CORRECTED COPY AS OF 8/10/94

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF SSA FIELD OFFICE LOCALS
P.O. Box 221
GLENPOOL, OK. 74033-0221
(918) 581-6380

August 4, 1994
RE: DA-CA-40225

Office of The General Counsel of The
Federal Labor Relations Authority
607 14th St., NW. Suite 210
Washington, D.C. 20424-0001

Dear Sirs:

This is sent to you to appeal the Dallas Regional Director's dismissal of case DA-CA-40225 involving the Muskogee, Oklahoma Social Security District Office. This is requested because the facts of this case, applied to the statue and standards created by precedential cases, merit that a charge be reconsidered. The pivotal issue is whether or not there was a violation of 5 USC 7116(a)(1) and (8) by denying an employee union representation during a management investigation, as required by 5 USC 7114(a)(2)(B). The July 7th dismissal stated that no denial of representational rights occurred because there was no actual investigation, the employee did not request representation before or during the meeting, and no further management action was taken. Were these the pertinent facts, then reconsideration would be less appropriate, but this case is unique and is worthy of further action.

There was an investigation and it can be determined by objective measurement that the employee, Mrs. Jackie Webb, under the circumstances reasonably felt that the meeting between her and the Assistant District Manager, Robert Bell, would result in discipline. Crucial to measuring this issue is the benchmark set by Internal Revenue Service, Washington D.C., and Internal Revenue Service, Hartford District Office and National Employees Treasury Union., 4 FLRA 37.

In that case an employee was questioned by persons other than his immediate supervisor, he was aware that the matter in question was serious, and he received no assurance of immunity from discipline. Id. at 11. Had his answers warranted further inquiry he might have received representation, but even at that initial stage what he said could have been used in later investigatory actions. Id. at 11-12. The discussion was not an ordinary work conversation, it was conducted away from his work station, and he was aware of its' serious nature. Id. at 12.

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Jackie Webb's circumstances mirror that situation. She was questioned by herself, in the Assistant District Manager's office by him, after he summoned her from her work area. He was fully aware of management's obligation not to subvert 5 USC 7114(a)(2)(B) by camouflage and the formal obligation to the statute upon a legitimate request for representation, whereas she was not aware of any implications surrounding potential issues of representation. The resulting conversation was concerned with serious matters, falsification of government records, and stealing worktime, and there was no assurance of immunity in exchange for her information. Everything said could have been used against her if later action had taken place. The conversation was not run-of-the-mill: not only was it serious in nature, but it took place a day after the alleged incident giving Mr. Bell the opportunity to engineer a surprise for Mrs. Webb. Her externally observable words and actions make it clear that even though she was shocked, she sensed the serious nature of the questioning. She vehemently denied his accusations, she rebutted his allegation, and she was very upset telling him that she was totally offended. She also remembers being so mad that she was shaking, and that her presence of mind was effected by the quickness with which the meeting ended.

Important also is that she has never been reassured that the matter is considered closed. True, there was no visible retaliation, but this was only due to the Union's filing of a Charge of an Unfair Labor Practice. She has had later problems with management over a desired transfer, and the Area Director later made inappropriate statements about her situation. All of this happened within the context of very bad labor-management relations including the filing of a grievance on 11-30-93, and long term strife back to January, 1993.

In considering the matter of requesting representation, it is clear that the responsibility rests upon the employee. The assumption behind the cases determining whether or not an employee requested representation is that in each case the employee knew to ask to have a representative present, and had opportunity to ask for one due to the time and circumstances involved. Both of these critical elements were absent in the Webb case.

The Norfolk Naval Shipyard, Portsmouth, Virginia and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, 35 FLRA 116, case encapsulates rules guiding an employee's need to request representation, but qualifies what constitutes a valid request. Significantly, it and several supporting cases do not address situations like that of the Webb case. Each case concerning representation sets forth standards based upon facts that logically support the purpose behind requiring the employee to request representation, and in each case the ultimate desire behind 5 USC 7114(a)(2)(B) was achieved by a combination of employee and employer words and actions. In Norfolk, the employee was directly observed sleeping by two supervisors, immediately taken to be

questioned, the employee waited and had time to consider representation. Id. at 1080. In her case however, Mrs. Webb was not directly observed by her questioner, her action was not so obviously perceptible, she was not directly questioned at the time of the alleged action, and she had no time, once accused, to consider what she could or should do other than avoid insubordination.

In Norfolk, a union representative was fetched to the office and dismissed while the employee had time to think and respond. Id. at 1080. This was not true in the Webb case. In the Norfolk situation, the employee admitted the charge, and had been questioned two times before on different matters , once with a representative. That employee had good reason to know about his right to representation. Id. at 1082. Mrs. Webb however, had never been questioned before, and neither she nor anyone else in the office had been informed by management or had reason to know about any right to representation.

Contained within Norfolk are other important qualifications to determine if representation is properly given or denied. It points to Department of Justice, Bureau of Prisons, 27 FLRA 97, where it is stated that a request for representation is a prerequisite to any obligation under 5 USC 7114(a)(2)(B) along with the measurements of a valid request. Additionally, it was determined that a valid request, (1) must be sufficient to put the employer on notice that the employee desires representation, (2) nonverbal conduct may be the equivalent to spoken words for a valid request, (3) a request must not be obviously superfluous, and (4) circumstances must not demonstrate that requesting Union representation would be futile.

According to Bureau of Prisons, actions and words make up the validity of a request. In Bureau, the accused employee, a union steward, was questioned several times, in person, by different managers over different periods. The employee had a chance to respond in writing, and it was initially determined that he consciously waived the right to representation in order to talk with his warden. Id. at 875-877. The employee's rights however were determined to have been abridged, and his valid request was demonstrated by actions that he had a chance to manifest: he stated that he wanted a representative, he refused to write a memo, the management knew to stop the meeting, get him a representative, or to offer him the chance to talk without representation, and lastly the employee could not stop the meeting. Id. at 880. Once again turning to Jackie Webb's incident, her circumstances were completely different resulting in a situation in which she was not allowed to explicitly create a valid request for a Union presence. She had no control over a planned, calculated, surprise questioning designed to catch her off guard and end within minutes of its' beginning. If in her case, Mr. Bell had struck her on the head and in the resulting shock she was conscious but unable to ask for

representation, it would not be declared that she waived her right to representation. Very fittingly, she testifies that she was so shocked by being accused of a serious matter in such a provocative way that she could not ask for representation.

Even the case creating a canon for nonverbal valid requests, Department of The Navy, Charleston Naval Shipyard SC, 32 FLRA 22, does not directly apply to a case such as Mrs. Webb's. The case differs because the constituent facts indicate that the employee talked with management several times, and the employee had notice and responded with several actions showing a desire for representation. Id. at 224. Again, Mrs. Webb was given none of these opportunities. Significant within the Department of the Navy case are the comments:

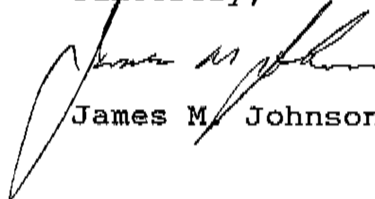
> The right to representation at an examination is designed to protect an employee who is called to a meeting with his employer in connection with an investigation. The Court in Weingarten, was concerned with the right of an employee to have "assistance of his union representative in a confrontation with his employer" (emphasis added). 420 U.S. at 260. In the Court's view, "[a] single employee confronted by an employer investigating whether certain conduct deserves discipline **may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors**" (emphasis added). Id. at 262-63. In such circumstances, the Court concluded that "[a] knowledgeable union representative could assist the employer by eliciting favorable facts and save the employer production time by getting to the bottom of the incident occasioning the interview." Id. at 263. (p. 228)

Although this speaks to the rationale behind Weingarten inclusion into the CSRA it demonstrates that the need is recognized as legitimate because circumstances may make an employee inarticulate or fearful such that they cannot respond. The entire purpose foundational to Weingarten and 5 USC 7114(a)(2)(B) is subverted as in the Webb case where time and action totally prevent the words or deeds that would demonstrate valid request. Furthermore, the record of the Webb case does not indicate that a request for a Union representative would have been superfluous or fit the test of Department of The Army, Reserve Personnel Center, 32 FLRA 96, which determined that circumstances may demonstrate that a request for a Union steward may be futile.

The facts of the Webb case show that the cases decided do not address its' situation due to the unique nature of management's action. By doing as it did, management paid lip service to the

idea of Union representation, and it will continue to use the employee obligation to ask for representation as a rock to hide under whenever it seeks to avoid the clear intent of 5 USC 7114(a)(2)(B). It is important that Mrs. Webb's case be reconsidered and that it not be dismissed because it does not fit the check list requirements of representation. Please reconsider the dismissal, and contact me with the decision.

Sincerely,



James M. Johnson

cc: James Petrucci,
Regional Director - FLRA
Robert Smith,
RVP - Dallas Region

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

FEDERAL OFFICE BUILDING
525 GRIFFIN STREET, SUITE 926, LB 107
DALLAS, TEXAS 75202-1906
(214) 767-4996 FAX: (214) 767-0156

July 7, 1994

James M. Johnson
Regional Representative
AFGE - Dallas Region
P.O. Box 221
Glenpool, Oklahoma 74033-0221

Re: Social Security Administration
Muskogee, Oklahoma
Case No. DA-CA-40225

Dear Mr. Johnson:

This office has investigated the unfair labor practice charge you filed. I have carefully considered all of the evidence and conclude that issuance of a complaint is not warranted.

The charge alleges that the Social Security Administration, Muskogee, Oklahoma (Activity) violated Section 7116(a)(1), (2), (5) and (8) of the Federal Service Labor-Management Relations Statute (Statute) by discriminating against a Union official, bypassing the exclusive representative, breaching the contract, and denying an employee Union representation during an investigatory interview.

The investigation revealed that on December 2, 1993, Jackie Webb, Union Safety Officer, was the first person in the office besides Carolyn Roberson, supervisor. When Webb arrived at 7:00 a.m., she signed in at 7:00 a.m. On December 3, 1993, she was called into the office of Bob Bell, her supervisor, who told her that it had been brought to his attention that on December 2, 1993, Webb signed in at 7:00 a.m. but had not arrived until 7:10 a.m. Webb told him that it was not true. She told him that she was the first to arrive and that she was the person who took the old sign in sheet off the board and put up the new day's sign in sheet. She did not request Union representation at any time during this meeting. To date, nothing further has happened regarding this matter.

The Activity's position is that Webb's direct supervisor had been given information that Webb had arrived at work at a time later than what she reported. To determine if this was true, her supervisor called her in and asked her about it. There was no investigation, no planned action was taken, and no notation of the meeting was made. Moreover, Webb did not request Union representation.

Re: Case No. DA-CA-40225

Based on the above information, I have determined to dismiss the allegations of this charge. In cases of alleged discrimination, it must be established that the employee against whom the alleged discriminatory action was taken was engaged in protected activity and such activity was a motivating factor in the Activity's treatment of the employee. Letterkenny Army Depot, 35 FLRA 113 (1990). Although Webb is the Union's Safety Officer, no evidence was presented to establish that her protected activity was a motivating factor in the Activity's questioning her about her arrival time at work.

To prove a bypass, there must be evidence that the Activity attempted to deal directly with employees over employment conditions. Defense Logistics Agency, Defense Depot Tracy, 14 FLRA 475 (1984); General Services Administration, Region 8, Denver, Colorado, 19 FLRA 20 (1985). In this instance, the meeting between the employee and her supervisor regarding attendance does not constitute an attempt to deal directly with unit employees regarding conditions of employment and, therefore, no evidence has been presented to establish the Activity bypassed the exclusive representative.

In order to determine whether there is a repudiation of the obligations imposed by the contract, the Authority has held that the nature and the scope of the breach must be examined. Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 40 FLRA 1211 (1991) The Union has provided no evidence of a breach of the contract, Article 2, Section 3, which states that the Union will not be bypassed. As stated above, the evidence fails to reflect that the Activity bypassed the exclusive representative.

There are five elements of the right to Union representation which must met in order to find a violation of Section 7114(a)(2)(B), one of which is that the employee must request Union representation. Norfolk Naval Shipyard, Portsmouth, Virginia, 35 FLRA 1069 (1990). The Union has provided evidence that the employee did not request representation during the meeting, therefore there can be no violation of Section 7114(a)(2)(B).

Accordingly, further proceedings in this matter are not warranted and I am refusing to issue complaint in this matter.

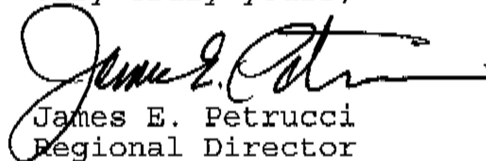
If you do not agree with my decision, you may file an appeal with the General Counsel at the address below. Please send me a copy of your appeal. You must notify all other parties that you have filed an appeal with the General Counsel. You are not required to send a copy of the appeal to the other parties.

Re: Case No. DA-CA-40225

Any appeal which you file must contain a complete statement of the reasons why you disagree with my decision. Your appeal must be filed with the Office of the General Counsel of the Federal Labor Relations Authority, 607 14th Street, NW, Suite 210, Washington, DC 20424-0001. If you file your appeal by mail, it must be postmarked no later than August 8, 1994. If there is no postmark date evident on the mailing, it will be presumed to have been mailed 5 days prior to receipt by the Office of the General Counsel. If you deliver your appeal personally, it must be received by the Office of the General Counsel no later than August 8, 1994.

If you need more time to file your appeal, you may write to the General Counsel to request an extension. A request for extension, either mailed or delivered in person, must be received by the Office of the General Counsel at least 5 days before the date your appeal is due. You will find the procedures and time limits for filing an appeal in Vol. 5, Code of Federal Regulations, Sections 2423.10(c) and (d). These regulations may be found in any Authority office, public law library and some general purpose libraries and Federal Personnel Offices.

Very truly yours,



James E. Petrucci
Regional Director

cc: Ron Lancaster, Labor Relations Specialist, Social Security Administration, Regional Office VI, 1200 Main Tower Building, Dallas, Texas 75202