at 33-34.

The testimony of other GC witnesses is similarly unreliable, according to the Respondent. In this regard, Pouliot was unable to recall what, if anything, Thayer said to Guilmette; Morrison could not recall which riggers were saying what on the walk to the clinic; and Mendes testified, contrary to many other witnesses, that the riggers were not talking among themselves on the way to the clinic. *Id.* at 33 n.25. More generally, the Respondent contends that some of the GC’s witnesses “may . . . have been under the impression that a finding” of a ULP here “might result in the reinstatement” of the terminated employees. *Id.* at 34. As for Holton, the Respondent suggests that his testimony was affected by the fact that he has an appeal of his removal pending before the Merit Systems Protection Board. *Id.* at 35 n.29.

Accordingly, if Thayer’s description of Guilmette’s query is accepted, Guilmette simply said, “the guys are talking . . . should there be a union rep?” Tr. 240. Respondent submits that this did not meet the legal standards applied by the Authority in cases such as *BOP, OIA*, 55 FLRA at 394, and *Norfolk Naval Shipyard, Portsmouth, Va.*, 35 FLRA 1069 (1990) (*Norfolk I*). If Guilmette actually desired a union representative on March 11, he could and should have used direct, clear language to communicate it to Thayer. Resp. Br. at 20-21 (citing *Border Patrol Del Rio* and *Metro. Corr.*). The Respondent also cites an NLRB decision, *Lennox Industries*, 244 NLRB 607 (1979), to support its contention that Guilmette should have notified Tromblee, not Thayer, of his alleged desire for representation.

But even if Guilmette’s description of the inquiry is accepted, the Respondent insists that Guilmette did not make a specific, personal request for representation, as required by the Statute. Resp. Br. at 35. The Respondent adds that even if Thayer responded, “It won’t help you,” his response “does not constitute a denial of representation.” *Id.* at 20 n.14.

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.

An employee's right to union representation under § 7114(a)(2)(B) is triggered when four elements are present: (1) there must be an examination of an employee by a representative of the agency; (2) the examination must be in connection with an investigation; (3) the employee must reasonably believe that the examination may result in disciplinary action against the employee; and (4) the employee must request representation. *U.S. Dep't of the Interior, BLM, Eugene Dist., Portland, Or.*, 68 FLRA 178, 181 (2015) (*Interior*). An agency's failure to comply with § 7114(a)(2)(B) of the Statute is a ULP under § 7116(a)(1) and (8) of the Statute. *Dep't of Def., Def. Criminal Investigative Serv.*, 28 FLRA 1145, 1145 (1987).

Section 7114(a)(2)(B) is intended to provide rights to federal sector bargaining unit employees consistent with those provided in the private sector by the NLRB in interpreting and applying the National Labor Relations Act (NLRA) and the Supreme Court's decision in *Weingarten*. See *BOP, OIA*, 55 FLRA at 393-94. In *Weingarten*, the Supreme Court held that an employer's denial of an employee's request for union representation during an investigatory interview which the employee reasonably believed might result in disciplinary action violated the employee's right to engage in concerted activity under the NLRA. 420 U.S. at 267. The Court stated 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 union representation might allay such fears and help to elicit useful information. *Id.* at 263. The Court also stated that an exclusive representative protects the interests of the entire bargaining unit. A union representative who is present at an investigatory interview is able to exercise "vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly." *Id.* at 260-61. The Authority has endorsed these principles in the context of the Statute, noting that "the purposes underlying the *Weingarten* right in the private sector – promoting a more equitable balance of power and preventing unjust disciplinary actions and unwarranted grievances – also apply to the right of representation created by 7114(a)(2)(B)." *BOP Safford*, 35 FLRA at 439-40.

Although § 7114(a)(2)(B) is intended to provide rights consistent with those provided by the NLRB, the distinctive legislative history and statutory basis of § 7114(a)(2)(B) also reflect Congressional recognition that the right to representation might evolve differently in the private and federal sectors, and that NLRB decisions would not necessarily be controlling in the federal sector. *U.S. Immigration & Naturalization Serv., N.Y. Dist. Office, N.Y., N.Y.*, 46 FLRA 1210, 1218 (1993) (*INS*). In this regard, the Authority has stated that NLRB decisions regarding *Weingarten* rights are "not necessarily . . . determinative under the Statute." *Id.* at 1220.

I will address each of the elements of § 7114(a)(2)(B) individually, but because the evidence is clear on some elements, I will dispose of these elements first, and then concentrate the remainder of my analysis on the two key disputed issues: were the drug tests an examination, and did Guilmette invoke his statutory right to representation?

Guilmette's Drug Test Was Conducted by Representatives of the Agency

The General Counsel alleges that Guilmette's drug test was conducted by representatives of the Agency, first on the orders of Thayer and then overseen by Berube and Tromblee and administered by an outside contractor. Respondent does not contest this point. See ¶6 of the Respondent's Answer, GC Ex. 1(f); Tr. 16-18. Indeed, it admits that Tromblee oversaw the March 11 drug tests. Resp. Br. at 8, 17.

It is clear that Thayer, Tromblee, and Berube were all management officials at the Shipyard and were representatives of the Agency. Further, while the collection agent was a contractor, it is apparent that he was performing an Agency function and was working under Tromblee's direction. Tr. 203. Therefore the collection agent too was a representative of the Agency. See *Pension Benefit Guar. Corp., Wash., D.C.*, 62 FLRA 219, 223-24 (2007). Accordingly, I find that Guilmette's drug test was conducted by representatives of the Agency.

Guilmette's Drug Test Was Conducted In Connection with an Investigation

The Authority has stated that an examination is conducted "in connection with an investigation" if its purpose was to obtain the facts and determine the cause of an incident. *Border Patrol Del Rio*, 46 FLRA at 372. The connection between Guilmette's drug test and the Agency's investigation into the causes of the crane accident is clear and direct. Post-accident drug testing was authorized because management was investigating the causes of the crane accident; as part of that endeavor, it wanted to determine whether illegal drug use by members of the crane crew might have caused or contributed to the accident. Tr. 202-03, 213-15, 276-77. The basis for Thayer's decision to have the employees tested was the Agency's drug testing instruction, which authorizes testing when an employee's "actions are reasonably suspected of having caused or contributed to an accident. . . ." GC Ex. 6, Enclosure 1 at 10-11. While Tromblee insisted (Tr. 213) that the drug testing "is not an exam in conjunction with or in the course of an investigation[,]" his attempt to avoid admitting anything harmful to his employer cannot hide what is obvious. Even he acknowledged that the drug tests were given in connection with the Agency's effort to determine the causes of the crane accident. Tr. 214-15. Accordingly, I find that Guilmette's drug test was conducted in connection with an investigation.

Guilmette Reasonably Believed That the Drug Test Might Result in
Disciplinary Action Against Him

In order to be entitled to union representation, the requesting employee must reasonably believe that the examination may result in disciplinary action against him or her. 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. *Interior*, 68 FLRA at 181. "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. *AFGE, Local 2544 v. FLRA*, 779 F.2d 719, 724 (D.C. Cir. 1985)

(as amended Feb. 14, 1986). 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 or she is not the target of an investigation. *Internal Revenue Serv., Wash., D.C.*, 4 FLRA 237, 250-51 (1980), *aff'd*, 671 F.2d 560 (D.C. Cir. 1982).

I have no doubt that Guilmette reasonably believed that the March 11 drug test could result in discipline. This belief was formed in the aftermath of the crane accident. Work halted and police, firefighters, engineers, and QA specialists arrived at the scene. As Thayer stated, it was "the worst crane accident of ours that I had seen at the Shipyard." Tr. 231. Being part of a crew that was involved in such a significant accident must have caused Guilmette and others to be fearful of what the Agency might do in response. These fears were quickly realized. In the hours after the crash, management treated Guilmette and the other riggers as if they might have caused the crash: they were ordered to submit statements detailing where they were and what they were doing at the time of the accident; they were relieved of their duties the moment a relief crew arrived; and they were made to wait as a group by the accident scene, as if they were in "timeout." Tr. 36. Indeed, management did suspect the crew of having caused the accident. Banks and Thayer decided to test the entire crane crew for illegal drug use because an accident of this type indicated that "the entire team . . . fail[ed]." Tr. 276. Indeed, the Shipyard's policy dictated that for post-accident drug testing to be authorized, the employees must be "suspected of having caused or contributed to an accident." GC Ex. 6, Enclosure 1 at 10-11. So, when Thayer, a high-level manager whose presence underscored that something "really bad happen[ed]," directed the riggers to undergo testing, he made management's suspicions clear. At that point, it was reasonable for any employee in that crew to be apprehensive that the investigation of the accident might result in disciplinary action. The general apprehension as to how blame for the accident would be meted out was compounded by the employees' recognition that they would likely be fired if they tested positive for drugs. And as we know, those employees who tested positive on March 11 were fired. But even those employees who knew they had not used drugs would reasonably have believed that they could be disciplined. Accordingly, the statutory requirement was met.

The March 11 Drug Test Was an Examination

Now we come to the first of the two main issues in this case. The parties dispute whether the March 11 drug test was an "examination" within the meaning of § 7114(a)(2)(B). While the Authority has interpreted the term in a variety of factual and legal contexts, it has not ruled specifically whether a drug test constitutes an examination. However, considering the statutory language, the legislative history of § 7114(a)(2)(B), and related decisions of the Authority and other persuasive sources, I conclude that the March 11 drug test was an examination.

"Examination" is not defined by the Statute, either in the definitions listed in § 7103 or elsewhere in the text. See *AFGE, Local 1941, AFL-CIO v. FLRA*, 837 F.2d 495, 498 (D.C. Cir. 1988). Under principles of statutory interpretation, terms that are undefined in a statute or its legislative history are understood to have their ordinary meaning, and the

dictionary is a useful reference for this. *AFGE, Local 446*, 59 FLRA 461, 464 (2003). The primary dictionary definition of examination is, a “detailed inspection or investigation: an examination of marketing behavior/a medical examination[.]” *New Oxford American Dictionary* 602 (3d ed. 2010). A secondary meaning is “the formal questioning of a witness in court.” *Id. Webster’s Third New International Dictionary* 790 (2002) defines an examination as a “search, investigation, scrutiny,” as well as “a formal interrogation, as of a witness in a legal action.” Clearly, however, the secondary definition is too narrow for our case – it does not cover situations involving questioning that does not rise to the level of formal interrogation, situations in which individuals are told to provide written statements, or situations in which a search or medical examination is performed, as reflected in the primary definition. *See Soc. Sec. Admin., Albuquerque, N.M.*, 56 FLRA 651, 658 (2000) (informal questioning); *Border Patrol Del Rio*, 46 FLRA at 364, 371 (written statements). The secondary definition is simply a specific example of a type of examination and does not limit the meaning to that narrow example. Accordingly, I will use the primary definition of the word: an examination involves an inspection or investigation and encompasses medical examinations. This clearly covers the urinalysis drug test that Guilmette was ordered to take. Thus, the plain meaning of the word “examination” indicates that Guilmette’s drug test was an examination within the meaning of § 7114(a)(2)(B).

The legislative history of the provision sheds some light, albeit not a definitive one, on this question. The original language of what became § 7114(a)(2)(B), contained in an amendment offered by Representative Udall and adopted by the House, used the term “investigatory interview” instead of “examination . . . in connection with an investigation.” *See Subcomm. on Postal Personnel & Modernization of the House Comm. on Post Office & Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 914 (Comm. Print 96-7) (1979) (Legislative History)*, cited by the court in *NTEU v. FLRA*, 835 F.2d 1446, 1450 (D.C. Cir. 1987). The House-Senate Conference Committee modified the House language, replacing “investigatory interview” with “examination,” but its report offered little explanation of the reasons for the change.⁶

⁶ The Conference Report states in this regard:

House sections 7114(a)(2) and (3) give a labor organization . . . the right to be present at the employee's request at any investigatory interview of an employee by an agency if the employee reasonably believes that the interview may result in disciplinary action against the employee. In addition, the House bill requires the agency to inform the employee of his right of representation at any investigatory interview of an employee concerning ‘misconduct’ which ‘could reasonably lead’ to suspension, reduction in grade or pay, or removal. The Senate bill contains no comparable provision. The conferees agreed to adopt the wording in the House bill with an amendment deleting the House provision requiring the agency to inform employees before certain investigatory interviews of the right to representation, and substituting a requirement that each agency inform its employees annually of the right to representation. The conferees further amended the provision so as to give the labor representative the right to be present at any examination of an employee by a representative of the agency in connection with an investigation if the employee reasonably believes that the

In *Prisons*, the Administrative Law Judge reviewed the legislative history of § 7114(a)(2)(B) in depth, to determine whether a strip search of an employee for suspected contraband was an examination. Reviewing that history, the Judge found that Congress's reasons for replacing "investigatory interview" with "examination" were "obscure." 14 FLRA at 348. See also a different judge's description of the legislative history in *Internal Revenue Serv., Detroit, Mich.*, 5 FLRA 421, 430-34 (1981). Despite Congress's lack of explanation for changing the text, the ALJ in *Prisons* found that the decision to substitute the word examination in place of interview was a conscious one, and that the use of the broader term rebutted the agency's claim that an examination requires some sort of verbal interrogation. 14 FLRA at 348-49. While it might plausibly be argued that an interview encompasses only verbal questioning, an examination covers a much wider range of encounters seeking to elicit information. Indeed, it would be highly implausible to claim that a nonverbal medical examination is *not* an examination within the meaning of 7114(a)(2)(B). Considering the common understanding of the word "examination" in the context of Congress's stated intent to extend *Weingarten* rights to federal employees, Judge Cappello concluded that non-interrogatory actions such as strip searches are 7114(a)(2)(B) examinations, if conducted in connection with an investigation. 14 FLRA at 350-51.⁷

Judge Cappello's decision was appealed to the Authority, which found it unnecessary to resolve the issue of whether a strip search, "even absent oral interrogation, was an 'examination' within the meaning of section 7114(a)(2)(B)[,]" because it held that the employee had withdrawn his request for representation. 14 FLRA at 335. As a result, the ALJ's analysis regarding strip searches is not precedential, but I find that her analysis is persuasive and worthy of consideration in the analogous context of employee drug testing. I will come back to it shortly.

examination may result in disciplinary action against the employee. The conferees recognize that the right to representation in examinations may evolve differently in the private and Federal sectors, and specifically intend that future court decisions interpreting the right in the private sector will not necessarily be determinative for the Federal sector. *Legislative History* at 823-24, cited at *Prisons*, 14 FLRA 350-51.

⁷ In *Prisons*, 14 FLRA at 351, Judge Cappello also referred to the testimony of Representative Ford, entered into the Congressional Record one week after the Statute was enacted, in which he sought to expand on the Conference Committee's report, which he described as "less helpful than normal in elaborating the underlying intention" of the bill's drafters, due to an "end-of-session rush to secure passage." *Legislative History* at 989. The Congressman then explained that, in exchange for dropping the requirement that employees be advised in advance of their right to a union representative, "the term 'investigatory interview' . . . was replaced [by the Conference Committee] by the term 'examination,' a much broader term that will encompass more situations." *Id.* at 995. Judge Cappello noted, however, that the Authority generally gives such post-enactment legislative commentary "little weight." 14 FLRA at 351; see also *AFGE, Local 3911*, 56 FLRA 480, 482 (2000). While I agree that Representative Ford's comments should not be conclusive, I also believe that they should be given some weight. His statement that an examination is a "much broader term" than an interview is consistent, after all, with the plain meaning and usage of the words, as already discussed, and thus reinforces the logical meaning of the Statute.

While the Authority declined to rule in *Prisons* whether “oral interrogation” was a necessary element of an examination, it seems to have subsequently answered that question in the negative. In *Border Patrol, Del Rio*, 46 FLRA at 364, 371, the Authority held that the agency’s requirement that three employees prepare written statements explaining the circumstances of a prisoner escape was an examination, as the statements were designed to elicit information and have the employees explain their conduct. In *IRS*, 15 FLRA at 646-47 an audit of an employee’s tax returns was held to be an examination, but the implications of this decision are ambiguous, because the audit involved both the review of documents and verbal questioning. But the general principle concerning this element of 7114(a)(2)(B) was best expressed by the ALJ in *Treasury*, 15 FLRA at 370: “the usual concept of an examination . . . is an orderly attempt to obtain information by asking questions or otherwise attempting to gain or elicit responses from an employee.” This principle was affirmed by the Authority, 15 FLRA at 361.

As Judge Cappello understood the strip search of an employee in *Prisons*, and as I understand the March 11 drug testing of Guilmette and the other members of the crane crew, they squarely fit within the definition articulated in *Treasury* – and more importantly, the purposes of 7114(a)(2)(B) expressed in *Weingarten* and *BOP Safford*. The drug test involved an orderly attempt to obtain information from Guilmette: it sought to answer the question, “Have you taken any unauthorized drugs recently?” While the information was obtained through a technical procedure – urinalysis testing – rather than through oral or written questioning, it was equally intended to elicit information that the Agency considered relevant to its investigation of what caused the crane accident of March 11 and whether any employees should be disciplined. That is the essence of “an examination in connection with an investigation.”

Guilmette surely was in a situation similar to the one envisioned in *Weingarten*. If not personally fearful, Guilmette was at least in a vulnerable position in the aftermath of the crane accident. Guilmette and the other members of the crane crew had many questions about the drug testing they were about to undergo, and Agency officials at the clinic were either unable or unwilling to answer those questions. This must have been troubling, since Guilmette and the other employees were unfamiliar with the details of the Agency’s drug testing instruction. A union representative could have informed them of their rights under the instruction and of the responsibilities of the Agency officials conducting the tests. A union representative could also have monitored the process on March 11, to ensure that proper procedures were followed, which in turn might have helped prevent unjust discipline and unwarranted grievances.

For instance, the union representative might have known that Thayer had discretion in deciding which employees should be tested. According to the instruction, employees are subject to post-accident testing if, “based upon [the] circumstances” of the accident, “their actions are reasonably suspected of having caused or contributed” to the accident. GC Ex. 6, Enclosure 1 at 10-11. Thayer testified that he initially planned to have only the crane operator tested, but he was persuaded by Banks to test the entire crew. Tr. 275-76. A well-informed union representative would have understood that this decision was subject to

discretion, and that he could at least discuss the matter with Thayer. Such advocacy might have saved Guilmette the indignity of being tested, and it might have prevented other employees from being fired.

Because Guilmette was in a situation similar to the one envisioned in *Weingarten*, it follows that Guilmette would have benefited from, and should have been entitled to, the type of representation provided in § 7114(a)(2)(B) when he was tested on March 11. See *Fed. BOP, Office of Internal Affairs, Wash., D.C.*, 54 FLRA 1502, 1509 (1998).

That Guilmette should have been provided a Union representative during testing is further supported by two recent NLRB decisions regarding an employee's right to representation during drug testing. In *Ralphs Grocery*, the Board held that an employer violated the NLRA by requiring an employee to submit to a drug and alcohol test notwithstanding his request for representation, and by suspending and discharging him for his refusal to take the test without representation. In so finding, the Board stated that the drug and alcohol test, ordered as part of an investigation into the employee's conduct, "triggered [the employee's] right to a *Weingarten* representative." 361 NLRB No. 9, 2014 WL 3778350 at *1. In *Manhattan Beer*, the Board reaffirmed its holding in *Ralphs Grocery* and noted that the presence of a union representative could have given the employee "valuable assistance even with respect to the testing procedure itself." 362 NLRB No. 192, 2015 WL 5081424 at *3. Thus, while NLRB decisions on this topic are not controlling, the common purposes of the federal and private sector rights to a union representative at investigatory examinations, as well as the Board's reasoning in these two decisions, further support a conclusion that Guilmette was entitled to union representation here. See *INS*, 46 FLRA at 1220.

Finally, the Respondent asserts that the Union waived any asserted right of the employees to representation during post-accident drug testing when it negotiated the Shipyard's drug testing instruction with management. Resp. Br. at 41-42. Because the instruction entitles employees to union representation during "reasonable suspicion" drug testing (GC Ex. 6, Enclosure 1 at 9), but is silent with regard to any representation during post-accident drug testing (*id.* at 12), Respondent argues that I should infer an intent by the negotiators to deny employees that right in the latter situation. But the Authority has held that waivers of statutory rights must be clear and unmistakable. See *U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 63 FLRA 524, 527 (2009); *Norfolk I*, 35 FLRA at 1077. Here, the Respondent has cited no bargaining history, provided no testimony, and submitted no other evidence to indicate that the Union clearly and unmistakably waived an employee's right to representation at post-accident drug testing. Based on the evidence of record, it would be equally plausible to infer that the negotiators could not agree on a rule for post-accident testing, and therefore said nothing about an employee's right to representation in such cases. Accordingly, I reject the Respondent's argument.

Based on the wording of § 7114(a)(2)(B), the purpose of the statutory language, and case law of the Authority and the NLRB, I find that the March 11 drug test was an examination within the meaning of the Statute.

Guilmette Asked Thayer for a Union Representative and Thayer
Denied His Request

The right to union representation under § 7114(a)(2)(B) attaches only if an employee makes a valid request for representation. To be valid, a request need not be made in a specific form; however, the request must be sufficient to put the agency on notice of the employee's desire for representation. *Norfolk I*, 35 FLRA at 1073-74. The Authority has, in some cases, found that a request was valid, even though it was somewhat vague or tentative. *Id.* (employee asked for an attorney and said, "I want somebody to talk to"); *Metro. Corr.*, 27 FLRA at 879-80 (employee said "maybe I need to see a union rep"). The adequacy of a request for representation depends on the facts of each case. *BOP, OIA*, 55 FLRA at 394. In this case, the parties dispute not only the adequacy of Guilmette's request, but also what Guilmette and Thayer said. Therefore, I must first determine whose account is more credible and what the protagonists said to each other

I Credit Guilmette's Version of His Exchange with Thayer

Guilmette testified that he asked Thayer, "Trevor, not to be rude, but don't you think union representation should be here?" and that Thayer replied, "It won't help you." Tr. 45, 52. Thayer, however, testified:

[Guilmette] came back behind the group with me and said, "Hey, Trevor, some of the guys are talking, you know, should there be a union rep?" And I said, "Corey, I don't have a problem with that. If somebody wants to call the Union, I'm fine with it." And then he said, "It's not me asking. I just want to let you know that these guys are talking." I said, "Okay." And he went back to the group.

Tr. 240; *see also* Tr. 237.

Determining whose version to believe depends in part on credibility determinations, which I make here. Guilmette spoke in a straightforward manner and provided a thorough description of what happened on March 11. Guilmette's ability to speak in such detail gives me confidence in the accuracy of his testimony. Moreover, the fact that Guilmette openly acknowledged that his personal desire for a union representative was just one of the reasons he decided to talk to Thayer strengthens, rather than weakens, Guilmette's credibility. That credibility is further bolstered by the fact that he testified without any kind of clear agenda, grudge, or self-interest: he did not receive discipline in connection with the accident or the drug test, and he was not even a dues-paying member of the Union. He had nothing to gain by challenging Thayer's actions, but he had much to lose, particularly if he were falsely testifying about a high-level manager. I do not think that he would stick his neck out in this manner, unless he was telling the truth. Further, while it is reasonable to assume that Guilmette felt sympathy for his former coworkers who were terminated, there is no indication that this skewed Guilmette's testimony, especially since the General Counsel is alleging that only Guilmette's (and not the other riggers') right to a representative was denied.

With specific regard to what was said during the exchange, the key points of Guilmette's testimony were corroborated by other witnesses. With respect to the request, Guilmette's version of what was said ("don't you think union representation should be here?") (Tr. 45) was confirmed by Pouliot (Guilmette asked Thayer "if the Union should be involved") (Tr. 90); Goyarola (Guilmette asked "if we could have union representation") (Tr. 108); Mendes ("Can we have union representation?") (Tr. 124); Morrison ("Trevor, not to be rude or anything, but can we – shouldn't we have union representation?") (Tr. 141); and Holton ("Excuse me, Trevor, but shouldn't the Union be here for this?") (Tr. 302). Even Thayer acknowledged that Guilmette asked, "should there be a union rep?" Tr. 240. With respect to Thayer's response, Guilmette's version of what was said ("It won't help you") was clearly confirmed by Goyarola ("No, they're not going to help you at this time") (Tr. 108); Mendes ("It's not going to help") (Tr. 124); Morrison ("It's not going to do you any good anyway") (Tr. 141); and Holton ("The Union can't help you now. There's nothing they can do for you") (Tr. 303).⁸ Given this level of corroboration, I have great confidence that Guilmette's testimony is an accurate depiction of the exchange.

By contrast, key points of Thayer's testimony regarding the exchange were uncorroborated. No other witness testified that Thayer responded in a neutral or positive manner to Guilmette's inquiry, or that he indicated that he didn't "have a problem" or that he was "fine" with anyone calling the Union. And no other witness testified that Guilmette excluded himself from the request for representation, or that Guilmette told Thayer, "It's not me asking. I just want to let you know that these guys are talking." Indeed, Holton – a supervisor⁹ – rejected the suggestion that Thayer said anything to encourage Guilmette to call the Union, or that Guilmette excluded himself from his request for representation. Tr. 303-04. The multiple corroborations of Guilmette's account, and the lack of corroboration of Thayer's, strongly indicate that Thayer did not say anything to encourage Guilmette to call the Union, and that Guilmette did not exclude himself from his request for representation.

Further, I place more emphasis on the testimony concerning the exchange between Guilmette and Thayer than on Thayer's written statements concerning the exchange. Thayer submitted the first of those statements on April 22 to Human Resources, after the Union had filed its ULP charge. R. Ex. 1. Since it was written a month and a half after the March 11 incident, it does not reflect Thayer's recollection of the events when they were fresh in his mind. Rather, its preparation immediately after the Union accused him of denying the

⁸ Pouliot similarly testified that he got the impression that having the Union "wasn't going to matter," but he was not sure whether it was Thayer's response that gave him that impression. Tr. 90, 92, 95. While I give less weight to Pouliot's testimony, it still doesn't support Thayer's account.

⁹ I recognize that Holton was likely to have mixed motivations when he testified, since he was one of the individuals who were terminated as a result of the drug testing. Thus he might be expected to harbor some resentment against the Agency. Nonetheless, his status as a supervisor would not have made him particularly sympathetic to a request for union representation, and a union official at the testing would not have represented him. The fact remains that Holton was the only other supervisor who was present for the conversation between Guilmette and Thayer, and Holton contradicted Thayer's account of that conversation.

riggers' request for union representation makes it more likely to be a defense of his own conduct. Nonetheless, the fact that the April 22 statement was self-serving makes it all the more notable that Thayer did not quote Guilmette as saying "It's not me asking," or words to that effect, as he did later.

There are additional reasons for crediting Guilmette's version of the exchange over Thayer's. It is simply improbable that Guilmette would go to the trouble of speaking to Thayer only to say that he himself did not want representation. It is far more likely that Guilmette was asking for "[m]e and everyone else." Tr. 50. Further, it is unlikely that Thayer encouraged Guilmette to contact the Union. If Thayer had done so, then I believe that Guilmette or one of the other riggers would have asked for a supervisor's phone or called the Union at the clinic. In this regard, it was evident from the riggers' testimony that several of them, in addition to Guilmette, had been talking among themselves about the need for a union representative. *See, e.g.*, Tr. 89-90, 140-41. If Thayer had given them any encouragement, I am sure that a concerted effort would have been made to contact the Union.

The Respondent's attacks on Guilmette's credibility are unconvincing. Respondent argues that Guilmette erroneously testified that he and Thayer were in the middle of the group while walking to the clinic, rather than in the rear of the group. While the evidence strongly indicates that Guilmette was walking in the middle of the group and had to go to the rear to talk to Thayer, Guilmette's location in the group is a relatively minor point, and there is nothing surprising in the fact that he failed to accurately remember this detail among all the events of March 11. I do not believe that it reflects any intent to fabricate on Guilmette's part, or that it undermines the accuracy of his overall testimony.

As for the other GC witnesses, it is true that Pouliot and Morrison had sketchy recollections of what happened during the walk, but both admitted their uncertainties in a forthright manner, which leads me to credit their testimony overall. In other words, to the extent that they are able to recall details, I accept the truthfulness of their answers. Similarly, the fact that Mendes could not hear or recall the whispering among riggers that Guilmette and other witnesses testified to is unsurprising, given the darkness and the large group of people walking that night. Everybody is not going to hear everything in that sort of situation; I am more concerned with what witnesses did hear, rather than what they didn't hear. And in this case, all or nearly all the riggers heard Guilmette assert that "union representation should be here" (or words to that effect) and Thayer respond that "it won't help you."

As the Respondent undoubtedly recognizes, it is in the difficult position of having one witness dispute the testimony of six, and of convincing me that the six opposing witnesses colluded to falsely testify about a manager. While I recognize that a couple of the GC's witnesses may have hoped that successfully prosecuting this ULP case would help their own challenges to their disciplinary actions, Guilmette and most of the other riggers had no such potential bias, and I do not see evidence that they fabricated the details of their testimony. They were consistent in corroborating Guilmette's request for union representation, Thayer's response that a union representative would not help them, and that Thayer did not tell them it would be "fine" for them to call a representative. Therefore, I find that the exchange happened as Guilmette described it.

*Guilmette's Request Was Sufficient to Put the Agency On Notice of
Guilmette's Desire for Representation*

I further find that Guilmette's request – "Trevor, not to be rude, but don't you think union representation should be here?" – was enough to put Thayer and the Agency on notice of Guilmette's desire for representation. If a lawyer asked this of a witness at a trial, it would be correctly labeled a leading question, because the form of the question suggests the answer. Guilmette here was clearly indicating his opinion to Thayer that the circumstances called for the presence of a union representative, and a reasonable manager in Thayer's position would understand that Guilmette was asking the question because he wanted a representative for himself. Similarly, a manager in Thayer's position should have known that an employee like Guilmette, who was in a relatively low-ranking position and who had just been involved in a serious crane accident, would speak to Thayer in a deferential or even tentative manner, even (or especially) when requesting union representation. That Guilmette voiced his request in such a manner does not render his request deficient. His language was comparable to the employee's statement in *Metro. Corr.* that "maybe I need to see a union rep." 27 FLRA at 879-80. It was more specific and union-focused than the employee's assertion in *BOP, OIA* that "I want somebody to talk to." 55 FLRA at 394. In each of those latter cases, the Authority found the request was sufficient to invoke § 7114(a)(2)(B). Additionally, while Guilmette posed his request in the form of a question rather than an unequivocal demand, his language strongly indicated that he believed a union representative was needed.

While the Respondent cites *Norfolk I* as supporting its position that Guilmette failed to invoke his statutory rights, that case does not help the Agency. In *Norfolk I*, the employee said nothing to any supervisor or management official to express his interest in having a representative, and no supervisor led the employee to believe that such a request would have been futile. 35 FLRA at 1075-76. Here, everybody agrees that Guilmette asked Thayer about having a union representative. The crucial question is whether Guilmette's words adequately communicated his interest in having a representative, and in that regard, *Metro. Corr.* and *BOP, OIA* point toward an affirmative answer.

Finally, Thayer's words and actions indicate that he was in fact aware that Guilmette was seeking representation. His response, "It won't help *you*," reflects his understanding that: (1) Guilmette was asking for help, and (2) Guilmette was asking at least for himself, if not also for others.¹⁰ That Guilmette's request led Thayer to try to page Local 745 President Johnson further supports a conclusion that Thayer understood Guilmette to be asking for a union representative. For these reasons, I find that Guilmette's request was sufficient to put Thayer (and the Agency) on notice of Guilmette's desire for a union representative, and that Guilmette invoked his rights under § 7114(a)(2)(B).

¹⁰ It is not necessary in this case to evaluate whether Guilmette was requesting union representation for the other riggers in his crew, as well as for himself, or whether Thayer's response preemptively denied representation for all of them, because the General Counsel has alleged only that the Respondent violated Guilmette's rights under § 7114(a)(2)(B). GC Ex. 1(e). The facts of this case would make this a very close question.

Thayer Effectively Denied Guilmette's Request

Once an employee has made a valid request for representation, the agency must either grant the request, discontinue the examination, or offer the employee the opportunity to choose between continuing without representation or discontinuing the examination. See *Norfolk I*, 35 FLRA at 1077; compare *Dep't of Labor, Emp't Standards Admin.*, 13 FLRA 164, 164-65, 170-71 (1983) (finding no violation where agency took "every reasonable step" to ensure that the union had an opportunity to represent an employee who had requested representation). If, after having been given the option of continuing an examination without representation or having no examination at all, an employee elects to continue without representation, the employee is considered to have waived his or her rights to a representative. Waiver will be found only if it is clear and unmistakable. *Norfolk I*, 35 FLRA at 1077.

In this regard, the Authority has found that once an employee has asked for representation and received a denial that was preemptive and foreclosed further discussion to clarify whether an employee wanted union representation, the employee satisfied the request requirement under § 7114(a)(2)(B) of the Statute and did not need to repeat the request. *BOP, OIA*, 55 FLRA at 394; see also *Montgomery Ward & Co., Inc.*, 273 NLRB 1226, 1227 (1984). The Authority has also found that once an employee requested a union representative and was then pressured to withdraw that request, his subsequent consent to continuing the interview alone was not voluntary. *U.S. Dep't of Justice, Immigration & Naturalization Serv., Border Patrol, El Paso, Tex.*, 42 FLRA 834, 838-41 (1991) (*Border Patrol, El Paso*). And when an employee asked her immediate supervisor for a union representative immediately before being interviewed by her third-level supervisor, the Authority held that the employee had made her desire for representation clear and did not need to repeat it. *Norfolk Naval Shipyard*, 14 FLRA 82, 82-83 (1984) (*Norfolk II*).

Thus, once Guilmette requested union representation, Thayer had three options: grant the request, allow Guilmette not to take the test, or give Guilmette the opportunity to choose between taking the test without representation and not taking the test.¹¹ Thayer did none of these things. His decision instead to furtively page Johnson is especially damning, as it was not his decision to make as to what official of the Union would represent Guilmette, and as he appears to have made a conscious decision not to advise Guilmette that he had even tried to contact Johnson. Telling Guilmette what he had done would have communicated to Guilmette (and perhaps the other riggers) that they indeed had the right to such representation, and it would likely have encouraged them to make their own efforts to reach the Union. Thayer's secretiveness puts his motives more starkly into question.¹²

¹¹ I recognize that in the context of mandatory drug testing, the latter two options are not viable for an agency. Nonetheless, the option of granting the request was perfectly viable, without defeating the purpose of the Agency's drug testing regime, and the Respondent has offered no justification for rejecting Guilmette's request.

¹² Perhaps tellingly, Thayer testified that while he "welcomed the presence of Gammon Johnson" (Tr. 272), he seems to have not harbored similar feelings about any of the many other Union officials who could have been contacted, even though he talked to them frequently. Tr. 269-72

To compound the problem, Thayer responded to Guilmette's request by stating, "It won't help you." Guilmette and other riggers viewed this as a definitive denial, and I agree with their assessment. This terse denial from a high-level manager could only be seen as a final "no," such that subsequent requests would be futile. Tr. 56, 66, 93, 110, 125-26, 144. Indeed, the very wording of Thayer's denial – "It won't help you" – conveyed a sense of futility at the mere prospect of enlisting the Union. I therefore view Thayer's response as a denial of Guilmette's request. After receiving such a denial, Guilmette was under no obligation to repeat his request, either to Thayer or to another Agency representative. I certainly cannot fault Guilmette for failing to ask Tromblee or the collection agent for a union representative, in light of Thayer's high management position and his control over the investigation of the crane accident and over Guilmette's future working conditions. Asking Tromblee or the collection agent for a union representative would not have simply been futile, but rather could have been seen as a direct challenge to Thayer's authority, in the face of his previous denial. It would be unreasonable to expect Guilmette to risk antagonizing Thayer in this way, especially since he and the other riggers were facing scrutiny in connection with the crane accident. In addition, and contrary to the Respondent's argument, there is no requirement under Authority precedent that an employee direct a request for representation to a specific management official, such as Tromblee. See *Norfolk II*, 14 FLRA at 82-83.

Finally, because Thayer denied Guilmette's request for representation in a preemptive manner, and because Guilmette would likely have faced discipline if he had refused to undergo testing, I do not view Guilmette's decision to undergo testing as a waiver of his right to representation. See *BOP, OIA*, 55 FLRA at 394; *Border Patrol, El Paso*, 42 FLRA at 839.

For all of these reasons, I find that Thayer and the Agency failed to accommodate Guilmette's request for representation as required by § 7114(a)(2)(B) of the Statute.

The General Counsel has demonstrated that Guilmette was entitled, under § 7114(a)(2)(B) of the Statute, to have a union representative present during the March 11 drug test. Specifically, the GC has shown that Guilmette reasonably believed that the March 11 drug test could result in disciplinary action against him, that Guilmette requested representation, and that the drug test was an examination conducted by a representative of the Agency in connection with an investigation. By refusing to provide Guilmette with a union representative during testing, the Agency failed to comply with § 7114(a)(2)(B) and violated § 7116(a)(1) and (8) of the Statute.

In order to remedy this violation, the Respondent will be ordered to cease and desist from denying an employee's request to have a union representative present during post-accident drug testing. In accordance with the Authority's decision that unfair labor practice notices should, as a matter of course, be posted on bulletin boards and distributed to employees electronically, I will order both methods of dissemination. See *U.S. Dep't of Justice, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

Accordingly, I recommend that the Authority adopt 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 (the Statute), the Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, shall:

1. Cease and desist from:

(a) Refusing an employee's request to have a union representative present during post-accident drug testing.

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

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

(a) Grant an employee's request to have a union representative present during post-accident drug testing.

(b) Post at its facilities where bargaining unit employees represented by the Federal Employees Metal Trades Council, AFL-CIO are located, 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 Commander, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 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.

(c) In addition to physical posting of paper notices, notices shall be distributed electronically, on the same day, such as by email, posting on an intranet or an internet site, or other electronic means if such is customarily used to communicate with bargaining unit employees.

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

Issued, Washington, D.C., October 27, 2016

A handwritten signature in cursive script, appearing to read "Richard A. Pearson", written over a horizontal line.

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 the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL grant an employee's request to have a representative of the Federal Employees Metal Trades Council, AFL-CIO (Union), present during post-accident drug testing.

WE WILL NOT refuse an employee's request to have a Union representative present during post-accident drug testing.

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

(Respondent/Activity)

Dated: _____

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 any of its provisions, they may communicate directly with the Regional Director, Boston Region, Federal Labor Relations Authority, whose address is: 10 Causeway Street, Suite 472, Boston, MA 02222, and whose telephone number is: (617) 565-5100.