UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

DEPARTMENT OF HOMELAND SECURITY BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION TUCSON, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, LOCAL 2544 Charging Party	Case No. DE-CA-02-0645

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his 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. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **AUGUST 15, 2005**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20005

____
RICHARD A. PEARSON
Administrative Law Judge

Dated: July 14, 2005

Washington, DC

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: July 14, 2005

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: DEPARTMENT OF HOMELAND SECURITY
BORDER AND TRANSPORTATION
SECURITY DIRECTORATE, BUREAU OF
CUSTOMS AND BORDER PROTECTION
TUCSON, ARIZONA

Respondent

and Case No. DE-CA-02-0645

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, NATIONAL BORDER PATROL
COUNCIL, LOCAL 2544

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, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcripts, exhibits and any briefs filed by the parties.

Enclosures

OALJ 05-40

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
Washington, D.C.

DEPARTMENT OF HOMELAND SECURITY BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION TUCSON, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, LOCAL 2544 Charging Party	Case No. DE-CA-02-0645

Steven B. Thoren, Esquire
For the General Counsel

Catherina C. Sun
For the Respondent

Edward Tuffly, II
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. pt. 2423 (2005).

American Federation of Government Employees, National Border Patrol Council, Local 2544 (the Charging Party or Union) initiated this case on August 7, 2002, when it filed an unfair labor practice charge against the Department of Justice, Immigration and Naturalization Service, Border

Patrol (Border Patrol),[1] and an amended charge on March 28, 2003. After investigating the charge, the Regional Director of the Denver Region of the Authority issued a complaint on March 31, 2003, alleging that the Respondent violated section 7114(a)(2)(B), and thereby committed an unfair labor practice under section 7116(a)(1) and (8) of the Statute, by preventing employee Jose Romo from requesting representation at two examinations in connection with an investigation. The Respondent filed a timely answer to the complaint, admitting some of the factual allegations but denying that it prevented the employee from requesting representation or that it committed an unfair labor practice.

A hearing was held in Tucson, Arizona, at which all parties were represented and afforded the opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The General Counsel and the Respondent subsequently filed post-hearing briefs,[2] which I have fully considered.

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

FINDINGS OF FACT

The American Federation of Government Employees, National Border Patrol Council (the Council), a labor organization within the meaning of 5 U.S.C. § 7103(a)(4), is the exclusive collective bargaining representative of a consolidated nationwide unit of Border Patrol employees. The Union is an agent of the Council for the purpose of representing bargaining unit employees in the Respondent's Tucson Sector. Jose Romo was hired by the Respondent as a Border Patrol Agent Trainee on October 29, 2001, and his employment was terminated by the Respondent on August 9, 2002.[3]

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[1] Effective March 1, 2003, pursuant to the Department of Homeland Security Act of 2002 and the Department of Homeland Security Reorganization Act, the Border Patrol became the Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection (the Respondent or Agency).

[2] The General Counsel's uncontested Motion to Correct the Transcript is hereby granted.

[3] All dates occur in 2002, unless otherwise stated.

The central events in this case occurred on June 5 and June 12, when Romo was interviewed by Supervisory Border Patrol Agent (SBPA) Rene Noriega. Romo was stationed at the Border Patrol Station in Douglas, Arizona, and Noriega was a supervisor assigned to the facility in Nogales, Arizona, approximately a two-hour drive from Douglas. Noriega was assigned to conduct a management inquiry into allegations, stemming from an anonymous call to the Agency, that Romo had had some sort of improper relationship with a narcotics trafficker prior to working for the Border Patrol (Tr. 126-28). In the course of checking Romo's background, Noriega learned that he had worked for the Santa Cruz County (Arizona) Sheriff's Department, and Noriega was further told that drug allegations had been made against Romo while working there (Tr. 128-32). Noriega then sought to interview Romo about these issues. Romo was still a probationary employee at this time, and he alternated between working in the field with experienced agents and training sessions at the Douglas Station. Both interviews in this case occurred on Wednesdays, when Romo was engaged in classroom training and thus was easier to locate.

While Agent Romo was in his training class on the morning of June 5, he was told to go to the main office. When he got there, he was introduced to SBPA Noriega, whom he had never met before. After another supervisor left the office, Noriega began the interview and asked whether Romo had received a written notice concerning the interview. Romo said that he hadn't, so Noriega handed him a Notice to Appear, dated June 5, which he had just filled out (compare G.C. Ex. 2 and Resp. Ex. 8). The document was entitled, "Notice to Appear - Non-Bargaining Unit Member Employee," and it stated that Romo was required to appear and "answer questions concerning your knowledge of alleged misconduct relating to: allegations brought against you." It did not contain any reference to whether or not Romo had the right to be accompanied by a representative. The two men engaged in some preliminary discussion concerning the purpose of the interview and Romo's legal rights (or lack thereof), and Noriega then told him that the interview would be tape-recorded. He turned on the tape recorder at this point and began questioning Romo, first about his knowledge of and dealings with an individual who had recently been arrested at the border with a large quantity of marijuana, and then about Romo's knowledge of allegations made in early 2001 that Romo had given drugs to inmates while working as a Santa Cruz County detention officer (Tr. 68-76). At no time before or during the interview did Romo request that he be allowed to have a Union or other representative assist him at the interview.

While the above-stated facts surrounding the June 5 interview are essentially undisputed, Romo and Noriega gave sharply differing descriptions of many other aspects of the session. I will focus only on the most noteworthy of those discrepancies. With regard to the Notice to Appear form, SBPA Noriega explained that he had initially tried to send a different version of the form to Agent Romo on May 25 through the inter-office mail system: this form (Resp. Ex. 7) was in most respects identical to the form he handed to Romo on June 5, except that it was entitled, "Notice to Appear - Bargaining Unit Member Employee" and it stated, "You have a right to Union representation." Romo denied having received any advance notice of the June 5 interview, and Noriega confirmed that at the start of that interview Romo told him he hadn't received any notice (Tr. 140). According to Noriega, he forgot to take Romo's complete file with him when he drove to Douglas, and so to ensure that Romo had something in writing advising him of his rights, he made a photocopy of a Notice to Appear form from his investigative manual, filled it out just before the start of the interview, and gave it to Romo (Tr. 140, 141-43, 146-47, 158-60). Noriega testified that he believed at the time that he was photocopying the "Bargaining Unit Member" version of the Notice, and that he didn't realize he had given Romo the wrong form until August, when he learned the Union had filed an unfair labor practice charge (Tr. 143, 145).

In other words, while Noriega and the Respondent concede that Romo was given the "Non-Bargaining Unit Member" version of the Notice on June 5, Noriega insists that his intent was always to advise Romo that he had the right to a representative. Accordingly, he insists that he explicitly told Romo at the start of the interview that he had the right to have a witness or representative with him; he asked Romo if he wished to have one, and Romo said he didn't (Tr. 140, 146, 160-61). Romo, however, disputes this testimony. Romo testified that when Noriega handed him the Notice, Noriega underlined the word "Non" in "Non-Bargaining Unit Member Employee" and explained that since Romo was a trainee, he "didn't have the right to a union representative or any representation." (Tr. 33, 58-60). For his part, Noriega denied that he underlined the word "Non" on the form, and he testified that he had no idea who underlined that word, or when it was done (Tr. 142). To buttress this contention, Noriega submitted the copy of the June 5 Notice to Appear that he kept (Resp. Ex. 8), on which the word "Non" is not underlined.

After the June 5 interview, Noriega had no evidence that Romo had done anything wrong with the named drug

trafficker, but he had statements from other Santa Cruz County detention officers contradicting Romo's denial of knowledge of misconduct allegations against him dating to 2001. He therefore decided to interview Romo again on June 12 to try to resolve the conflict (Tr. 173-75). On that date, Noriega again had Romo taken out of training class to be interviewed at the Douglas facility. Both men agree that Noriega showed Romo the same Notice to Appear form dated June 5 *(i.e.*, the "Non-Bargaining Unit Member Employee" version) that he had used at the earlier interview (Tr. 41-42, 177). And as with the June 5 interview, the testimony of Romo and Noriega conflicted as to what Noriega advised him concerning his right to representation: Romo testified that Noriega told him he was not entitled to a representative because he was "in training status" (Tr. 41); but Noriega testified that he explicitly asked Romo whether he wanted a representative or a witness present, and Romo said, "no." (Tr. 178-79). As noted previously, Romo concedes that he never asked for a Union representative at either meeting, but he testified that this was "Because at the beginning of each meeting, Mr. Noriega told me that I wasn't entitled to one." (Tr. 43).

After the two interviews, it was apparent to SBPA Noriega that Romo's responses were not consistent with the information he had obtained from officials in the county sheriff's office. Specifically, Romo denied any knowledge of misconduct allegations being made against him in 2001, notwithstanding comments he allegedly made to county detention officers in 2001 that reflected an awareness on his part of such allegations (Tr. 232-34). Noriega did not personally make any recommendation concerning the matter, but he presented a report to his superiors (Tr. 190), and on August 5 Romo was notified by one of his supervisors that his employment was being terminated, effective August 9. The termination letter stated, among other things: "During a recent Management Inquiry, when questioned, you provided incorrect and/or incomplete statements to management." (G.C. Ex. 3)

DISCUSSION AND CONCLUSIONS

Issues and Positions of the Parties

This case essentially boils down to whether the Respondent, through Noriega, misled Romo by incorrectly telling him that he could not have a representative at the interviews; that question, in turn, boils down to whether I believe Noriega's story or Romo's. Two additional legal issues are posed by the parties: whether Romo had a reasonable belief that the interviews might result in

discipline, and whether the Agency violated the Statute even if Noriega told Romo that he was not entitled to a representative.

The General Counsel argues that Romo's story is more credible, because it is corroborated by a considerable amount of circumstantial evidence. The "smoking gun," in the G.C.'s view, is the fact that Noriega gave Romo a document at the start of both interviews which advised Romo that he was not in the bargaining unit, and which omitted any reference to the right to representation. This stands in stark contrast to the standard form used by the Agency to notify bargaining unit members of an investigatory interview, which expressly states they have such a right. The General Counsel scoffs at Noriega's insistence that he tried to mail the proper Notice to Appear form to Romo on May 25, noting that Noriega did not refer to the May 25 Notice to Appear when he was first apprised of the Union's ULP charge against him (see Resp. Ex. 3, Noriega's file memo dated August 28), and noting further that the Respondent did not include the May 25 form in its prehearing disclosure. The best evidence, in the G.C.'s view, that Noriega told Romo that he was not entitled to a representative is that he gave Romo a Notice to Appear that was meant for non-bargaining unit employees who have no statutory right to representation.

Compounding Noriega's use of the wrong Notice to Appear form is his failure to tape-record his complete interview with Romo. Noriega testified that at both the June 5 and 12 interviews, he did not begin taping the interview until after he had given an introductory explanation to Romo, during which time he advised Romo of his rights. Thus the G.C. argues that Noriega had it within his power to eliminate all disputes of this nature, merely by turning on the recorder promptly; his failure to do so should be weighed against him and his credibility. The General Counsel also faults Noriega for using the same erroneous Notice to Appear form on June 12, further weakening Noriega's credibility in insisting that he intended to give Romo the form for bargaining unit employees. Finally, the General Counsel cites a provision in the collective bargaining agreement previously in effect between the Immigration and Naturalization Service and the Union, in which the Agency agreed to advise employees in writing of their right to be represented by the Union prior to interrogating them in situations that might lead to disciplinary action (Tr. 201). While the G.C. agrees that such a contractual obligation exceeds the requirements of section 7114(a)(2)(B) of the Statute, the failure to follow

internal procedures should be a factor weighing against the Respondent.

In these circumstances, the General Counsel urges me to credit Romo's testimony that Noriega told him he was not entitled to representation at the June 5 and 12 interviews. It further argues that by affirmatively misleading Romo about his rights, the Agency denied representation to Romo, even though he did not actually request representation. In light of the fact that Noriega was a supervisor and Romo was a very new employee, the G.C. argues that it would have been useless for Romo to ask for a representative after he had just been told he wasn't entitled to one, and that the law does not require an employee to engage in a futile gesture. Citing *Axelson, Inc.*, 285 NLRB 49 (1987), and *Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas*, 36 FLRA 41, 51 (1990) (*Border Patrol El Paso*), the G.C. asserts that Noriega's misconduct effectively prevented Romo from asserting his right to a representative and that it therefore violated the Statute. It also argues that evidence regarding Romo's subjective belief that he was subject to discipline is irrelevant; as long as a "reasonable person" would consider himself subject to discipline from the interviews, he is entitled to representation. As a remedy, the General Counsel asks that the Agency be required, upon Romo's request, to re-interview him and to reconsider its decision to terminate his employment based on the information obtained at the new interview; if the Agency then decides that termination was unwarranted, Romo should be reinstated and made whole with backpay. It also asks that the Agency post a notice to employees.

The Respondent argues, however, that Noriega went beyond the requirements of the Statute by affirmatively asking Romo whether he wanted a witness or representative to assist him at the interview, and that Romo knowingly refused the offer. Romo, it argues, was the person whose testimony is unreliable, not Noriega. The Respondent characterizes Romo's answers at the June 5 and 12 interviews themselves as inconsistent and contradicted by other former colleagues, and it argues that this undermines Romo's credibility for purposes of this hearing. Respondent further challenges the plausibility of many details of Romo's testimony about the interviews, pointing to the tapes of the interviews as contradicting his testimony. For instance, Romo testified that the first interview lasted between an hour and an hour and a half (Tr. 80), even though the tape recording of the interview was only ten minutes long. He testified that Noriega had him sign the Notice to Appear, even though there is no signature on the document or a place for a signature.

Romo testified that he gave Noriega some names of former fellow employees as references, but there is nothing to confirm this on the tapes. In comparison, Noriega is an experienced supervisor who has received training in investigations and in labor relations, who understands the rights of employees under section 7114, and who had served as a union steward himself before he was a supervisor. It is implausible to think that such an individual would have done the things that Romo has accused him of committing. Rather, Noriega simply made inadvertent errors of a clerical nature, such as copying the wrong Notice to Appear form, while Romo has repeatedly lied about what was said at the interviews. Finally, Respondent asserts that Romo himself did not believe that the June 5 or 12 interviews could result in disciplinary action (Tr. 90-92); therefore, the General Counsel did not establish a basic requirement of section 7114(a)(2)(B).

Analysis

Section 7114(a)(2)(B) of the Statute requires an agency to give an exclusive representative

> the opportunity to be represented at . . . any examination of an employee in the unit by a representative of the agency in connection with an investigation if--
>
> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> (ii) the employee requests representation.

In applying the first element of this standard, the Authority (consistent with the Supreme Court and the NLRB) has always used objective criteria and has rejected any focus on the interviewee's subjective state of mind as "an endless and unreliable inquiry". *Internal Revenue Service, Washington, D.C., and Internal Revenue Service, Hartford District Office*, 4 FLRA 237, 249-50 (1980), quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 257 n.5 (1975). This objective standard bases its inquiry on "whether, in light of the external evidence, a reasonable person could conclude that disciplinary action might result from an examination." *Social Security Administration, Albuquerque, New Mexico*, 56 FLRA 651, 656 (2000).

Despite the Respondent's references to Romo's lack of a personal belief that he could be disciplined (Respondent's Post-Hearing Brief at 17-18), it is perfectly clear to any objective observer that disciplinary action might result from the June 5 and 12 interviews. The Notice to Appear at the interviews stated that Romo would be asked "questions concerning . . . alleged misconduct . . . brought against you" and that Romo was "a subject of the allegation(s)." It is only reasonable to expect that if such allegations were investigated and found to be supported, Romo would be subject to disciplinary action. This was even more likely for Romo, since he was still a probationary employee with few procedural protections against discipline. Thus the requirement of section 7114(a)(2)(B)(i) was satisfied.

The serious issues in this case, legally and factually, involve the second element of section 7114(a)(2)(B). The plain language of the Statute requires, and the Authority has often reiterated, that in order for an employee to be entitled to a union representative at an investigatory interview, he must request representation. *Norfolk Naval Shipyard, Portsmouth, Virginia*, 35 FLRA 1069, 1073-74 (1990). It is undisputed in this case that Agent Romo did <u>not</u> ask for representation. But Romo and the General Counsel insist that at the outset of both interviews, Noriega told him that as a trainee, he was not entitled to representation. Assuming Romo's allegation is true, was he required to make the request anyway?

In order to prevail in this case, therefore, the General Counsel must overcome two difficult obstacles: it must demonstrate factually that Noriega misrepresented to Romo his *Weingarten* rights, and it must establish legally that such misrepresentation obviated the normal requirement that Romo assert his *Weingarten* rights.

Looking at the legal question first, the responsibility on the employee to request representation must be balanced against the dangers of condoning supervisory misconduct. The Authority does not permit agencies to intimidate employees or coerce them not to request a representative. It was in this context that the Authority held that a supervisor's repeated statements to an employee, that it would not be to his advantage to have a union representative at his interview, violated the Statute by discouraging him from exercising his rights. *Border Patrol El Paso*, 36 FLRA at 50-52. Similarly, in *Southwestern Bell Telephone Company*, 227 NLRB 1223 (1977), the NLRB found unlawful coercion in the statements of a supervisor that higher management would be brought in and the case could get out of

hand if the employee requested a union representative. And in *Axelson, Inc.*, 285 NLRB 49 (1987), a manager responded to an employee's request for a union representative during a morning interview by saying there was no union representation; at a subsequent meeting that afternoon, the employee made no request for representation. The Board held that it was unnecessary for the employee to renew his request for representation at the afternoon meeting, because the employer's reply to his initial request had "made it clear that any renewed request would be futile." 285 NLRB at 53.

A common element in all the above cases, however, was that the interviewee did express some affirmative interest in having a representative.[4] But our case is also different in that the Agency is accused of directly telling the interviewee, at the outset of the interview, that he is not entitled to a representative. An agency is not normally required to advise an interviewee at each interview of his right to representation,[5] but if the interviewer does purport to advise the employee and advises him improperly, this presents serious questions as to the employee's ability to freely assert his right. This is particularly true here, where Romo was a probationary employee who may well have had little understanding of his *Weingarten* rights and their

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Moreover, the Authority is lenient in inferring an employee's desire for representation. The employee need not explicitly ask for a union representative, but merely must express a desire for some sort of representation or assistance. *See, e.g., U.S. Department of Justice, Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C.*, 55 FLRA 388, 394 (1999) (*DOJ-OIA*); *U.S. Department of Justice, U.S. Immigration and Naturalization Service, U.S. Border Patrol, Washington, D.C.*, 41 FLRA 154, 167 (1991).

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Portsmouth Federal Employees Metal Trades Council and Portsmouth Naval Shipyard, 34 FLRA 1150, 1155 (1990); *Sears v. Department of the Navy*, 680 F.2d 863 (1st Cir. 1982). It should also be noted that the collective bargaining agreement between the Union and Respondent here did require Agency interviewers to advise employees of their *Weingarten* rights at each interview (Tr. 201); this partially explains why Noriega would have raised the issue at the start of the June 5 and 12 interviews, regardless of whether he thought the right to representation applied to probationary employees.

applicability to his situation.[6] Moreover, the preemptive timing of Noriega's alleged comments makes it even more difficult to ascertain whether Romo would have independently requested a representative in the absence of Noriega's statements.

The *DOJ-OIA* case, *supra*, resembles the previously-cited *Border Patrol El Paso* and *Southwestern Bell* decisions, in that the interviewee initially asked for "somebody to talk to," without specifying a union representative; like the other cases, the Authority found that this was sufficient to put the agency on notice of his desire for representation. 55 FLRA at 394. Then, citing *Montgomery Ward & Co.*, 273 NLRB 1226 (1984), the Authority went on to state that by ignoring the employee's request, the interviewer "effectively foreclosed further discussion" on the issue. *Id.* In the cited *Montgomery Ward* decision, a manager responded to an employee's request to consult with his supervisor by saying that he could not see anyone. The Board found the supervisor's reply to be "preemptive" and held that it "effectively prohibited Steele from making a further request for authorization." 273 NLRB at 1227.

In all these decisions, the employees (unlike Romo) articulated some form of request to consult with somebody, and thus it is easier to infer some intent on the employee's part. But in *DOJ-OIA* and *Montgomery Ward*, the Authority and the Board also recognized that "preemptive" action by a supervisor can have the effect of precluding the employee from pursuing his legal rights. The potential for preemption is even greater in our case, because the alleged statement was made at the very start of the interview.

As the General Counsel has noted, the Authority has held in other legal contexts that a union is not required to demand bargaining over a change in working conditions when the change has been announced as a *fait accompli*. *Department of the Air Force, Nellis Air Force Base, Nevada*, 41 FLRA 1011, 1015 (1991); *Department of the Air Force, Scott Air Force Base, Illinois*, 5 FLRA 9, 23 (1981). The law does not generally require individuals to engage in

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Respondent has not disputed that probationary employees are entitled to *Weingarten* representation. *See Department of Veterans Affairs, Veterans Affairs Medical Center, Jackson, Mississippi*, 48 FLRA 787, 797-98 (1993), reversed on other grounds on reconsideration, 49 FLRA 171 (1994); *see also U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Detroit Teleservice Center, Detroit, Michigan*, 42 FLRA 22, 54-55 (1991).

futile acts. *See, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, Local 1923,* 57 FLRA 538, 539, 541 n.6 (2001); *Abilities and Goodwill, Inc.*, 241 NLRB 27, 27 (1979). The General Counsel asserts that once Noriega announced that Romo was not entitled to a representative at the interview, it would have been futile for Romo to make the request. I agree.

The alleged misconduct of Noriega is also more severe than the coercive comments made in *Border Patrol El Paso* and *Southwestern Bell*. In the latter cases, the supervisors tried to persuade employees not to insist on having a union representative, but at least the employees knew they had the right of representation; in our case, Noriega allegedly told Romo he didn't have such a right at all. Even if Romo had been told during training about the *Weingarten* rights of employees under 7114(a)(2)(B), this knowledge would not have helped him on June 5 and 12. On those dates, he (a trainee still in his probationary period) was alone in a meeting with a supervisor from another office. He was being told he needed to answer questions about alleged misconduct from his past, questions that could end his career. He was hardly in a position to argue with Noriega or engage in a debate on the fine points of labor law. If indeed Noriega told him that he was not entitled to representation, a request by Romo for a representative would only have angered his interviewer and increased the likelihood of Romo being disciplined. Not only would it have been futile for Romo to request a representative after Noriega had told him he wasn't entitled to one, but it would have been self-destructive. In these circumstances, I believe the Statute cannot rationally require Romo to fulfill the literal requirements of the Statute and request a representative. Not only does such a statement from a supervisor violate the employee's 7114(a)(2)(B) rights, but it is also an independent violation of section 7116(a)(1), in that it coerces the employee not to exercise his rights.

This brings me to the central factual dispute of this case: should I believe Romo's account of the interviews (that Noriega showed him the "Notice to Appear - Non-Bargaining Unit Member Employee," underlined the word "Non" and told him that as a trainee he had no right to a Union representative), or should I believe Noriega's (that he asked Romo at each interview if he wanted a witness or a representative present, and he said he didn't)?

I am generally quite hesitant to believe accusations of supervisory misconduct, and I was equally so in this case, but ultimately the overwhelming balance of circumstantial

factors weighs against Noriega's testimony and leaves me no reasonable alternative. I begin with a rebuttable presumption that government employees will follow government rules, and experience has shown me that employees often become confused by explanations; therefore, what is attributed to another person's misconduct often is actually the first person's own confusion or misunderstanding. In this case, however, the weight of the evidence convinces me that Noriega did not follow either his agency's or his government's rules and procedures, and the events cannot be attributed simply to Romo's inexperience, confusion or malice.

If this case were simply a matter of Romo's word against Noriega's, I might be inclined to accept the testimony of the experienced supervisor over the potentially vengeful, inexperienced, suspected drug dealer. But so much of Romo's testimony is corroborated and so much of Noriega's is contradicted or implausible, that I must conclude either that Noriega is not telling the truth, or that he made so many errors as to make the truth incredible.

I begin with the central dispute between the witnesses: did Noriega tell Romo that he had no right to a representative, or did he ask Romo whether he wanted one? There are two possible ways of finding an answer to this question: direct evidence from a tape recording of the actual interviews, or indirect proof that corroborates one version or the other. In this case, the documents used during the interviews (namely the Notice to Appear form given to Romo) corroborate Romo's testimony, while the potentially best evidence (the tape recordings) is silent on this crucial fact, because the person controlling the tape recorder (Noriega) intentionally turned on the recorder <u>after</u> he had already advised Romo of his rights (or lack thereof).

Although Noriega insists he asked Romo whether he would like to have a witness or representative at the interviews, he admits that he gave Romo a document (the Notice to Appear dated June 5) which expressly advised Romo (wrongly) that he was not a bargaining unit member and which omitted any mention of his right to a representative. This, on its face, corroborates Romo's testimony that Noriega advised him he did <u>not</u> have the right to a representative. It is logical to expect that Noriega, who normally interviews bargaining unit employees and is contractually required to tell them they are entitled to a Union representative, would have reviewed the Notice to Appear form with Romo as he handed it to him. After all, according to Noriega, he had only just realized on the morning of June 5 that he had left

part of Romo's file back in his Nogales office, and he had therefore filled out a "new" Notice form for Romo in order to ensure that Romo would have a written notice explaining his rights and obligations. Having just filled out the Notice to Appear, it is reasonable to expect that Noriega would explain the details of that Notice, especially those details applicable to Romo. Both witnesses agree that Noriega explained the reason for the interview, and it follows that Noriega would have referred Romo to the portion of the Notice stating, "alleged misconduct relating to: allegations brought against you." Similarly, as both witnesses agree that Noriega advised Romo of his right to a representative (or lack thereof), it would make sense that Noriega would refer to that part of the Notice which addresses this issue. In this case, the Notice given to Romo advised him that he was "not" a bargaining unit member, and Noriega would most likely have pointed to that portion of the document for emphasis. Romo testified that Noriega underlined the word "Non" at this point in the interview, and this is the most reasonable explanation of the events, in my view. Conversely, if Noriega had understood that Romo was a bargaining unit member and was entitled to a Union representative at the interview, I believe he would have directed Romo's attention to that portion of the Notice which advised him of his right to representation. He would, at that point, have realized that he had filled out the wrong form, and he would have corrected his mistake in a timely manner. His failure to do so leads me further to believe that Noriega knew precisely which form of Notice he was giving Romo on June 5; that he erroneously believed trainees were not bargaining unit members and thus not entitled to Union representation; and that he advised Romo of his "rights" accordingly.

Noriega insists that he filled out the "Non-Bargaining Unit Member Employee" form by mistake on June 5, that he simply photocopied a form from his investigation manual and thought it was the "Bargaining Unit Member Employee" form. But it stretches plausibility a bit too much that he would have made a special trip from Nogales to Douglas and brought part of his file on Romo, but not the Notice to Appear that he allegedly prepared and mailed to Romo on May 25. Then he testified that at the outset of the June 12 interview he showed Romo the same incorrect form that he had used the week before. Seemingly, if he had left the May 25 Notice (which correctly identified Romo as a bargaining unit member entitled to Union representation) back in his office on June 5, he should have found it on his return to Nogales on June 5; he should then have recognized that he had given the wrong form to Romo earlier that day, and he should not have used the same incorrect form at the follow-up interview

June 12. Moreover, when LMR Specialist Linda Maddux apprised him on August 28 that the Union had filed a ULP charge and alleged that he had denied representation to Romo, Noriega logically should have reviewed his file and mentioned in his August 28 memorandum (Resp. Ex. 3) that he had sent Romo a "Notice to Appear - Bargaining Unit Employee" on May 25 that advised Romo of his right to representation (Resp. Ex. 8). In so many respects, Noriega's explanation of the circumstances surrounding the interviews just doesn't add up.

All of these details and discrepancies would probably not have mattered, if only Noriega had taped the interviews properly and thoroughly. In his own testimony and in his August 28 memorandum, however, he admitted that he did not turn on the tape recorder on June 5 until after he had introduced himself to Romo, explained the purpose of the interview, and asked Romo if he wanted a witness or representative present (Tr. 140, 164, 204-05, 230; Resp. Ex. 3). While it is perfectly understandable that some introductory conversation would occur before Noriega started to tape the interview itself, it is neither understandable nor acceptable for him to advise Romo of his legal rights and to obtain a waiver of Romo's right to representation without recording that conversation. It is evident from the transcripts of the interviews (Tr. 68, 103) that immediately after turning on the tape recorder, Noriega read an introductory passage or preamble from his manual, which explained to Romo the purpose and procedure for the interviews. Just as Noriega wanted to document the fact that Romo understood the purpose of the interview and that he was testifying under oath, in order to protect the integrity of the interview, Noriega should have also wanted to document the fact that Romo had voluntarily and knowingly chosen to proceed without a representative.[7] By failing to record this latter fact, Noriega placed into doubt that he ever advised Romo of his rights at all, and it leads me to draw an adverse inference concerning this entire aspect of Noriega's testimony.

Counsel for both the General Counsel and the Respondent have sought to discredit the opposing witnesses by noting factual discrepancies in their respective testimony, but in most respects I consider such details to be irrelevant or of no probative value. I recognize that even truthful witnesses will not have photographic memories of events and conversations that occurred nearly a year before the

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[7] This is especially true at this Agency, since the collective bargaining agreement required Agency interviewers to advise interviewees of their rights.

hearing, but I place more emphasis on details that go directly to the central issue of what Romo was told about his right to representation at the interviews, and the overall consistency and plausibility of those details. Therefore I have given little weight to questions such as the length of the entire meetings on June 5 and 12, whether Romo took a copy of the Notice to Appear or signed it, or whether Noriega told Romo about his personal life history. I also do not consider it appropriate to evaluate the substance of Romo's answers concerning the misconduct allegations that were the subject of the interviews themselves. The Respondent seeks to impeach Romo's credibility by arguing that he gave inconsistent answers to Noriega about his work history with the Santa Cruz Sheriff's Department, but this is circuitous logic. It is not for me to determine whether Romo committed any misconduct in his prior job or even whether he answered Noriega's questions accurately. Ultimately, the Respondent must evaluate those questions when it decides whether Romo's employment should have been terminated. But his alleged guilt on those matters does not undermine his credibility on whether he was told he could not have a representative at his interviews. On this crucial issue, I find the evidence as a whole supports Romo's testimony over Noriega's.

In summary, I find that on June 5, Noriega gave Romo a Notice to Appear which identified Romo as a non-bargaining unit employee; that Noriega underlined the word "Non" in the title of this document; and that he told Romo that because he was a trainee he was not entitled to representation. This conversation occurred at the very start of the interview and effectively prevented Romo from asserting his right to representation. As a very new employee, Romo was particularly susceptible to the advice and directions of a senior supervisor such as Noriega, and he would not have wanted to risk alienating the person investigating him by challenging Noriega's advice. I believe that it was Noriega, not Romo, who was confused as to whether Romo's status as a trainee/probationary employee placed him in the bargaining unit and entitled him to Union representation; that as a consequence of his confusion, Noriega advised Romo incorrectly that he was not entitled to Union representation, and he repeated this error at the interview on June 12. If he had correctly advised Romo of his right to a Union representative at the interviews and obtained an explicit waiver of his right to representation, I believe Noriega would have made sure that such a knowing waiver was tape-recorded.

Based on these findings, I conclude that the Respondent, through Noriega, failed to comply with the

requirements of section 7114(a)(2)(B) of the Statute, and committed an unfair labor practice in violation of section 7116(a)(1) and (8).

The General Counsel recognizes that I cannot order the rescission of the termination action taken by the Respondent against Romo; rather, the Authority has held that the appropriate remedy for a violation of section 7114(a)(2)(B) is to repeat the investigatory interview, upon Romo's request, and to afford Romo full rights to Union representation. After repeating the interview, the Respondent should reconsider the disciplinary action taken against Romo; if on reconsideration the Respondent concludes that the action taken was unwarranted or that a different penalty is warranted, Romo should be made whole for any losses suffered, to the extent consistent with the Respondent's decision on reconsideration. *United States Department of Justice, Bureau of Prisons, Safford, Arizona*, 35 FLRA 431, 444-49 (1990). This is in addition to the normal cease and desist order and posting of a notice.

The case before me has not involved any evaluation of the substantive allegations against Agent Romo, for which he was being investigated in June 2002. However, as the Authority noted in the *Bureau of Prisons* decision, *supra*, 35 FLRA at 446, denying an employee the right to Union representation incurs the risk that the investigation will not be as thorough as it should be, and that an unjustified disciplinary action will be taken. These possibilities are particularly acute in this case, where the employee was a probationary with no grievance and procedural rights to contest the outcome of the investigation. Therefore, although a great deal of time has passed since the original investigation, I would encourage the Respondent's personnel officials to give careful consideration to the allegations against Agent Romo, if indeed Romo requests a new interview and Union representation.

I therefore recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, Tucson, Arizona (Respondent), shall:

1. Cease and desist from:

(a) Telling probationary employees that they do not have the right to Union representation at examinations in connection with an investigation conducted by the Respondent, if the employee reasonably fears that the examination may result in disciplinary action against him or her.

(b) Denying any bargaining unit employee the opportunity to request Union representation at an examination in connection with an investigation conducted by the Respondent, where the employee reasonably believes that the examination may result in disciplinary action against him or her.

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

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

(a) On request of Jose Romo, repeat the examination of Romo that occurred June 5 and June 12, 2002, and offer Romo the right to representation by the American Federation of Government Employees, National Border Patrol Council, Local 2544 at such examination. Upon completion of the new examination, the Respondent shall reconsider its decision to terminate Romo's employment based on the information obtained in the new examination; if the Respondent determines that Romo's termination was not warranted, it shall reinstate Romo and make him whole for any losses suffered, to the extent consistent with the decision on reconsideration, and consistent with the Back Pay Act.

(b) Post at the Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, Tucson, Arizona, copies of the attached Notice to All Employees on forms furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Sector Chief, Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, Tucson, Arizona, and they shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Denver Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, July 14, 2005.

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RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, Tucson, Arizona, 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 NOT tell probationary employees that they do not have the right to Union representation at examinations in connection with an investigation, if the employee reasonably fears that the examination may result in disciplinary action against him or her.

WE WILL NOT deny any bargaining unit employee the opportunity to request Union representation at an examination in connection with an investigation, where the employee reasonably believes that the examination may result in disciplinary action against him or her.

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

WE WILL, on the request of Jose Romo, repeat the examination of Romo that occurred June 5 and June 12, 2002, and offer him the right to representation by the American Federation of Government Employees, National Border Patrol Council, Local 2544 at such examination. Upon completion of the new examination, we will reconsider the decision to terminate Romo’s employment based on the information obtained in the new examination; if we determine that Romo’s termination was not warranted, we will reinstate Romo and make him whole for any losses suffered, to the extent consistent with the decision on reconsideration, and consistent with the Back Pay Act.

____
(Respondent)

Date:________________By:___________________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204 and whose telephone number is: 303-844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. DE-CA-02-0645, were sent to the following parties:

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CERTIFIED MAIL:	**CERTIFIED NUMBERS**:
Steven B. Thoren Counsel for the General Counsel Federal Labor Relations Authority 1244 Speer Boulevard, Suite Denver, CO 80204	**7000 1670 0000 1175 6292**
Catherina C. Sun Department of Homeland Security 24000 Avila Road Laguna Niguel, CA 92607	**7000 1670 0000 1175 6308**
Edward Tuffly, II AFGE, NBPC, Local 2544 8862 Myrtle Place Tucson, AZ 85737	**7000 1670 0000 1175 6315**

REGULAR MAIL

President
AFGE
80 F Street, NW
Washington, DC 20001

Dated: July 14, 2005

Washington, DC