

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

MEMORANDUM

DATE: July 14, 2011

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION
UKIAH, CALIFORNIA
RESPONDENT

AND

Case Nos. SF-CA-09-0477

SF-CA-10-0004

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 3172, AFL-CIO
CHARGING PARTY

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision on Motion for Summary Judgment, the service sheet, and the transmittal form sent to the parties. Also enclosed are other supporting documents filed by the parties.

Enclosures

UNITED STATES OF AMERICA
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CHARGING PARTY

Case Nos. SF-CA-09-0477
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NOTICE OF TRANSMITTAL OF DECISION

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

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **AUGUST 15, 2011**, and addressed to:

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

SUSAN E. JELEN
Administrative Law Judge

Dated: July 14, 2011
Washington, D.C.

LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 11-09

SOCIAL SECURITY ADMINISTRATION
UKIAH, CALIFORNIA

RESPONDENT

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AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3172, AFL-CIO

CHARGING PARTY

Case Nos. SF-CA-09-0477
SF-CA-10-0004

Yolanda Shepherd, Esq.
For the General Counsel

Eddie Taylor
For the Respondent

Charles R. Estudillo
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, *et. seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority/FLRA), 5 C.F.R. Part 2423.

On July 7, 2009, the American Federation of Government Employees, Local 3172, AFL-CIO (Charging Party/Union) filed an unfair labor practice charge (ULP) in Case No. SF-CA-09-0477 with the San Francisco Region of the Authority, against the Social Security Administration, Ukiah, California (Respondent). (G.C. Ex. 1(a)). On February 19, 2010, the Regional Director of the San Francisco Region of the Authority issued a Complaint and

Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1) and (8) of the Statute by denying employee Miguel Muniz' request for representation by the Charging Party during an investigatory examination within the meaning of section 7114(a)(2)(B). (G.C. Ex. 1(b)). On March 16, 2010, the Respondent filed an answer to the complaint, in which it admitted certain allegations while denying the substantive allegations of the complaint. (G.C. Ex. 1(d)). On October 2, 2009, the Charging Party filed an unfair labor practice charge in Case No. SF-CA-10-0004 with the San Francisco Region of the Authority against the Respondent. (C.G. Ex. 1(h)). On April 22, 2010, the San Francisco Regional Director issued a Complaint and Notice of Hearing and Corrected Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1) and (8) of the Statute by denying employee Audrey Hernandez' request for representation by the Charging Party during an investigatory examination within the meaning of section 7114(a)(2)(B). (G.C. Ex. 1(i) and 1(ii)). On May 17, 2010, the Respondent filed an answer to the complaint, in which it admitted certain allegations while denying the substantive allegations of the complaint. (G.C. Ex. 1(k)). On May 13, 2010, the San Francisco Regional Director issued an Order Consolidating Complaints Case Nos. SF-CA-09-0477 and SF-CA-10-0004. (G.C. Ex. 1(j)).

A hearing was held in Ukiah, California on June 22, 2010, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel and the Respondent filed timely post-hearing briefs, which I have fully considered.

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

STATEMENT OF THE FACTS

The Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. (G.C. Ex. 1(c), 1(g), 1(h)). At all times material to this matter, Nancy Long has been the office manager and Latohya Hunt has been the supervisor at the Ukiah branch office of the Santa Rosa District. Both Long and Hunt have been supervisors and/or management officials within the meaning of section 7103(a)(10) and (11) of the Statute. (G.C. Ex. 1(c), 1(g), 1(h); Tr. 36).

The Charging Party is a labor organization within the meaning of section 7103(a)(4) of the Statute. Charles Estudillo, who is located in the Santa Rosa office, has been the representative for bargaining unit employees located in the Ukiah office. (Tr. 43).

Both cases involve allegations that Latohya Hunt denied two bargaining unit employees the right to Union representation during investigatory interviews in violation of section 7114(a)(2)(B) of the Statute. Both cases will be determined on the basis of credibility determinations as discussed herein.

Case No. SF-CA-09-0477

Miguel Muniz is a bilingual claims representative who has worked in the Ukiah office since October 1998. (Tr. 12). Muniz first contacted Charles Estudillo about representation in

March 2009, after he had been written up. (Tr. 13). He and Estudillo talked on the phone and exchanged emails; eventually Muniz determined that he would be able to work the matter out and did not file a grievance on the matter. (Tr. 13-15; G.C. Ex. 2(a)-(d)).

On June 9, 2009¹, at 11:14 a.m., Hunt questioned Muniz at his desk and wanted to know where he had been for the last 30 to 40 minutes. (Tr. 16-17; G.C. Ex. 3). She stated that they had looked for him 2 or 3 times; he had not been at his desk; and there were people waiting for their claims to be taken. (Tr. 17). Muniz told her that he had just finished a disability claim and was going to the next one and that he had just returned from break. (Tr. 17). Hunt continued to question Muniz about his absence. Muniz told her that they had already gone over that and that she was not listening to him. At that point, Muniz stated that he wanted his union representative and did not want to talk to Hunt any further about this issue. (Tr. 18). Muniz then went to the mailroom to talk to Nancy Long, the office manager. Muniz told Long that he needed to talk to his union representative and that Hunt was accusing him of doing something wrong. Long told Hunt that it was okay and that Muniz could talk to his union representative. (Tr. 18).

Muniz then returned to his desk and sent an email to Estudillo. (G.C. Ex. 3; Tr. 19). According to Muniz, later that afternoon, Long told him that they had figured out what had happened and everything was okay. Apparently, appointments had been set up incorrectly; the service representative in the office also apologized to Muniz. (Tr. 20).

The Ukiah office generally schedules redeterminations (a type of work) on Thursday of each week. On June 10, which was a Wednesday, Muniz had scheduled redeterminations, although he was also scheduled for training out of the office that day. (Tr. 21). He double-booked both regular appointments and the redeterminations and was not able to take all of his appointments. Muniz wrote emails to Hunt asking for assistance. He left early that day for the training that was scheduled in Sacramento. (Tr. 21).

According to Muniz, on June 17, Hunt asked Muniz to come to her desk, telling him that she had three questions for him. (Tr. 22). When they were at her desk, Hunt asked Muniz why he had left her standing there talking to herself on June 9. According to Muniz, he told Long that they had already gone over this and he thought it was taken care of. He asked her if she had talked to Nancy. Hunt responded that she wanted to know why he had left her there and that she was insulted that he left her standing there and walked away. (Tr. 23).

At this point, Muniz said that he had told her before that he needed to speak to his union representative if she was going to continue with this kind of questioning. Muniz stated that he thought this issue has been resolved and that he wasn't going to get into it with Hunt. He stated again that he wanted his union rep. (Tr. 23).

Hunt then said fine and that she had another question for Muniz. Muniz asked what the question was. (Tr. 23). Hunt said that she needed to know why Muniz scheduled redeterminations on June 10 when he was already assigned disability appointments. Muniz responded with a question regarding assignments on Thursdays. Hunt apparently dropped

¹ All dates are in 2009, unless otherwise noted.

this particular matter and did not ask any further questions. (Tr. 23).

Hunt then asked the third question, that she needed to know if Muniz had taken work that was assigned to other workers and put it in his name to clear. Muniz stated that he thought this was a trick question and told Hunt that he wasn't going to lie to her. (Tr. 24). Hunt asked him for a name, but he told her didn't have a name. (Tr. 24). Hunt then said that she already knew what he did and she had the name. (Tr. 25).

Muniz then asked Hunt why she continued to ask him questions without his union representative. He asked if she had any other questions for him. Hunt then said no; that she was wondering why he left her standing there. Muniz told her that he wasn't going to give her that; that he asked for a union rep. He asked if that was all and the meeting ended. Hunt said yes and Muniz returned to his desk. The meeting lasted 5 to 10 minutes. Hunt did not write anything down during the meeting. (Tr. 25).

On December 18, Muniz received a reprimand for failure to follow supervisory instructions and conduct unbecoming a federal employee. Specification No. 4 under failure to follow supervisory instructions concerned the June 10 incident when Muniz made redetermination appointments when he was scheduled to be working 800# appointments. (G.C. Ex. 5; Tr. 27).

On cross examination, Muniz admitted that he stayed at the meeting after he requested union representation and answered questions on two additional work related matters. (Tr. 34). It was his opinion that the other two issues didn't have anything to do with him asking for union representation.

According to Hunt, she had four questions to ask Muniz during the meeting, including giving another employee work assignments, not taking assigned interviews on June 9, pulling and clearing pending claims not assigned to his unit, and his scheduling his redetermination appointments on Wednesday. At some point during the meeting, Hunt testified that Muniz

asked if he needed Charlie Estudillo to come over there. (Tr. 114). Hunt testified that she asked Muniz if he wanted her to stop so that the union representative could be there. According to Hunt, Muniz said no, why don't you finish first, and then I'll call my union rep. I won't say a word. (Tr. 114, 120).²

Hunt then continued with her questions. She asked him about scheduling redeterminations on Thursdays (Tr. 114). Muniz sat in silence, although he did answer questions about redeterminations and why he didn't let her know ahead of time. (Tr. 115).

Case No. SF-CA-10-0004

Audrey Hernandez is a bargaining unit employee who has worked in the Ukiah office for many years. In February 2009, she received a reprimand from her supervisor, Latoya Hunt, and contacted Charlie Estudillo, the Union Vice President, to represent her in this and other matters. (G.C. Ex. 8, 9; Tr. 51, 88-89). During May and June, Estudillo represented her in an EEO complaint and at mediation. (G.C. Ex. 11; Tr. 55). Estudillo visited the Ukiah office and met with Hernandez in late August. (Tr. 62). According to Estudillo, he told Hernandez that she needed to be careful when talking to Hunt and Long and to make sure that she asked for her union representative. (Tr. 90-91). Hunt acknowledged that Hernandez had been represented by Estudillo on significant disciplinary issues prior to the September meeting. (Tr. 146).

On September 28, Hernandez was at her desk when she was approached by Hunt around 3:00 pm. Hunt requested to speak to her; Hernandez shut down her computer and accompanied Hunt to Nancy Long's office. (Tr. 62). Long was also present and Hunt shut the door to the office. (Tr. 62). After Hernandez and Hunt sat beside each other and across the desk from Long, Hunt asked Hernandez if she knew an Everett Mayfield. Hernandez replied that he was her brother. (Tr. 63). Hunt stated that Hernandez had been running inquiries on Mayfield, which Hernandez admitted, although explaining that his name was one of many on a list given to her by Long. (Tr. 63). Hernandez asserted that she told Hunt and Long that all of her family knew not to come to the office and denied that she ran any more queries on family members. (Tr. 64-65). Hunt asserted that she saw from the computer that Hernandez had run more queries on family members.

Hunt and Long began talking to each other and, according to Hernandez, at this point, she thought "You know what? I think I better talk to Charlie." According to Hernandez, neither Hunt nor Long even acknowledged her request for Charlie (which meant Charlie Estudillo, the Union representative). (Tr. 66). Long continued to ask Hernandez if she knew other individuals by name. (Tr. 66).

² Muniz was not asked whether or not Hunt asked him if he wanted her to stop the meeting so that his union representative could be present.

As Hunt and Long talked to each other, Hernandez testified that she thought to herself “wow, what’s going on. I really need to see Charlie.” At that point, she asked again, “Can I talk to Charlie?” and “Can I call Charlie?” (Tr. 68, 78, 80). Neither Hunt nor Long responded and Hunt asked her if she knew a Karen. Hernandez denied that she had run any queries on family members. She stated again that she needed to talk to Charlie, and asked if she could be excused. Hunt said no, not right now, and she and Long continued to talk. (Tr. 69).

By that point, Hernandez was becoming quite emotional and teary and wanted to leave the office. Long told her that she could be excused and Hernandez left. (Tr. 69). As she left the office, one of her co-workers, Linda, was at the copy machine and asked Hernandez if she was all right. Hernandez said no, she wasn’t and Linda told her to go to her desk and she would be right there. (Tr. 69). Hernandez told Linda that Hunt and Long had asked her all these questions. Linda asked if Hernandez had asked for her union rep. Hernandez told her that she had asked for Charlie three times but they just didn’t listen to her. (Tr. 70). Linda told her to watch out; they’re after you. (Tr. 70).

Either soon after or the next morning, Muniz asked Hernandez if she had asked for Charlie and Hernandez told him that she had asked three times. (Tr. 71, 84-85).

Hernandez asserted that she originally thought the meeting was job-related, but when she went in, she couldn’t come out. She asserted that she asked for Charlie three times and that Hunt and Long didn’t listen to her. (Tr. 73). After this meeting, Hernandez received a fourteen day suspension proposal, which is still pending. (G.C. Ex. 19; Tr. 73).

Latoya Hunt, the former supervisor in the Ukiah office, testified that she and Long met with Hernandez in Long’s office on September 28, 2009. Prior to that time the Ukiah office received a report from the Center for Security Integrity (CSI) that showed that Hernandez had accessed her brother’s Social Security record. (Tr. 122). Part of Hunt’s job is to investigate when the office receives alerts that family members and relatives SSA information has been accessed. (Tr. 123). At the meeting on September 28, Long was present as a note taker. (Tr. 125). Hunt had written out the questions that she intended to ask Hernandez regarding accessing the records of her brother, niece, and niece’s grandchild. (R. Ex. 5; Tr. 126, 143). Long wrote down Hernandez’ responses. (Tr. 145). Hunt and Long denied that Hernandez ever asked for Union representation or mentioned the names Charlie or Mr. Estudillo. (Tr. 128).

POSITIONS OF THE PARTIES

General Counsel

Case No. SF-CA-09-0477 (Muniz)

The General Counsel (GC) asserts that the meeting between Hunt and Muniz on June 17 constituted an examination in connection with an investigation and that the Respondent violated the Statute by continuing the meeting after Muniz requested Union representation. While the Respondent does not dispute that Muniz requested Union representation on June 17, it does argue that Muniz then waived the right to Union representation after his initial request. The GC asserts that this defense is not supported by the record evidence.

The GC asserts that Muniz' testimony should be credited over Hunt, noting that it is not believable that Muniz would participate in a meeting without his Union representative for the sake of expediency when he had demonstrated how important he viewed Union representation in such circumstances.

On June 17, Muniz requested the Union presence at the meeting. The Respondent then had three options: (1) grant the request for representation; (2) discontinue the interview; or (3) allow the employee the choice of continuing without representation or discontinuing the interview. *U.S. Dep't of Labor, Mine Safety & Health Admin.*, 35 FLRA 790, 803 (1990) (*Mine Safety*). Hunt, however, continued her examination notwithstanding the request for union representation. The waiver of a statutory right to union representation under section 7114(a)(2)(B) must be clear and unmistakable. *Id.* at 805. The Authority will not find a waiver of the right to Union representation unless there is a clear indication that intimidation and coercion tactics that the right was designed to prevent were not used. *See Dep't of Justice, Immigration & Naturalization Serv., Border Patrol, El Paso, Tex.*, 36 FLRA 41, 52 (1990). Muniz' innocent response to his supervisor's announcement that she had a question does not rise to the level of a clear and unmistakable waiver of his statutory right to union representation under 7114(a)(2)(B).

The GC also asserts that the Respondent implied that Muniz was at fault for not leaving the meeting when Hunt violated his rights. The Statute does not require an employee to engage in offensive measures to protect rights afforded by section 7114(a)(2)(B). *See United States Dep't of Justice, Bureau of Prisons, Metro. Corr. Ctr., New York, N.Y.*, 27 FLRA 874, 880 (1987)(*Bureau of Prisons*)(whether or not the employee could have stopped the meeting is irrelevant. The violation occurred when the supervisor continued the examination.) *See also U.S. Dep't of Justice, U.S. Immigration & Naturalization Serv., U.S. Border Patrol, Washington, D.C.*, 41 FLRA 154 (1991)(*INS*). Hunt was required to cease her questioning of Muniz when Muniz requested his Union representative at the June 17 meeting. Her failure to do so constitutes a failure to comply with section 7114(a)(2)(B) in violation of section 7116(a)(1) and (8) of the Statute.

Case No. SF-CA-10-0004 (Hernandez)

The GC asserts that it is undisputed that Respondent's September 28 meeting with

Hernandez was an investigatory examination as defined by section 7114(a)(2)(B). Further, whether Hernandez had a reasonable expectation of disciplinary action is not at issue, since Hernandez was in fact disciplined concerning matters that she was questioned about. (G.C. Ex. 19; Tr. 73). The only issue is whether Hernandez made a request for Union representation that the Respondent failed to honor.

The GC asserts that the evidence shows that Hernandez requested Union representation three separate times during this investigatory meeting and that Hunt and Long denied these requests for Union representation. The GC asserts that Hernandez recalled the meeting with extreme detail. She asked for “Charlie”, which would be sufficient in this case to put the Respondent on notice that she was requesting Charlie Estudillo, the Union representative for the office. *See U.S. Dep’t of the Army, HQ XVIII Airborne Corps and Fort Bragg, Fort Bragg, N.C.*, 35 FLRA 681 (1990)(employee made a valid request for union representation at an investigatory meeting even though he did not mention the word Union.). The request need only be made in a manner which puts respondent on notice of the employee’s desire for representation. *See INS*, 41 FLRA at 167. Respondent’s managers were well aware of Estudillo’s position as Union representative and had numerous dealings with him representing both Hernandez and Muniz.

Further, during this time frame, Hernandez was represented by Estudillo on her proposed 14 day suspension and he had cautioned her about going into a meeting with the managers and that she must request Union representation in such circumstances. (Tr. 90, 97). The GC asserts that it strains belief that Hernandez would not have requested representation.

The GC also asserts that Hernandez’ testimony was corroborated by other employees at the Ukiah office. The GC argued that Long and Hunt made sure that no one save themselves would hear what happened during the September 28 meeting, but they could not anticipate Hernandez’ tearful departure and her discussions with concerned employees after the meeting.

The GC further asserts that Hunt and Long should not be credited, and since they were both named in the complaint, they were obviously biased. The record evidence supports the conclusion that Hunt and Long never intended to allow Hernandez Union representation at the meeting. This is demonstrated by their timing of the meeting at 3:20 p.m., since they were aware that Estudillo worked in Santa Rosa, an hour away from the Ukiah office. And that they wanted her to come to the meeting unaware of the topic. (Tr. 142). Their intention from the start was to exclude Estudillo from the meeting and to ignore any request for Union representation by Hernandez.

The GC also asserts that discord between the Ukiah management and Union representative Estudillo cannot be ignored. At the time of the September 28 meeting, Estudillo had filed a grievance with the Regional Commissioner against Hunt and an unfair labor practice charge (ULP) against Hunt raising the Muniz issue. (Tr. 93; G.C. Ex. 21). Long had ordered Estudillo out of the Ukiah office on July 1 and he had filed a ULP on this action as well. (Tr. 93; Ex. 21). This friction between Estudillo and the Ukiah office

management no doubt played into Hunt and Long's decision that Estudillo should not be present when Hernandez was questioned, and the action they took (i.e. ignoring Hernandez' request for Estudillo) to effectuate the decision.

Respondent

Case No. SF-CA-09-0477 (Muniz)

The Respondent asserts that there was no violation of the Statute and that its witnesses to this meeting were more credible in their testimony. Relying on Hunt's testimony, the Respondent asserts that Muniz clearly waived his right to have a union representative present at the meeting. Even looking at Muniz' testimony, Hunt ceased asking questions about the topic for which Muniz requested union representation. Therefore, what occurred after he requested representation, did not meet the standards for an investigatory interview.

At some point in the meeting, following the third discussion topic (concerns regarding adjudicating claims that were not assigned to him), Muniz mentioned wanting Charlie Estudillo, the union representative, present. The Respondent concedes that regardless of the precise wording used by Muniz, the mere utterance of Estudillo's name may have been enough to trigger his Weingarten rights. (*INS*, 41 FLRA at 154). (A request for union representation does not have to be in a specific format or use any particular words.); *Norfolk Naval Shipyard*, 14 FLRA 82 (1984)(a request for representation does not have to be repeated in order to remain in effect.).

Ms. Hunt then had three options: (1) grant the request, (2) discontinue the interview, or (3) offer the employee the opportunity to choose between continuing the interview without representation or having no interview. *Bureau of Prisons*, 27 FLRA at 880. If an employee elects to continue without representation, the employee has waived his rights under section 7114(a)(2)(B). *United States Postal Serv.*, 241 NLRB 141 (1989). The Authority has also held that the waiver must be clear and unmistakable. *Dep't of the Air Force, Scott Air Force Base, Ill.*, 5 FLRA (1981); *Compare Metro. Edison Co., v. NLRB*, 460 U.S. 693, 708 (1983) (court held that union may waive employee's Weingarten rights, provided waiver is "clear and unmistakable.").

The Respondent asserts that the evidence shows that Hunt asked Muniz if he wanted her to stop so the union representative could be present. Muniz said no, why don't you finish first, and then I'll call my union representative. I won't say a word. This statement cannot be

interpreted as anything other than a waiver. His language was clear and unmistakable. Because he waived his right to have his union representative present, Hunt was entitled to continue with her questions.

Muniz continued to participate in the discussion following his alleged request for a union representative. He did so "because two other issues didn't have anything to do with me asking for union representation." (Tr. 34). Muniz was only requesting union representation for the June 9 incident.

But even assuming Muniz requested a union representative, the Respondent argues that what transpired after that request was not an investigatory interview. The question is whether Muniz reasonably believed that this examination might result in disciplinary action. Counseling sessions are not investigatory interviews. *See U.S. Dep't of Treasury, Internal Revenue Serv.*, 8 FLRA 324, 330 (1982)(The right of representation arises when a significant purpose of the interview is to obtain facts to support disciplinary action that is probable or that is being seriously considered. However, when the meeting is nothing more than a pure counseling session and remedial in nature, without the requisite investigatory element it did not qualify as an “examination of an employee . . . in connection with an investigation”, even though the employee asked to be represented by the Union. A meeting held for the purpose of warning an employee against acts of misconduct does not constitute an investigatory interview.). *Dep't of the Treasury, Internal Revenue Serv.*, 15 FLRA 360 (1984).

The discussion on June 17 was a counseling session. (Tr. 113-14; R. Ex. 3). Muniz was counseled not to reassign work to another employee, that it was not appropriate to walk away from his supervisor when she was discussing interview assignments with him, that he should not adjudicate claims that were not assigned to him, and that he should only perform the type of work that he is assigned to do on any particular day. She was not discussing these issues to investigate these matters. Rather it was to counsel him and warn him not to do the same things in the future. This was a counseling session, and therefore, even if he requested a union representative, Hunt was not required to stop the discussion.

After he asked for union representation, Hunt asked Muniz questions about two work related matters, and he did not mind answering these questions and did not request representation during those two questions. Muniz makes a very clear distinction between the three topics discussed during the June 17 meeting. The first concerned the incident on June 9 and he did not wish to discuss this without having a union representative present. When he asked for a union representative, Hunt stopped asking questions about the June 9 topic but went on to discuss two other work related matters, which Muniz apparently had no qualms about discussing.

Case No. SF-CA-10-0004 (Hernandez)

The Respondent asserts that Hernandez did not request to have a union representative present at the meeting. The Respondent concedes that it conducted an investigatory interview

with Hernandez on September 28, concerning several “sanctions violations”. (Tr. 122; R. Ex. 5). This was clearly an investigatory meeting and the employee was correct to assume that the results of the investigation could lead to disciplinary action.

The Respondent argues that Hernandez’ asserting that she requested a union representative three times during the meeting is simply not credible. The Respondent asserts that the testimony of Hunt and Long, along with contemporaneous documents, establish that Hernandez never asked for union representation. (R. Ex. 5).

ANALYSIS AND CONCLUSIONS

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

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

- (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
- (ii) the employee requests representation.

In *United States Dep't of Justice, Bureau of Prisons, Safford, Ariz.*, 35 FLRA 431, 438-40 (1990), the Authority reviewed the provisions, purposes, and benefits of section 7114(a)(2)(B). Fundamentally, however, “[F]our conditions must be met before a statutory right to union representation vests in a federal employee: (1) the meeting between the employee and management must be an examination; (2) the examination must be in connection with an investigation; (3) the employee must reasonably believe that disciplinary action may result from the meeting; and (4) the employee must request representation.” *Am. Fed'n of Gov't Employees, Local 1941 v. FLRA*, 837 F.2d 495, 498 (D.C. Cir. 1988).

Although the right to Union representation under section 7114(a)(2)(B) attaches only if an employee makes a valid request for representation, a request need not be made in any specific form to be valid. Instead, a request must be sufficient to put the respondent on notice of the employee’s desire for representation. *See generally Norfolk Naval Shipyard, Portsmouth, Va.*, 35 FLRA 1069, 1073-74 (1990)(*Norfolk Naval Shipyard*) and cases cited therein.

Case No. SF-CA-09-0477 (Muniz)

The evidence in this matter clearly reflects that the meeting on June 17 met the criteria of an investigatory interview under section 7114(a)(2)(B). The meeting between Hunt and Muniz was an examination; the examination was in connection with an investigation; the employee reasonably believed that disciplinary action may result from the

meeting, and the employee requested representation. Looking at the meeting as a whole, I specifically reject the Respondent’s argument that portions of the meeting involved counseling related to work related assignments. The purpose of the meeting was to investigate certain areas of Muniz’ conduct in doing his work, including communications with his supervisor, working redeterminations outside their regularly scheduled day, and working outside his assigned area. Further, Hunt herself treated this meeting as an investigatory meeting and was given instructions by Marvin Mueller, the Respondent’s Level 1 District Manager, on how to conduct such a meeting. (Tr. 151-52). The fact that Muniz himself did not consider some of the topics to need Union representation does not remove them from the meaning of section 7114(a)(2)(B).

Further, I find that any employee would reasonably believe that disciplinary action might result from the meeting. *Internal Revenue Serv., Washington, D.C. & Internal Revenue Serv., Hartford District Office*, 4 FLRA 237 (1980), enf’d 671 F.2d 560 (D.C. Cir. 1982). Such disciplinary action was eventually taken against Muniz on some of the topics covered by the investigatory interview.

I further find, and the Respondent does not argue against, that Muniz requested representation during the meeting. The question, however, is whether or not he waived his right to representation during the meeting. Hunt testified that once Muniz requested Charlie, she asked Muniz if he wanted her to stop so the union representative could be present. Muniz told her she could finish first and then he would call his representative.

As stated above, once Muniz requested representation, Hunt had three options: (1) grant the request, (2) discontinue the interview, or (3) offer the employee the opportunity to choose between continuing the interview without representation or having no interview. *Mine Safety*, 35 FLRA at 803; *Dep't of Def., Def. Criminal Investigative Serv.*, 28 FLRA 1145 (1987); *Bureau of Prisons*, 27 FLRA at 880. The Respondent therefore argues that Muniz elected to continue without representation and thus, waived his rights under section 7114(a)(2)(B). The GC asserts that, even if this was to be considered a waiver, it was not "clear and unmistakable" and Hunt's continuance with the interview was a violation of the Statute, as alleged in the complaint.

A waiver of a Statutory right will be found only if it can be shown that a party clearly and unmistakably waived it. *Bureau of Prisons*. The evidence in this case shows that Muniz made a voluntary and uncoerced decision to continue the interview without Union representation. Muniz did not deny that he told Hunt to continue, even though his Union representative was not present. This is consistent with Muniz' previous behavior, where he had first contacted Charlie Estudillo for assistance, but then decided to handle the situation himself. Considering the interview as a whole, I find that Muniz did in fact waive his right to Union representative when he agreed to continue with the interview without his Union representative. (Cf. *U.S. Dep't of Justice, Immigration & Naturalization Serv., Border*

Patrol, El Paso, Tex., 42 FLRA 834 (1990)(Employee's decision to participate in the interview was not voluntary; continued emphasis on the criminal nature of the proceeding found to be coercive.). Under the circumstances of this case, Hunt was within her rights to continue the interview and her conduct did not violate the Statute as alleged.

Case No. SF-CA-10-0004 (Hernandez)

The simple question in this matter is whether or not Hernandez requested Union representation during the meeting with Hunt and Long on September 28. The GC asserts that Hernandez' testimony should be credited and that she be found to have requested Union representation three separate times during the meeting and that her requests were ignored by the Respondent's representatives. The GC further asserts that Long's and Hunt's testimony that Hernandez never requested representation is self-serving and should be rejected.

The evidence reflects that, during the time prior to the meeting, Hernandez was represented by Charles Estudillo (known by all the parties as Charlie) on various disciplinary matters. Hernandez clearly understood her right to request Union representation and had been repeatedly encouraged to make such a request in any meeting with management. However, knowing one has the right to Union representation and actually making the request are two different things. The law requires that an employee make a specific request for

Union representation. In this matter, I would find a request for “Charlie” would be an adequate request for Union representation since all the parties are aware of his position as the Union representative and of his actual representation of Hernandez. The Respondent does not deny that such a request would be adequate. *U.S. Dep’t of Justice, Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C.*, 55 FLRA 388, 398 (1999).

Despite this, I do not find that Hernandez’ testimony that she requested Charlie’s presence three times to be credible. Rather, it appears to me that Hernandez only thought to herself that she wanted or needed Charlie during the meeting and did not make the request out loud. In her own testimony, Hernandez twice stated that she thought to herself that she needed Charlie. Without making her request out loud to the two managers conducting the meeting, there is no request for representation.

I do not find Hernandez’ repeated statements that she told both Linda Sanders and Muniz that she requested Union representation three times during the meeting of any weight in determining that she made an actual request. She emerged from the meeting in a highly agitated state³ and was immediately asked if she requested Union representation. Knowing that she had been repeatedly told to request such representation, I find her later statements to

other employees nothing more than attempts to assure herself and them that she had followed instructions and that the Respondents had ignored her requests, rather than that she had never made such a request. It is also clear to me that by the time of the hearing, Hernandez was convinced that she had actually requested representation. But, as stated above, I am not so

³ The GC noted Hernandez’ highly emotional state, apparently arguing that this aids in finding her testimony credible. However, I disagree. There is no reason why this would make it more likely that Hernandez requested representation, rather it seems to show an inability to think logically in the midst of a highly stressful situation.

convinced and find that she did not request representation. *Norfolk Naval Shipyard*.⁴

For the reasons set forth above, I conclude that the Respondent did not violate the Statute and that the Consolidated Complaint should be dismissed.

ORDER

It is hereby ordered that the Consolidated Complaints be, and hereby are, dismissed.

Issued, Washington, D.C., July 14, 2011.

Susan E. Jelen
Administrative Law Judge

⁴ I further reject the GC's overly dramatic argument that Long and Hunt made sure that no one save themselves would hear what happened during the September 28 meeting, but could not anticipate Hernandez tearful departure from the meeting and her subsequent discussions with concerned employees. Is the GC somehow arguing that keeping an investigatory interview private is an indication of bad motivation on the part of management? Surely Long and Hunt were aware of the size of their own office, the proximity of employees, and the possibility that employees talk to each other.

I am also unconvinced by the GC's argument that the fact the meeting was held in the afternoon and knowing the distance of the Union representative from the Ukiah office showed that the Respondent did not want the Union representative present for the interview. I am unwilling to make such a leap within the circumstances of this case. Of course, ultimately the question is not whether or not management representatives prefer to have a Union representative present during an investigatory interview, but whether the employee actually made such a request, which I have found did not occur in this matter.

I further reject the GC's argument that Hunt's and Long's testimony was self-serving and not credible. I find their testimony logical and convincing.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by SUSAN E. JELEN, Administrative Law Judge, in Case Nos. SF-CA-09-0477 & SF-CA-10-0004, were sent to the following parties:

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Dated: July 14, 2011
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