JAMES J. SHERMAN,
Arbitrator

In the Matter of Arbitration
Between

AFGE LOCAL 596	)	**Grievance No. 06*54089I**
	)	**Union Representation at**
and	)	**Fitness for Duty**
	)	**Examination**
DEPARTMENT OF JUSTICE	)	
FEDERAL BUREAU OF PRISONS	)	
FEDERAL CORRECTIONAL	)	
COMPLEX COLEMAN FLORIDA	)	

DATES OF HEARING: March 15and 16, 2007

PLACE OF HEARING: Coleman, Florida

BRIEFS RECEIVED: May 20, 2007

APPEARANCES:

For **AGENCY:** **LY T. NGUYEN, Esq..**

For the **UNION:** **KEN PIKE, Technical Advisor**

ISSUES

1. **Whether the Grievance is arbitrable?**

2. **Whether the Agency violated the Grievant's rights when it refused her request for Union representation at her fitness for duty examination . If so, what is the proper remedy?**

A PRELIMINARY STATEMENT BY THE ARBITRATOR

After two days of hearings and receiving more than one thousand pages of transcript and exhibits, the Arbitrator concluded that the issue was exceptionally complex. Moreover, the Parties made it clear that the issue was important as it could affect procedures throughout the Agency.

For this reason the Arbitrator decided to quote verbatim the respective arguments.

Furthermore, while there is general agreement on the facts, there are some significant differences because each party placed emphasis on different events.

THE UNION'S STATEMENT OF THE FACTS AND ITS ARGUMENTS

STATEMENT OF FACTS

A. Grievant and the Parties

Jackie Carson, a white woman, was hired by the Federal Bureau of Prisons in Coleman, Florida in approximately 1995 as a recreation specialist. (Tr. 42, 96). Carson worked as a recreation specialist, an education specialist, a corrections officer, and for a short time, she was a secretary. (Tr. 42). Ms. Carson has been an outstanding employee and has received awards for her work. (Tr. 99).

FCC Coleman is a part of the BOP, which is part of the US Department of Justice. FCC Coleman is a complex with four separate components.

Local 506 is a local bargaining unit of the American Federation of Government Employees.

B. The Master Agreement

The parties are subject to a Master Agreement, a collectively bargained agreement effective March 9, 1998 through March 8, 2001. (U. Ex. I.) The parties stipulated that the Master Agreement was still in effect as of the date of the hearing.

The Master Agreement provides, among other things, that employee Union members rights including "the right to a Union representative during any examination by, or prior to submission of any written report to, a representative of the Employer in connection with an investigation" under certain circumstances. (U. Ex. I, Art. 6, Rights of the Employee). Representation must be provided if the employee

requests it, (U Ex. I, 11) or if the "employee reasonably believes that the examination may result in disciplinary action against the employee." (U. Ex. I, 11). The Employer has a responsibility under the Master Agreement to inform the employee, when the initiation of an official examination could potentially lead to disciplinary action, of the right to a union representative. (U. Ex. I, Art. 7; Right of the Union, Art. 11, Official Time).

The Master Agreement also contains a general prohibition against discriminatory or unfair treatment.

The parties agree that there will be no restraint, harassment, intimidation, reprisal or any coercion against any employee in the exercise of any employee rights provided for in this Agreement and ant other applicable laws, rules, and regulations, including the t right: (2) to be treated fairly and equitably in all respects of personnel management, (3) to be free from discrimination based on their political affiliation, race, color, religion, national origin, sex, marital status, age, handicapping condition, Union membership or Union Activity. (Id. Art. 6, 10).

The Master Agreement also provides that people are the most valuable resource of the Federal Bureau of Prisons.

The Union and the Employer endorse the philosophy that people are the most valuable resource.

C. The Actions At Issue

Specifically, the Grievant in this case, Ms. Carson, was ordered, by the Agency, to attend a fitness for duty examination on December 7, 2005 and again on February 7, 2006. (U. Ex. A.) On both occasions, the Grievant requested Union representation at the fitness for duty examination(s). (U. Ex. B and L, 6.) Grievant was denied Union representation on both occasions. (U. Ex. C, D and L, 8.).

As was presented during the hearing of March 15 & 16, 2007, there was much more to the Grievant story leading up to the actual fitness for duty examination(s). When reviewed in the larger sense, it is apparent as to why she would have had a reasonable fear that the fitness for duty examination(s) could have resulted in disciplinary action being taken against her which, in fact, it did. Suffice it to say, a brief overview of those other factors are necessary to better understand Carson's fear.

On May 17, 2005, the first day that Ms. Carson was told she was being placed on enforced leave, Ms. Carson was working in a special housing unit (a secure room with inmate property) as a property officer. (Tr. 44). That morning, the Grievant arrived for duty only to be harassed by a staff member with whom she had previously had problems and of which had been reported to management at the time of their occurrence. (Tr. 44). Sometime that same morning, Ms. Carson attempted to contact someone at the Personnel department and ultimately spoke with Dave Honsted, a manager in personnel. (Tr. 44) Ms. Carson described the incident of that morning with him and asked Mr. Honsted a series of questions regarding the Agency's Volunteer Leave Program. (Tr. 44-45) Mr. Honsted asked Ms. Carson a series of questions and then admitted that he had a copy of Ms. Carson's medical summary from her personal doctor on his desk. (Tr. 45; March 18, 2007 Tr. 40:2-13; 40:14-41:7). Ms. Carson questioned Mr. Honsted as to why he had this document in his possession, at which point he stated that he has heard it was in her file and was curious about it. (Tr. 45).

Later that day, the Grievant received a call from the Operations Lieutenant Grant (U. Ex. 1-G, Daily Assignment Roaster) informing Ms. Carson that she was being reassigned from Special Housing Property Room Officer to the Front Lobby of Penitentiary One. (Tr. 46). Ms. Carson testified that while in the Front Lobby, the then-acting Captain Juan Carmona, passed her and made a comment about her current situation and the fact that Ms. Carson had filed an EEO complaint. (Tr. 46)

Later that same day, Ms. Carson attended an Affirmative Action Committee function at the Complex Training Center. (Tr. 46-47) Ms. Carson was then pulled out of that function by Mr. Honsted and Mr. Carmona. (Tr. 47) At that time, Ms. Carson was told that she was being placed on leave the following day, May 18, 2005. (Tr. 47; U. Ex. 1-G, 8). The Grievant went as far as to ask whether she needed a Union representative at the time she spoke to Mr. Honsted and Mr. Carmona. (Tr. 47; 117). The Grievant was told "no, we're done." (Tr. 47; 117).

In that the Grievant was placed in leave status against her will, it is safe to say that the Grievant was placed on an enforced leave by the Agency-BOP, which is in fact by definition,

n adverse employment action and amounts to discipline of the Grievant. 5 C.F.R. § 752.4O2(c) states:

"Indefinite suspension means the placing of an employee in a temporary status without duties and pay pending investigation, inquiry or further agency action." (U. Ex. 1-J).

"Statutory entitlements. An employee against whom action is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. § 7513(b)." Id.

"An employee against whom an action is proposed is entitled to: (1) at least 30 days advance written notice, unless there is reasonable cause to believe an employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reason for the proposed action; (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer; (3) be represented by an attorney or other representative; and (4) a written decision and the specific reason therefor at the earliest possible date. Id.

The Grievant was not afforded any of the above stipulations prior to being placed on leave on May 18, 2005 by the Agency. Therefore, the Grievant clearly had an adverse form of disciplinary action taken against her when she was later ordered for a fitness for duty examination by the Agency.

During cross-examination, Mr. Honsted was unable to recall any conversation with the Grievant on May 17, 2005, as indicated in the Grievant's testimony, or even how he came into possession of the medical summary in question from the Grievant's personal doctor, in the first instance. (Tr. 176-177) Documentation in the form of the Grievant's medical summary, dated April 20, 2005, would seem to indicate that it was faxed to Mr. Honsted on May 13, 2005, at 9:03 a.m. (U. Ex. 1-A; Tr. 175). This date and time can be seen in the top left hand corner of the document. This was approximately four (4) days before Mr. Honsted's confrontation with Ms. Carson.

Further, it would appear that the decision to place Grievant on enforced leave was based partly on the medical summary from the Grievant's doctor. (U. Ex. 1-A), on Mr. Honsted's recollection of the events of May 17, 2005 (U. Ex. 1-B), and on the memorandum generated by

the Chief Psychologist, Ms. Georgia Whitlock to Warden Tracy Johns (Agency Ex. 11), in which Ms. Whitlock states that Ms. Carson "should probably not be working inside USP-1, due to the context of the report provided by her psychologist." In fact, there is nothing in the medical summary by Ms. Carson's doctor that even alludes to Ms. Carson being unable to perform her duties.

Ms. Whitlock further stated in her memorandum, in reference to a comment taken from the medical summary, "This statement suggests that Ms. Carson is not suitable for work at USP-1 and I suggest that Ms. Carson be considered for a fitness for duty evaluation." Again, there is nothing contained in the relevant medical summary that would lead to any conclusion that the Grievant was "unfit" for any duty or that she should be considered for a fitness for duty evaluation, let alone be placed on leave.

The Union would proffer that the Grievant's medical history was improperly and illegally obtained by Mr. Honsted from Ms. Carson's Worker's Compensation file maintained in the Safety Office. Mr. Honsted was unable to formulate any justification or cause for having the medical history in his possession in the first instance. (Tr. 175-177).

It is further curious that Ms. Whitlock stated that she was contacted by Mrs. Robin Pitcairn and Mr. Honsted on May 18, 2005 and "that they stated they had received a letter from Ms. Carson's psychologist' regarding her medical health problems, specifically "chronis Post Traumatic Stress Disorder." Ms. Whitlock's statement would lead one to assume that the Grievant's doctor had, in fact, voluntarily submitted the medical history to Mr. Honsted and Mrs. Pitcairn for some unknown reason.

In reality, however, the situation is much different. Ms. Carson testified that she had never given her doctor the authority to release the medical summary to anyone representing the Agency nor, as far as the Grievant was aware, was it actually requested by the Agency in any official capacity. (March 18, 2007 Tr. 41:7-13). The Grievant was not even aware, until March 15, 2007, until it was presented by the Agency representative during the hearing as an Agency exhibit, that Ms. Whitlock had been contacted regarding the Grievant's supposed "mental state" or that Ms. Whitlock had submitted a memorandum to Warden Johns making the aforementioned

suggestions. (March 18, 2007 Tr. 41:11-15; 41:15-18) At no time did the Grievant discuss the issue with Ms. Whitlock prior to being placed on enforced leave. (March 18, 2007 Tr. 41:19-23.)

Summarily, this led to the Grievant eventually being ordered to attend a fitness for duty examination on December 7, 2005 and then again on February 7, 2006.

The entire episode is extremely suspect and, though not strictly referred to in the four (4) corners of the grievance, should be taken into account hen considering the central issue of denial of Union representation at the fitness for duty examination(s) that ensured and the Grievant's reasonable belief that she needed to have Union representation during the fitness for duty examination(s).

The Union would argue that, through the agents of the Agency (primarily Mr. Honsted and Mrs. Pictarin), the aforementioned scenario was concocted simply to justify placing Ms. Carson on leave, which then created cause for a fitness for duty examination. The foregoing was borne out of the Grievant having earlier filed in EEO action which is still in motion at the time of this writing.

As was testified to during the hearing, the Grievant was, in fact, subsequently issued a proposal for termination letter on February 6, 2007 partly based on the final report by Dr. Raju Nandimandalam who administered the second fitness for duty examination on February 6, 2006, and in which the Grievant had no representation. (U. Ex. 1-D). This, in and of itself, goes a long way in providing the propensity for disciplinary action based on a fitness for duty examination.

D. Fitness for Duty Examination of December 7, 2005

1. Physical Portion of the Examination

As mentioned above, the Grievant was ordered by the Agency, via a letter, to attend a fitness for duty examination on December 7, 2005. This fitness for duty examination was to be conducted at the offices of Dr. John Corwin, M.D., located in the city of Leesburg, Florida. The actual name of the organization is Lake Center Rehabilitation.

The Grievant understood that she had no choice but to attend this examination, in that the letter from the Agency stated, "However, failure to report for this examination with Dr. Corwin on the date and time scheduled, may result in a proposal for disciplinary action, up to and including removal." (U. Ex. A, 1). The Grievant had no reason to believe that she would not be disciplined should she have ignored the order.

Furthermore, Warden Jonhns testified that if the Grievant did not attend the fitness for duty examination, the Grievant could have been disciplined for misconduct. (Tr. 139-140).

Ms. Carson attended the fitness for duty examination, as compelled, on December 7, 2005 and without representation. (Tr. 52) Upon arrival, Ms. Carson was told to sign a form in which she would agree to bear the costs of the examination. (Tr. 58-59) In fact, the burden is on the Agency to pay for fitness for exams examinations. When the Grievant challenged the assertion that she was responsible for the cost of the examination, she was told that, should she refuse to sign the form, she would be considered as "non-compliant" and that the examination would not continue. (Tr. 59-60) She was further told that the Agency would be contacted and advised of her "non-compliance" as well. (Tr. 59-60) In that the Grievant believed she would be perceived as disobeying the order of the Agency and possibly disciplined, she reluctantly signed the form. (Tr. 59)

Upon completion of this and other forms, the fitness for duty examination was conducted. (Tr. 61) Ms. Carson testified that Dr. Corwin only met with her for a short time and then only administrating the actual hands-on examination. (Tr. 81) The Grievant had no further contact with Dr. Corwin. (Tr. 81-82) The Grievant was then given the physical portion of the examination by Laura Southern. (Tr. 48) The Grievant was unclear as to Ms. Southern's actual position with Lake Center Rehabilitation, but the Grievant believed that Ms. Southern was possibly a nurse. (Tr. 48; 70)

The Grievant was then administered a series of physical acuteness tests over the course of several hours. (Tr. 61) The Grievant soon realized that those acts being administered were not within the guidelines provided by the standards of employment, or at least not as the Grievant understood the guidelines based on the information the Grievant was given. (Tr. 60-61)

Program statement 3000.02, Physical Requirements for Institution Positions, dated 12-03-1997, Section b. states:

> Current employment in law enforcement positions will not normally be subject to further physical examination. However, employees must be able to perform the following physical activities: (1)
>
> (2) Walking for up to one hour
>
> (3) Standing for up to one hour
>
> (4) Seeing a human figure at a distance of one fourth of a mile
>
> (5) Seeing a target at a distance of 250 yards Hearing and
>
> (6) detecting movement
>
> (7) Hearing commands and radio broadcasts
>
> (8) Ability to use various firearms, including pistols, rifles and shotguns
>
> (9) Ability to perform self-defense movements Running an
>
> (10) extended distance
>
> (11) Dragging a body an extended distance Carrying a
>
> (12) stretcher with one other person Ability to smell smoke
>
> (13) and drugs
>
> (14) Climbing stairs and
>
> Lifting objects weighing 25 pounds

(U. Ex. J, 1, 2).

The Grievant, in her own words, described the battery of tests conducted by Ms. Southern, as follows:

(1) Standing toe touch for four (4) times

(2) Sitting toe touch for four (4) times

(3) Crawl around the floor on hands and knees for approximately three (3) minutes

(4) Remain in an unsupported ½ squat position without calves and legs touching, arms forward, with shoulders approximately thirty five (35) inches high from the floor for three (3) minutes four (4) times

(5) Pull a wooden sled containing one hundred seventy five (175) pounds for fifty (50) feet

(6) Lift a wooden box containing seventy five (75) pounds of weights and carry it for fifty (50) feet

(7) While standing, screw nuts and bolts into a shoulder high wooden box for three (3) minutes four (4) times with a ten (10) minute break in between each movement

(8) Walk around a large ditch located at the back of the doctor's office

(9) For a total of fifty two (52) minutes, while standing, screw nuts and bolts into a wooden box that was over the head for three (3) minutes four (4) times with a ten (10) minute break between each movement

(10) Run fourteen (14) wind sprints in less than three (3) minutes in the parking lot of the doctor's office.

(U. Ex. G,2; Tr. 60-68).

Out of the approximately twelve (12) tests administered, there were only three tests that remotely resembled those physical requirements as found in Program Statement 3000.02. (U. Ex. G, 2; Tr. 66-69).

At one point in the examination, the Grievant questioned lifting seventy five (75) pounds of weights in a box. (Tr. 61) She explained to Ms. Southern that the standards of employment required lifting twenty five (25) pounds only. (Tr. 61) Ms. Southern advised the Grievant that, should she not perform the test as instructed, she would be considered as "non-compliant" and the examination would cease. (Tr. 61-62; 67-68) Ms. Southern further stated that she the Agency would be contacted and advised that Ms. Carson was non-compliant. (Tr. 61-62; 67-68) Again, believing that she could face disciplinary action for non-compliance, Ms. Carson continued performing the test with great difficulty, sustaining a back injury as a result. (Tr. 61-62; 67-68).

Mr. Honsted was questioned about the business relationship between the Agency and the Lake Center Rehabilitation clinic. (Tr. 199-200) Honsted testified that there is a contractual relationship between the two and that Lake Center Rehabilitation conducted fitness for duty examinations on a case by case basis for the Agency. (Tr. 199-200; 201) The Agency pays for the services of Lake Center Rehabilitation. (Tr. 201). Honsted testified that Lake Rehabilitation

Center provides the final written report to the Agency based on which an employee may be disciplined. (Tr. 202).

Mr. Honsted further testified that Lake Center Rehabilitation was not provided with any particular guidelines for conducting fitness for duty examinations, i.e. policy, rules or regulations, but is provided with the Position Descriptions for those Agency employees that may be ordered for a fitness for duty examinations. (Tr. 205, 206)

Mr. Honsted was not aware of any Bureau policy that stipulated how a fitness for duty examination should be conducted or any set criteria for such examination. (Tr. 213) He was not aware of staff from Lake Center Rehabilitation receiving any form of training in those policies regarding the Bureau standards of employment. (Tr. 213) Ms. Melinda Skeete testified that, primarily, an employee Position Description is the "guideline" used by Lake Center Rehabilitation for setting that criteria used in conducting fitness for duty examinations. (Tr. 233-234)

When asked as to whether a Position Description referred to any specific Bureau policy regarding the standards of employment, Ms. Skeete was unable to find any mention of said policy within the body of the Position Description. (Tr. 232-233, 234) Ms. Skeete was asked as to whether self-defense, skill in the identification of narcotics or narcotic paraphernalia or maintaining a working knowledge of radio and other electronic equipment used was part of a fitness for duty examination, as is found within the body of the Position Description. (Tr. 234-235) Ms. Skeete did not know. (Tr. 234-235) Ms. Skeete indicated that she did not know a particular policy that stipulated how a fitness for duty examination should be conducted or any set criteria for said examination. (Tr. 232-235)

It is clear, by the Grievant's testimony, that Lake Center Rehabilitation did not follow any standards of employment, at least as found in Program Statement 3000.02, for conducting said examination. (Tr. 60-61). It appears that, in fact, Lake Center Rehabilitation was left to its own devices when creating criteria for conducting fitness for duty examinations on Bureau employees, as was testified by Mr. Honsted and Ms. Skeete. (Tr. 205-206; 232-235). Therefore, it is abundantly evident that a Bureau employee, although having an expectation that the

standards of employment would be a basis for a fitness for duty examination, enters into a fitness for duty examination stripped of that expectation. 2. Firearms Portion of the Examination

Upon completion of the physical examination portion of the fitness for duty examination, the Grievant was then made to traverse to an outside privately owned shooting range located in the city of Leesburg, Florida. (Tr. 68-69) Again, Ms. Southern was the representative from Lake Southern Rehabilitation conducting this portion of the examination. (Tr. 70)

Upon the Grievant's arrival at the shooting range, she observed Ms. Southern explain to the owner of the shooting range what three (3) weapons the Grievant would be required to fire and how it would be conducted. (Tr. 70, 75).

The weapons were loaded by the range owner, with the 9 mm pistol being loaded with three (3) rounds, the M-16 rifle with 1 (one) round and the shotgun with 1 (one) round. (Tr. 70-75) This was to the best recollection of the Grievant. (Tr. 70-76)

The Grievant testified that at no time were the range rules explained to her. (Tr. 74) Prior to firing each weapon she was not given any form of a safety talk regarding the weapon. (Tr. 71) Prior to firing each weapon, the Grievant did not receive an explanation of the nomenclature of the weapon. (Tr. 71)

As it regards firing the 9MM pistol, the Grievant testified that

(1) She did not fire this weapon at the three (3) and seven (7) yard line

(2) She did not fire at a moving target but fired down the range at a wall

(3) She fired two (2) or three (3) rounds

(4) She was not given a score at the conclusion at firing this weapon.

(Tr. 71-72, 73)

Per Bureau policy regarding qualifications with firearms and based on the Bureau certified firearms instructions lessons plan, qualifications with a 9MM pistol involves, in part the following:

(1) A safety talk

(2) Explanation of the nomenclature of the weapon

(3) Loading the weapon

(4) Firing thirty (30) rounds at the three (3) and seven (7) yard lines

(5) Emergency reload

(6) Firing, at a moving target

(7) Receiving a score upon completion of firing (70% passing) (U. Ex. 1; Tr. 147-148).

As it regards firing the M-16 rifle, the Grievant testified that,

(1) She did not fire at a target but fired down range at a wall

(2) She fired one (1) round

(3) She was not given a score at the conclusion of firing this weapon

(Tr. 72-74)

Per Bureau policy regarding qualifications with firearms and based on the Bureau certified firearms instructors lesson plan, qualifications with the M-16 rifle, involves, in part, the following:

(1) A safety talk

(2) Explanation of the nomenclature of the weapon

(3) Loading the weapon

(4) Firing a minimum of five (5) rounds

(5) Firing at a target

(6) Receiving a score at the conclusion of firing the weapon (A minimum five out of five).

(U. Ex. 1; Tr. 147-148)

Ms. Carson testified that, over ten (10) years of employment with the Bureau, she had qualified with these weapons, at least that many times. (Tr. 74) She did not recall ever qualifying with these weapons in the manner in which she was made to qualify during the aforementioned portion of the fitness for duty examination. (Tr. 74)

Upon questioning, Mr. Honsted on the way the Grievant was made to qualify on these weapons during the fitness for duty examination, he was unaware that this portion

was even being conducted as part of the fitness for duty examination. (Tr. 206, 215) Mr. Honsted stated that the shooting range was not contracted by the Agency but, rather, probably through Lake Center Rehabilitation. (Tr. 206) Mr. Honsted did not believe that Ms. Southern, who conducted the firearms portion of the fitness for duty examination, or the range owner, were Bureau certified firearms instructors. (Tr. 215) In fact, they are not. Mr. Honsted was vague in his knowledge of the firearms portion of the fitness for duty examination. (Tr. 206, 214, 215)

The Grievant further testified that during the firearms portion of the fitness for duty examination, she was sexually harassed while firing the weapons and thereafter. (Tr. 76-80) Ms. Carspon related how the range owner told her a story about a real estate sales woman who had been dragged into a bedroom of a house she was showing and raped. (Tr. 76-78) Ms. Carson was initially told this story while Ms. Carson was firing the 9MM weapon. (Tr. 76-77)

Both before and after the Grievant was firing the weapons, the range owner showed Ms. Carson a chair, which the range owner proceeded to describe as a "diddle chair" that was used on women who were mentally ill or had hysteria. (Tr. 78-79) The range owner described that "diddling" was another name for masturbation. (Tr. 78-79) The Grievant further testified that the range owner then took a silver colored device and strapped it onto his hand at which time he plugged it into a socket and turned it on. (Tr. 79) He explained to the Grievant that this device was what doctors used to "diddle" crazy women. (Tr. 79-80)

At this point the Grievant left the shooting range. (Tr. 80) Carson testified that this incident occurred in the presence of Ms. Southern. (Tr. 79-80) Yet, Ms. Southern did nothing to stop the harassment. (Tr. 79-80)

3. The Psychological/Psychiatric Examination

The Grievant was ordered to another fitness for duty examination on February 7, 2006 which was conducted by Dr. Nandimandalm. (Tr. 85-86). Dr. Nandimandalm was an Agency-appointed doctor and not the Grievant's personal physician or psychiatrist. (Tr. 92).

During that (psychological/psychiatric portion of the) examination, the Grievant was asked numerous questions regarding Grievant's history and mental status, many of which had nothing to do with Grievant's fitness for duty. (Tr. 86) In the Agency's letter proposing the Grievant be terminated from employment, it cites Dr. Nandimandalm's conclusion that Carson suffers from major depressive symptoms which consist of anaerobia, feelings of worthlessness, hopelessness, poor concentration, and that Carson should continue her psychiatric case.

Dr. Nandimandalm's report further stated that the Grievant should not return to her current work setting due to the traumatic incident. It is interesting to note in his final report to the Agency, Dr. Nandimandalm mentions that he also reviewed the Grievant's personal doctor's notes. It is unknown as to what he might be referring to here but it can be assumed that he was speaking of the original medical summary that has initiated this entire incident on May 17, 2005. Dr. Nandimandalm asked the Grievant numerous questions so, it is not far off the mark to postulate that Ms. Carson's answers to the questions were used against her as these answers were used against her in a report that was later submitted to the Agency.

E. Pre Arbitration Procedural History

On November 22, 2005, the Grievant was issued a letter from the Agency ordering her to a fitness for duty examination on December 7, 2005. (U. Ex. A).

On November 25, 2005, the Grievant made an official request for Union representation at the fitness for duty examination. (U. Ex. B).

On November 30, 2005, Captain Oscar Barat denied the Grievant's request, via-email. (U. Ex. C).

On December 3, 2005, Warden Tracy Johns denied the Grievant's request via memorandum. (U. Ex. D).

On January 17, 2006, the Grievant was issued a letter from the Agency ordering her to another fitness for duty examination on January 25, 2006. This fate was later changed to February 7, 2006. (U. Ex. A, 2).

On February 2, 2006, the Grievant made an official request for Union representation at the fitness for duty examination. (U. Ex. L, 6).

On February 6, 2006, Warden Tracy Johns denied the Grievant's request, via memorandum. (U. Ex. L, 8).

The Union filed a grievance, via fax, pursuant to 5 U.S.C. § 7121 on January 1, 2006 in regards to the December 7, 2005, fitness for duty examination. (U. Ex. L, 3). The Agency claims that it did not receive this grievance in the Regional Office and therefore, no response was issued. This was contested by the Agency as a threshold issue.

The Agency's arguments, however, have little merit for at least two reasons: (1) the Agency has proffered absolutely no evidence to demonstrate that it had not, in fact, received the fax filing. The Agency failed to produce log sheets or even a scintilla of other documentation, testimony, or evidence to show that the fax was either not sent or received; and (2) the Agency has waived its timeliness argument.

The Union filed a grievance, via fax, pursuant to 5 U.S.C. § 7121 on February22, 2006, in regards to the February 7, 2006, fitness for duty examination. (U. Ex. L, 5). By letter dated March 15, 2006, Regional Director Holt denied the grievance. (U. Ex. N, 1).

After the parties could not informally resolve the grievance, the grievance was moved to arbitration.

ISSUE

The stipulated issue is: In the first instance, was the grievance entitled to Union representation during the fitness for duty examination(s)? In the second instance, was the Agency wrong in denying the Grievant's request for Union representation at said examination(s) and, if so, what shall the remedy be?

ARGUMENT

Grievant was willfully and wrongfully denied a Union representative during a fitness for duty examination in which the Grievant (1) had a reasonable fear of disciplinary action being taken against her and (2) she requested Union representation.

Both grievances challenge the Grievant being denied Union representation at the fitness for duty examination(s).

A. The Employer Violated Grievant's *Weingarten* Rights

The Grievant was examined by staff of Lake Center Rehabilitation, acting as representatives of the Agency, at a Doctor's office located in Leesburg, Florida, on December 7, 2005 and again on February 7, 2006.[1] It is clear and undisputed that both examinations were "conducted under unworn declaration," as the examination was ordered by the Agency, and that there was no compliance with the Grievant's *Weingarten* Rights.

As a bargaining unit member, Grievant had a right to Union representation. Grievant was denied Union representation during an examination, which was required by the Master Agreement (U. Ex. I) and by statute, *see* 5 U.S.C. § 7114(a)(2)(B) (codifying and applying to

[1] Agency is defined as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. Rest. 2d Agency § 1(1). The one for whom action is to be taken is the principal. Id. § 1(2). The one who is to act is the agent. Id. § 1(3). The facts of this situation make clear that Lake Center Rehabilitation was hired by BOP as its agent to perform the physical fitness for duty examination on Ms. Carson. In this situation the agency was such that Mr. BOP was the principal and Lake Center Rehabilitation was the agent. Agency could either be general or special. Rest. 2d Agency § 3. A special agent is an agent authorized to conduct a single transaction or a series of transactions not involving continuity of service. Rest. 2d Agency § 3(1). In this case, it appears that Lake Center Rehabilitation was a special agent of the BOP for the purpose of conducting a physical fitness for duty examination on Ms. Carson. As such, it is irrelevant that the fitness for duty "examination" was conducted by Lake Center Rehabilitation, rather than BOP as the examination was done at the insistence and direction of BOP, was financed by BOP, and was required of Ms. Carson precisely as the employee of BOP. The legal effect of the examination conducted by Lake Center Rehabilitation, as part of a larger investigation by BOP, under agency principles is equivalent to the examination having been performed by BOP itself The same is true of the February 7, 2006 examination by Dr. Nandimandalm.

federal employees the Supreme Court's decision in *NLRB v. Weingarten, Inc.*, 420 U.S. 251 *(1975)*. *See Dep't of Veteran's Affairs and AFBE Local 1985*, 115 Lab. Arb. Rep. (BNA) 198 (Cornellius, 2000) (failure to inform the grievant of his right to Union representation violated the parties' Master Agreement).

When an employee is interviewed or examined in connection with an investigation recommended by BOP and when the results of the investigation will concern possible disciplinary action in a report to be provided by BOP, *Weingarten* rights are mandated. *Fed. Bureau of Prisons and AFGE Local 709*, 54 F.L.R.A. 1502, 1998 WL 825723 (Nov. 20, 1998) (the OIA's interview of the AFGE local union president, a BOP employee, violated the statute requiring compliance with *Weingarten* rights). Importantly, the investigation conducted by the Lake Rehabilitation Center was recommended and instigated by the BOP. When an employee is interviewed in connection with an investigation recommended by the BOP and when the results of the investigation will concern possible disciplinary action in a report to be provided to the BOP, *Weingarten* rights are mandated. (Id.)

It is immaterial that the Grievant's rights were not given by the BOP where the actual examination was conducted by the Lake Rehabilitation Center because (1) the examination was instigated by the Bureau of Prisons and provided to the Bureau of Prisons for administrative disciplinary action; and (2) the examination was provided to the BOP as part of BOP's investigation. *(See supra* fn. 1).

Even an inadvertent breach of the requirement to allow union representation requires the employer to reconsider its action, this time considering only evidence obtained while the grievan was duly represented *Headquarters Space & Missile Sys. Ctr. and AFGE Local 2429*, 103 Lab. Arb. Rep. (BNA) 1198, 1201-02 (McCurdy 1995).

The Authority's analysis of the statute reveals that four conditions must be met before vesting an employee with his or her 5 U.S.C. § 7114(a)(2)(B) right to Union representation: First, the meeting between Agency management (in this case Lake Rehabilitation, acting as the Agency's representative) and the bargaining unit employee must constitute an examination. Second, the examination must be in connection with an investigation. Third, the employee must

reasonably believe that discipline could result from the meeting. Fourth, the employee must request representation.

1. The Fitness For Duty Examinations Were Examinations for the Purpose of Weingarten Rights

As it relates to the first issue, the meeting was an "examination" into whether Ms. Carson was medically fit and qualified to remain employed with the Bureau of Prisons. Medical questions were asked and answered, medical forms were filled out, and finally, a battery of physical examinations were given.

2. The Fitness For Duty Examinations Were Conducted In Connection With an Investigation

As it relates to the second issue, a fitness for duty examination is, in fact, and investigation in that, investigating Ms. Carson's fitness for duty. Once the investigation was complete, Lake Center Rehabilitation personnel was expected to write a final and formal report on Ms. Carson's state of fitness and then submit that report to the Agency which then would be utilized to base a decision as whether to retain or terminate her employment or issue her some other form of discipline. (Tr. 142)

During the hearing, the Agency attempted to confuse the definitions of terms such as "examination" and "investigation." They argued that a fitness for duty examination does not fall into the category of those specifics as found in 5 U.S.C. § 7114 when, in fact, they most certainly

By way of example, Black's Law Dictionary states an *examination* as being: "an 'investigation', search or interrogation, while stating an *investigation* as being: "to follow up step by step by patient inquiry or examination, to do. search into and find out by careful examination." Webster's Dictionary states an *examination* as being the act or process of examining and an exercise designed to examine progress or test qualifications, while stating an *investigation* as being "to observe or study by examination and systematic inquiry and to make a systematic examination."

It can clearly be argued that the terms "examination" and "investigation" can be interpolated. Therefore, in this instance, the physical fitness for duty examination is part of the greater investigation by the Bureau as to the Grievant's fitness for duty at the Agency.

is certainly akin to an investigation with the same potential for disciplinary action being taken against an employee.

3. The Grievant Reasonably Believed that Discipline Could Result from The Meeting

As it relates to the third issue, the Grievant had every reason to believe, that attending the Agency ordered fitness for duty examination, she could possibly be facing some sort of discipline up to and including termination, depending on the outcome of the final medical report. Ms. Carson knew as fact, based on the written order to submit to the fitness for duty examination issued by the Agency that, should she not be attended as ordered, she would have summarily and without question been subject to discipline up to and including termination.

Even Honsted conceded on cross-examination that it is possible that the Grievant could have very well had a reasonable fear of discipline up to and including termination due to the outcome of her fitness for duty examination. (Tr. 199).

InAFGE, *Local 2544 v. FLRA,* 779 F.2d 719 (D.C. Cir. December 24, 1985), the D.C. Circuit Court of Appeals accepted the Authority's standard for determining "reasonable belief." The Court noted that: "The FLRA has consistently interpreted 7114(a)(2)(B) to say that a right to Union representation exists whenever the circumstances surrounding the investigation make it reasonable for the employee to fear that his/her answers might lead to discipline. The possibility, rather than the inevitability, of future discipline determines the employee's right to Union representation.

Thus, for example, a Union has a right to represent an employee even if he employer does not contemplate taking any disciplinary action against the employee at the time of the interview, since disciplinary action will rarely be decided upon until after the results of the inquiry are known."

It is clear from the Grievant's testimony, that she had more than reasonable fear that her answers to questions or failure to meet any one of the ensuing tests during her fitness for duty examination, could lead to discipline. The Agency's February 6, 2007 letter proposing the Grievant's termination provides further concrete evidence that Ms. Carson's fear of discipline was more than reasonable. In fact, the situation here is far beyond that of *AFGE, Local 2544 v. FLRA,* as Ms. Carson's discipline is not only theoretically possible but has been made inevitable by the Agency's own actions.

4. The Grievant Requested Union Representation

As it relates to the fourth issue, it is evident that the Grievant did, in fact, request Union representation at both fitness for duty examinations and that both requests were denied by management. (Tr. 127-129)

5. The Foregoing Makes Clear that The Employer Violated the Grievant's Rights Under 5 U.S.C. § 7114(a)(2)(B)

As previously explained, an exclusive representation of an appropriate unit in an agency shall be given the opportunity 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. Here, Ms. Carson was subjected to psychological and physical fitness for duty examinations as part of a larger investigation into Ms. Carson's fitness of duty with the BOP; Ms. Carson was told by the Agency and reasonably believed that the examination may result in disciplinary action against the employee, and was in fact, correct in her assessment; Ms. Carson requested Union representation and Ms. Carson was denied the Union representation to which she was entitled. As a result, Ms. Carson was harmed.

B. The Employer Further Violated the Grievant's Rights Under the Master Agreement

Article 6, section (f) of the Master Agreement states that unit employees, including probationary employees, have the right to a Union representative during any "examination" by, *or prior to submission of any written report to, a representative of the Employer* in connection with an investigation.

As it regards, *or prior to submission of any written report to a representative of the Employer,* there is nothing in the contractual language that specifically indicates *a representative of the Employer* as being solely an agent of an investigative body., i.e. Office of Internal Affairs, Office of Inspectors General, etc. . . It clearly states "any written report" which would then be submitted by a (plural) representative of the Agency.

It was borne out during the hearing that a written report was submitted by Lake Center Rehabilitation to the Agency upon completion of a fitness for duty examination. (Tr.139-140, 210-211) It was also stated that this final report and its contents has the potential to lead the Agency to issue disciplinary action against an employee, up to and including termination. (Tr. 139-140, 210-211). A report was also submitted by Dr. Nandimandalm following the Grievant's psychological/psychiatric fitness for duty examination. (Tr. 85-86, 92)

When *Weingarten* rights have been violated under circumstances such as those presented here, the proper remedy is to order expungement of the prejudicial statements made in the interview. *See L.A. Water Treatment and Solder,* 263 NLRB 244, 248, 1982 WL 23839, * 5 (1982) (ordering the respondent to expunge and remove from its record all references to the interview and discharge of one of its employees); *see also Food & Drug Admin. And AFGE,* 47 FLRA 535, 1993 WL 148592 (Apr. 20, 1993) (violation of section 7116 by refusing to allow union representative in interview was remedied by ordering repeat of the interview with union representation, reconsideration of disciplinary action in light of lawful interview, and make the employee whole to the extent consistent with the decision).

On February 6, 2007, the Grievant was issued a letter proposing termination from her employment from the Bureau. (U. Ex. 1(f)). The letter cites comments found in the final report issued by Doctor Nandimandalm (Child, Adolescent & Adult Psychiatrist) to the Agency as part of the basis for their proposal to terminate Grievant.

C. The Agency's Case Has No Merit

1. The Agency's Mistaken Attempts to Distinguish Between Discipline Based on Misconduct and Discipline Based on Non-Misconduct Is Irrelevant Because The Statutory Language Does Not Make Any Such Differentiation

The U.S. Supreme Court has made clear many years ago, the most important and well established rule of statutory construction is the plain language rule, that is, if possible the Court will undertake a plain-language reading of the terms of a statute. The Court has declared this unambiguously in 1821:

> [W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law, until a judicial construction of those instruments had been obtained.

Green v. Biddle, 21 U.S. (8 Wheat.) 1, 89-90 (1821). Furthermore, it is "elementary that `no deference is due to agency's interpretations at odds with the plain language of the statute itself.' *Public Employees Retirement System of Ohio v. Betts,* 492 U.S. 158, 171 (1989) (cited in *Smith v. City of Jackson, Miss.,* 544 U.S. 228, 267 (2005)).

Based on the foregoing, in deciding the meaning of section 7114, with respect to the term "disciplinary action" we must first turn to the plain language of the statute. If the plain meaning is clear, we need not go further. *Green, 21* U.S. at 89-90. Furthermore, the Agency cannot interpret the statutory language contrary to what that language says. *Betts,* 492 U.S. at 171.

In this case, under 5 U.S.C. section 7114(a)(2)(B), an employee is entitled to a Union representative in " 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."

(emphasis supplied).

The foregoing language of the Statute cannot be more clear: the employee must reasonably believe that the examination may result in *disciplinary action.* Contrary to the

Agency's whimsical arguments,[2] the statute does not differentiate between disciplinary action based on misconduct and disciplinary action based on non-misconduct. The statute clearly includes all forms of disciplinary actions. Had Congress wanted to provide more specific language and/or include specific types of disciplinary actions which are excluded from the statute's grasp-it would have done so. Notably, Congress has chosen to leave its drafting of the statute alone, as evidenced by the term "disciplinary action" being missing from the definitional section of the Act. *See* 5 U.S.C. § 7103.

Because the plain language of the statute mandates Union representation, regardless of the reason for the discipline or the type, the Bureau's testimony and arguments to the contrary have no legal value and must be disregarded. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171 (1989) (cited in *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 267 (2005)).

2. The Public Policy Underlying 5 U.S.C. 7114 and *Weingarten* Stands for Protecting Workers, Like Ms. Carson, From Abuse By Their Employers

The public policy underlying 5 U.S.C. 7114 and *Weingarten* is that protecting employee rights is in the public interest, as well as a procedure for making the individual employee whole. *American Federation of Government Employees, AFL-CIO, Council of Social Sec. Dist. Office Locals, San Francisco Region v. FLRA*, C.A.D.C. 1983, 716 F.2d 47, 230 U.S. App. D.C. 243. *See also Ontario Knife Co. v. NLRB*, 637 F.2d 840, 844 (D.C. Cir. 1980) (the cornerstone of the *Weingarten* decision that the right to representation safeguards both the employee and the entire bargaining unit by "'exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly' and that '(t)he representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and

[2] The Agency provided extensive testimony as to the difference between discipline for misconduct and discipline for non-misconduct, and effectively argued that Union representation is only permitted for discipline based on misconduct. (Tr. 140-143, 150-157). Based on the plain language of the statute, there is clearly no merit to those assertions.

protection if called upon to attend a like interview"); 5 U.S.C. § 7101(a) ("The Congress finds that experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them, safeguards the public interest, contributes to the effective conduct of public business, and facilitates and encourages the amicable settlements of disputes between employees and the employers").

Here, as presented at the hearing, Ms. Carson was sexually harassed during her physical fitness for employment examination, was forced to perform tests that had nothing to do with her work requirements, and was forced to undertake a psychological/psychiatric evaluation, which had nothing to do with her employment. The circumstances underlying Ms. Carson's examinations are very suspect due to the comments said to Ms. Carson prior to Ms. Carson being put on unpaid administrative leave and prior to the Agency requiring Ms. Carson to undertake various fitness for employment examinations, which had the possibility and did, in fact result in Ms. Carson being disciplined in the worst way-with a proposal for termination.

The ruse under which Ms. Carson was compelled to undergo two fitness for duty examinations and the type of misconduct that took place at these examinations is exactly the type of misconduct that section 7114 and *Weingarten* decision seek to eliminate. *See also A Guide To Federal Sector Equal Employment Law and Practice,* Ernest C. Hadley, American Civil Rights Law Series (2004) at 1179 ("If an employee in a case under the Rehabilitation Act has provided sufficient medical documentation to support the existence of a disability and the need for accommodation . . . the agency's requirement that the employee also see an agency health care professional may constitute unlawful retaliation") (citing *Technical Assistance Manual, "Disability Discrimination"*, at pp. 781-782). Ms. Carson is the type of employee and Ms. Carson's situation is exactly the type of situation that section 7114 and *Weingarten* decision seek to protect.

Had Ms. Carson been allowed a Union representative at one or both of her examinations, the Union representative would have been able to exercise the vigilance necessary "to make certain that the employer does not initiate or continue a practice of imposing punishment

unjustly," as intended by the lawmakers. *Ontario Knife Co., 637* F.2d at 844. Furthermore, allowing a Union representative at Ms. Carson's examinations would have permitted other Union members to feel assured that their rights are being protected. Id.

As things stand now, and based on the Agency's unreasonable interpretation of the statute, the Agency can indiscriminately require employees to undergo fitness for duty examinations which are riddled with unlawful conduct, such as sexual harassment and intimidation, and there is nothing that employees can do to protect their interests for the fear of being disciplined. Ms. Carson's situation and the Union's take on fitness for duty examinations simply cannot be squared with not only the plain language but the clear legislative intent of section 7114 to protect employees from such unjust conduct.

Based on the foregoing, the only way to effectuate the legislative intent and the public policy underlying section 7114 is to permit Union representation at fitness for duty exams, at the request of the Union member. In so doing, the Agency will satisfy its requirements under section *7114* and *Weingarten* and the employee will have the option to request a Union representative, thereby alleviating any privacy concerns (which in all likelihood are not very strong as the physician and/or psychiatrist is a third party and not the employee's own private doctor).

3. *United States Postal Service and American Postal Union,* AFL-CIO, 252 NLRB *61* (1980) Is Inapplicable and Outdated

Per the Agency representative's opening comments, Ms. Nyguen primarily argued that an employee is not entitled to Union representation during a fitness for duty examination for the reason that union representation during a fitness for duty exam is a legal question that has been previously litigated.

The Agency cites *United States Postal Service and American Postal Union,* AFL-CIO, 252 NLRB 61 (1980), as its primary proof. In that case, the NLRB held that `fitness for duty' examinations were not part of a disciplinary procedure and do not fall within the purview of *Weingarten.* These fitness for duty examinations were initially prompted by the grievants' personal problems, such as excessive absenteeism because of alleged illness or injury and, while the examination might lead to recommendations respecting the employees' future work

assignments, there is *insufficient evidence establishing that these examinations were calculated to form the basis for taking disciplinary or other job affecting actions against such employees* because of past misconduct. The examinations at issue in that case were given by "in house" medical staff employed by the Postal Service and there existed, at the time of that case, a Postal Service policy that forbade employees Union representation during the physical portion of the fitness for duty examinations.

There are a number of problems with comparing the above referenced *NLRB* case and the current case involving the Grievant by way of providing the Agency's assumption that it strictly forbade an employee Union representation at a fitness for duty examination.

(1) In the case of the Postal Worker, *it was the policy of the Respondent not to allow a third party to be present during the actual examination itself* although after the examination was complete, it was the Respondent's policy to allow a discussion among the doctor, patient, and his representative at that time.

In the present case, as was testified by Ms. Honsted, there is no such Bureau policy that specifically restricts or denies an employee a Union representative at a fitness for duty examination or any part thereof. (Tr. 172-173)

This is vital to the Agency's case. While the Postal service in the case heavily relied on by the Agency, had a specific policy prohibiting third parties from being present at fitness for duty examinations, the Agency had no such policy. As a matter of fact, the Agency has absolutely nothing to point to that would require it to exclude persons from the examinations, including Union representatives.

(2) In the *NLRB* case, the Postal Worker was sent to *medical unit maintained by the Respondent.* The medical examination was conducted by medical staff in this unit. The records reflect that, in addition to conducting the examinations in question, the unit also provided first aid treatment and medical care for injured or ill

employees at the facility, conducted physical examinations for prospective employees and *clearance examinations following an illness or injury.*

In the present case, the Grievant was sent to an outside private doctor (Lake Center Rehabilitation) whose service was paid for by the Agency to conduct fitness for duty examinations. There are not Bureau employees who are on salary. The Rehabilitation Center is not used for anything other than fitness for duty examinations. It is not trained in Bureau policy, rules and regulations regarding the standards for employment. It is not governed by any particular guidelines, as provided by the Agency. In fact, it is left to their own devices in setting criteria for fitness for duty examinations. (Tr. 202-203; 233-234).

In the case of an "in house" medical clinic which provides actual treatment to *injured employees,* rather than the public at large, and which provides medical treatment, again to the employees-there is more likely the chance of a protected physician-client privacy concerns. For example, an employee who is injured at work and treats in a facility time and time again, or who received first aid medical treatment may have more of an expectation of privacy with the medical personnel and may be less inclined to seek Union representation for a fitness for duty exams at such an "in house" clinic. Clearly such concerns are dissipated where the employee sees the physician and/or other health care providers in the context of fitness of duty examinations only, without even a glimpse of any physician-client relationship.

Therefore, the situation as one here, where Ms. Carson only saw the physician and the psychiatrist only once and for the purposes of the employer-induced fitness for duty examination is utterly different. Ms. Carson's situation is especially different in light of the Postal Service's explicit prohibition on third party attendance of fitness for duty examinations.

Again, where the examinations are performed by "in house" medical personnel who have the potential of repeat medical encounters with the employees, and who in all likelihood retain and update employee medical records-the prohibition against third person attendance makes logical sense. In Ms. Carson's situation, however, where there has been no outright Agency prohibition on third party attendance and where Ms. Carson only saw the examining personnel

once in her life-the holding of the *NLRB* case is inapplicable due to important factual differences.

(3) The *NLRB* case was borne out of an issue involving some sort of personnel problems such as *excessive absenteeism because of alleged illness or injury.*

In the current case, the Grievant was placed on enforced leave by the Agency illegally and without just cause. It was not due to excessive absenteeism or due to alleged illness or injury in which the Agency would have felt compelled to take action nor was it due to any past misconduct. The Grievant had been employed with the Agency for approximately ten (10) years previous to the enforced leave and had never requested leave for personal reasons or otherwise.

Rather, the day of being placed on administrative leave and prior to being compelled to undertake "fitness for duty" examinations, Ms. Carson was told that she should have taken her EEO problems outside the Agency-clearly an illegal threat. Mr. Honsted further relied on the Grievant's confidential Worker's Compensation file, which he neither formally requested nor should have ever reviewed.

The foregoing makes clear that in this situation, there was nothing that the Agency should have properly considered in requiring the Grievant to undertake a series of fitness for duty examinations-a fact that clearly differentiates the situation here from the *NLRB* case. Rather, the Agency's command for the examinations was part of a larger investigation intended to discipline the Grievant and deprive her of her employment, *regardless of the fact* that the Grievant had no personnel issues and was an excellent employee.

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(4) The *NLRB* case stated that the examining physician at the medical unit has no authority to mete out any form of discipline or punishment to the employee/patient nor does the record reflect that he ever recommends such a course of action to the administrative officer.

In the current case, it was clear that, at least on part of Dr. Nandimandalm, that there was, in fact, a form of recommendation rendered to the Agency and it was specific, in that, he

concluded that the Grievant should not return to her current work setting. This does not leave the Agency much wiggle room and the comment was ultimately used as part of the Agency's justification to propose terminating the Grievant's employment, as was seen in the proposal letter dated February 6, 2007.

In a memorandum dated May 25, 2005 from Ms. Whitlock to Warden Johns, she states very clearly that "Ms. Carson should probably not be working inside USP-1, due to the content of the report provided by her psychologist." (Agency Ex. 11).

Ms. Whitlock is a Bureau employee whose position is that of Chief Psychologist for the Agency and, in that capacity, her opinion and recommendations would hold weight.

Again, this is clearly a solid and specific recommendation for some sort of action being taken against the Grievant.

(5) The Decision of *United States Postal Service and American Postal Service Union, AFL-CIO* Was Made in 1980, twenty-seven (27) years ago And Its Holding Is Outdated

United States Postal Service is an outdated decision, which on its face is contrary to the clear language of section 7114, legislative intent and public policy. As such, it should not be followed here.

The decision in *Weingarten, Inc.* was made in 1975. This decision was only five (5) years old and therefore was relatively new at the time of *United States Postal Service and American Postal Service Union, AFL-CIO* decision. *Weingarten* rule was, no doubt being tested in many different forums at that time, much like it is today. *See Epilepsy Fdn. Of Northeast Ohio v. NLRB,* # 00-1332, 268 F.3d 1095, 2001 U.S. App. Lexis 23722, 168 LRRM (BNA) 2673 (D.C. Cir. 2001) (NLRB reversed their original position, making *Weingarten* apply to the nonunion workplace).

Furthermore, while recent cases do not outright overturn, or decline to follow *United States Postal Service,* they sidestep the "fitness for duty" issue addressed in *United States Postal Service* by basing their decisions on other grounds. For example, in *System 99 and Walter Manning,* 289 NLRB 723, 1988 WL 213830, the Board affirmed the Judge's rulings that an

employer's requiring an employee to undertake a sobriety test was more investigatory in nature, and did not involve merely a physical examination or a fitness for duty examination, so as to fall within the purview of the *United States Postal Service* decision. * 723, n. 2. It is clear that a sobriety examination is a physical examination to the extent lifting of the boxes, or running is a physical examination. Yet, rather than deciding the issue directly, the Board in *Walter Manning* simply side-stepped the issue and decided to exclude a sobriety test from the universe of physical examinations.

The *Walter Manning* decision is instructive here because the Board focuses not on the activity at issue-an examination of the content of alcohol-and every arguably a physical examination b u t rather focuses on the issue of the interview being "investigatory" in nature. In Ms. Carson's case, it is clear that the examination at issue was investigatory in her ability to continue employment with the Bureau; therefore based on the logic of *Walter Manning,* Ms. Carson should have been entitled to her *Weingarten* rights. The *Walter Manning* decision is further instructive in that it deviates from *United States Postal Service* in its reasoning, although appearing to explicitly follow that decision. *See also Southwestern Bell Telephone Co. and Communications Workers of America, Local 6333,* 2002 WL 845760, Order Fn. 8 (differentiating *United States Postal Service* from the decision at issue (where the employee was referred to mandatory violence counseling for a comment he made-arguably likened by the employer to a fitness for duty exam) on the basis that the employer had another policy under which *Weingarten* rights had to be provided).

The foregoing indicates a trend wherein the Board avoids the harsh consequences of the *United States Postal Service* decision by creating exceptions and differentiating the present cases from *United States Postal Service.* However, the bottom line is clear-United *States Postal Service* is an outdated decision, which on its face is contrary to the clear language of section 7114, legislative intent and public policy. As such, it should not be followed here.

As its secondary proof, the Agency cites a response from the FLRA, dated November 18, 2005, in regards to the Unfair Labor Practices, FMCS Case No. SF-CA-05-0586, which had been filed by a Union representative at the Metropolitan Detention Center in Los Angeles, California.

In that case, an employee had been injured at work and was ordered by the Agency to a fitness for duty examination prior to returning to duty. The grievant in this case requested Union representation and was subsequently denied. An Unfair Labor Practice was filed. The FLRA concluded that the issuance of a complaint was not warranted in this matter.

The Authority stated in its brief, "However there is insufficient evidence that the March 17, 2005 visit with Dr. Abboy was an examination, which would trigger a right to representation under section 7114(a)(2)(B) of the Statute. In this regard, there is insufficient evidence that Dr. Abboy was gathering information from you regarding your worker's compensation claim; the physician neither questioned you nor sought written information from you about matters relating to your claim. Given the absence of an examination in connection with an investigation, there is insufficient evidence of a violation of section 7115(a)(2)(B) of the Statute.

Again, one must look at the particulars in this case. The grievant was made to attend a fitness for duty examination in regards to a Worker's Compensation fraud investigation. The actual examination lasted approximately five (5) minutes wherein the Doctor only took the grievant's blood pressure and asked him if he was planning on going back to work. The grievant responded yes. The grievant was asked if he was okay to which he responded yes. That was the entirety of the examination given. The grievant, in fact, returned to work.

This case, although similar in some ways in that the Grievant was ordered by the Agency to a fitness for duty examination, is critically different than that of Carson. The grievant in that case was not given such an extensive examination as would have necessarily met a threshold that violated his rights. While the grievant in that case could not have known whether his examination was extensive prior to the examination, that renders further proof as to why employees should be allowed representation at a fitness for duty examination. In that case, it just so happened that things turned out well for the employee. Also, the Authority did not conclude that a complaint was warranted because there simply was not enough evidence to formulate justification for a complaint.

Finally, just because the Authority decided not to issue a complaint in that case, it does not necessarily make it a firm and binding ruling that would be like most law and should not

cloud any decision that the Arbitrator might make in the current case. (Agency Ex. Unitled). Rather, the Arbitrator should focus on clear and unambiguous statutory language, Congressional intent, and underlying public policy considerations which make Union representation a vital necessity to employees.

The Agency further alluded to the fact that the Union Representatives are not medical professionals and therefore have no purpose for a fitness for duty examination. The Agency bases this erroneous assumption and interpretation of a fitness for duty examination as being excluded from the definition of an investigation.

The Union does not claim to be medical professionals nor would the Union make such a claim. Union representation during a fitness for work examination is necessary to ensure that the employees' rights are not being violated during the course of the examination, as happened here to the Grievant.

The Union representative *is* knowledgeable in the areas of public policy, rules, regulations, and law. The Union representative is an expert in the area of contractual language as found in the Master Agreement. It would be much the same as a representative being present during an investigation by SIA, OIG, or OIA.

The Union Representative is present to watch, listen, and interject, where applicable, to ensure that the investigating official(s) is/are not violating the employee's rights. There are understood and accepted boundaries that the Union representative must adhere to during these kinds of investigations and the same would apply for a fitness for duty examination. It is clear that, had the Grievant had a Union representative during her fitness for duty examination(s), said representative would have quickly recognized that the examination was not being conducted within any known guidelines, policies, rules, or regulations.

Although the Union representative could not have stopped the examination, at the very least, he/she could have been a witness to what transpired for later testimony and would have been within his/her rights as a representative, to have asked questions and/or seek clarification as the examination progressed. As it turned out in this case, the Grievant was utterly alone and at the mercy of the individual(s) conducting the investigation.

There can be no doubt that the Grievant had a reasonable fear that she could face disciplinary action, up to and including termination, based on the final report from Ms. Southern or Dr. Nandimandalm, and therefore, should have been afforded the right to a Union representative during the fitness for duty examination(s).

CONCLUSION

For the foregoing reasons and the evidence presented to the Arbitrator in the hearing in this matter, the Charging Party requests that the Arbitrator find that the Agency has failed to prove that the Grievant was not entitled to Union representation. The Charging Party requests further that the Arbitrator rule that the Agency recognize the right of all employees, within the bargaining unit at the Federal Correctional Complex, Coleman, Florida, to a union representative during any fitness for duty examination, ordered by the Agency, upon request of Union representation by the affected employee.

The Charging Party requests further that the Arbitrator award the Grievant Carson any physical or monetary damages or otherwise, that the Arbitrator feels appropriate due to the pain and distress that the Grievant had differed because of the Agency's actions. The Charging Party requests further that the Arbitrator compel the Agency to allow the Grievant medical retirement, in that she is unable to return to work and her career with the Bureau has dissolved directly because of the actions of the Agency.

THE AGENCY'S STATEMENT OF THE FACTS AND ITS ARGUMENTS

FACTS

The Federal Correctional Complex ("FCC") in Coleman, Florida, is comprised of four institutions and a satellite camp. Tr. at 126. Among the institutions is a penitentiary which has over 430 inmates serving a life sentence for anything ranging from drugs, murder, gang-related activities, and sexual crimes. Tr. at 127.

Ms. Carson is a correctional officer at the penitentiary at FCC Coleman. Tr. at 42, 98. Ms. Carson has been out on leave since May 2005.[2] Tr. at 50. Warden Johns testified

[2]Ms. Carson repeatedly testified that she was on "enforced leave," and that had she not been placed on leave by the agency, she would still be working at the institution. Tr. at 43, 95, 116. However, Ms. Carson later admitted during cross-examination that she submitted disability retirement paperwork indicating that her doctor placed her in a non-duty status since May 17, 2005. Tr. at 116. Ms. Carson stated in her disability retirement paperwork that "I became totally disabled w/PTSD [post traumatic stress disorder] on 5/17/05." Agency Hr'g Ex. 1. Ms. Carson certified on her disability retirement paperwork "that all statements made above are true to the best of my knowledge and belief. Agency Hr'g Ex. 1. Moreover, next to her signature on the disability retirement paperwork, was a warning that read, "Any intentionally false statement in this application or willful misrepresentation relative thereto is a violation of the law punishable by a fine of not more than $10,000 or imprisonment of not more than 5 years, or both." Agency Hr'g Ex. 1.

Ms. Carson's credibility was also put into question when she testified under oath that she requested a reasonable accommodation from the Agency. Tr. 47. However, in her disability retirement paperwork, box 7a read, "What accommodation have you requested from your agency," to which Ms. Carson responded, "Medical documentation does not allow me to willfully request accommodations due to disabilities and limitations." Agency Hr'g Ex. 1.

confidently at the hearing that at the time Ms. Carson went out on leave, she stated to Warden Johns that she could not perform her duties. Tr. at 130, 134. David Honsted, also testified that Ms. Carson told him that she could not work:

> Q. Did Ms. Carson state whether she could work or not?
>
> A. She told me that couldn't work. She stated that her psychologist had told her she couldn't work. She felt like she should not be here. However, she didn't have any leave and she couldn't go without a paycheck and that was only reason she was showing up to work.

Tr. at 160.

While Ms. Carson was out on leave, the Agency requested medical documentation from her. Tr. at 228. However, Ms. Carson did not provide sufficient medical documentation as to enable the Agency to make an informed decision on her ability to work. Tr. at 228. Subsequently, the Agency scheduled her for a fitness-for-duty examination. Tr. at 228.

On November 30, 2005, Jacqueline Carson submitted a request to have a union representative present at a fitness-for-duty examination. Union Hr'g Ex. B; Agency Hr'g Ex. 2. On December 3, 2005, Warden Tracy Johns denied Ms. Carson's request for a union representative at her fitness-for-duty examination. Union Hr'g ex. D. On December 7, 2005, Ms. Carson had her physical fitness-for-duty examination conducted by the Florida Musculoskeletal Institute. Tr. at 57; Union Hr'g Ex. 1-C. The physical fitness-for-duty examination was conducted by Ms. Southern, who Ms. Carson acknowledged at the hearing, was not an agency employee. Tr. at 58. In the report following the examination, Dr. John A. Cowin found that Ms. Carson "can perform all of her duties as far as her physical capacity is concerned." Union Hr'g Ex. 1-C.

In a memorandum dated February 2, 2005, Ms. Carson also requested to have union representation at her mental fitness-for-duty examination which was conducted by Orlando Psychiatrics Associates, Inc. Agency Hr'g Ex. 3; Tr. at 85. This request was subsequently denied by Captain Oscar Barat. Agency Hr'g Ex. 4. On February 6, 2007, Ms. Carson attended her mental fitness-for-duty examination conducted by Dr. Raju B. Nandimandalam's of the Orlando Psychiatrics Associates, Inc. In Dr. Nandimandalam's report, he stated that Ms. Carson suffers from a major Depressive symptoms consist of anaerobia, feeling of worthlessness, hopeless, helpless, poor concentration, lack of motivation." Union Hr'g Ex. 1-D. Dr. Nandimandalam further stated that, "Ms. Carson should not return to her current work setting due to her traumatic incident." Union Hr'g Ex. 1-D.

In a letter dated November 22, 2005, Ms. Carson's psychiatrist stated that, "In any case she [Ms. Carson] should never return to the previous or similar working conditions in order to avoid further incapacitation of her symptoms." Agency Hr'g Ex. 5.

APPLICABLE LAW

In National Labor Relations Board v. Weingarten, 420 U.S. 251 (1975), the Supreme Court held that a private sector employee has a right to have a union representative at an investigatory interview which the employee reasonably believed might result in discipline. This right, often referred to as "Weingarten," became codified and applicable to the public sector in 5 U.S.C. § 7114(a)(2)(B). U.S. Customs Serv. Miami, Florida and Nat'l Treasury Employees Union, 2004 WL 3321041, at *14 FN4 (F.L.R.A. January 27, 2004).

Title 5, United States Code, Section 7114(a)(2)(B) provides, in relevant part:

An exclusive representative of an appropriate unit in an agency shall be given the

opportunity to be represented at . . . **any investigation of an employee** in the unit by a representative of the agency **in connection with an investigation** if-

(I) the employee reasonably believes that the examination may result in **disciplinary action** against the employee; and

(ii) the employee requests representation.

5 U.S.C. § 7114(a)(2)(B) (emphasis added). Similarly, Article 6, Section f of the parties' Master Agreement provides:

> Unit employees, including probationary employees, have the right to a Union representative during any examination by, or prior to submission of any written report to, a representative of the Employer **in connection with an investigation** if:
>
> 1. the employee reasonably believes that the examination may result in **disciplinary action** against the employee; and
>
> 2. the employee requests representation.

Master Agreement, Article 6, section f (emphasis added).

"Disciplinary action" is defined in Article 30, section b of the Master Agreement as "written reprimands or suspensions of fourteen (14) days or less."

ARGUMENT

I. The first grievance should be dismissed based on the threshold issues of timeliness and failure to properly invoke arbitration.

A. The first [s] rievance should be dismissed because it was untimel filed if even filed at all.

The first grievance, which relates to Ms. Carson's fitness-for-duty examination held on December 7, 2005, is untimely filed because it was never filed with the Regional Office within 40 days of the alleged action, as required by Article 31, section d of the Master Agreement. Article 31, section 3 specifically mandates that the arbitrator decide timeliness as a threshold

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The first grievance, which relates to Ms. Carson's fitness-for-duty examination held on December 7, 2005, is untimely filed because it was never filed with the Regional Office within 40 days of the alleged action, as required by Article 31, section d of the Master Agreement. Article 31, section 3 specifically mandates that the arbitrator decide timeliness as a threshold

issue. Article 31, section e, states, "If a grievance is filed after the applicable deadline the arbitrator will decide timeliness as a threshold issue."

Article 31, section f(2) states, "when filing a grievance against the Chief Executive Officer of an institution/facility, or when filing a grievance against the actions of any manager or supervisor who is not employed at the grievant's institution/facility, the grievance will be filed with the appropriate Regional Director." In this case, David Honsted spoke with the Employee Services Department in the Region who indicated that they have not received this grievance. Agency Hr'g Ex. 8; Tr. at 158. Although the Union pointed to a fax report sheet dated January 11, 2006, this fax sheet fails to show that the grievance was successfully sent to the Regional Director. Union Hr'g Ex. L at 1. In fact, the Union should have been aware that the fax was not successfully sent. Normally, when a fax is successfully sent, the fax report sheet reads, "**Result** OK. For example, the second grievance which was faxed on the same fax machine had a report that read, "**Result** OK." Union Hr'g Ex. L at 4. Further, the Union provided no evidence that the Region ever signed as having received the grievance. Block 11 of the grievance is not signed where it states, "Signature of recipient." Union Hr'g Ex. L at 3. The Union offered no explanation why they did not call the Region to find out why the Region never sent them back a signed copy of the grievance. Therefore, the Union's lack of diligence in this matter does not excuse it from adhering to the filing deadlines that was negotiated in Article 31 in the Master Agreement.

B. The first grievance should be dismissed because the Union did not properly invoke arbitration on the this grievance as required by the Master Agreement.

The first grievance should be dismissed because the Union did not properly invokearbitration on this grievance as required by the Master Agreement. Article 32, section A states, "In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of an applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy."

In this case, the Union failed to notify the Agency of the statement of issues involved, the alleged violations, and the requested remedy. See Agency H'rg Ex. 7. In a memorandum for the Union dated March 31, 2006, David Honsted, Lead Employee Services Specialist, advised the Union that, "Your invocation dated February 22, 2006, failed to address a statement of the issues involved,

the alleged violations, and the requested remedy, as required by the Master Agreement." Mr. Honsted further stated that this was a threshold issue that would be raised in the arbitration for this case.

H. A bargaining unit employee does not have a legal right to union representation at a fitness-for-duty examination.

A bargaining unit employee does not have a legal right to union representation at a fitness-for-duty examination. In United States Postal Service and American Postal Service Union, AFL-CIO, 252 NLRB 61, 63 (1980), the union alleged that the agency improperly denied requests of six bargaining unit employees to be represented by the Union during fitness-for-duty examinations. The National Labor Relations Board ("NLRB") held that the fitness-for-duty examinations were not apart of a disciplinary procedure and do not fall within the purview of Weingarten. Id. The NLRB explained:

> Thus, while the examinations were prompted by personnel problems such as excessive absenteeism because of alleged illness or injury, and examinations might lead to recommendations respecting the employees' future work assignments, there is insufficient evidence establishing that these examinations were calculated to form the basis for taking disciplinary or other job-affecting actions against such employees because of past misconduct."

Id. at 61 (emphasis added).

Similarly, the Union presented no evidence at the hearing that the fitness-for-duty examinations were calculated to form the basis for taking disciplinary or other job-affecting actions against Ms. Carson because of past conduct. Rather, Ms. Carson was sent to the fitness-for-duty examinations to determine whether or not she was physically and mentally capable of carrying on the duties to which she was assigned.

Even assuming that Ms. Carson reasonably believed that the fitness-for-duty examinations might have an adverse impact on her employment, it does not logically follow that she could

reasonably believed that the fitness-for-duty examinations would result in disciplinary action. "Discipline" in the industrial context normally means a punishment or penalty which is imposed on an employee for violation of an employer's policy, practice, or plant rules.' Id. at 63. Thus, any adverse action resulting from Ms. Carson's fitness for duty examination would not be considered discipline in the sense of punishment for the breach of a rule or practice, but rather, would be considered a resolution of a medical problem for the health and safety of Ms. Carson, her co-workers, and possibly the public with whom Ms. Carson may come into contact.

In addition, "disciplinary action" is defined in Article 30, section b of the Master Agreement as "written reprimands or suspensions of fourteen (14) days or less." In this case, it is unreasonable for Ms. Carson, to fear disciplinary action, i.e. a written reprimand or suspension of

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fourteen days or less" based on the results of the fitness-for-duty examination. The Union provided no evidence of any case in which an employee was given a written reprimand or fourteen day (or less) suspension as a result of a fitness-for-duty examination. If in fact Ms. Carson or any other employee is found not fit for duty, that employee might reasonably fear removal, not disciplinary action as defined by the Master Agreement.

At the hearing, Warden Johns testified that he denied Ms. Carson's request for union representation at her fitness-for-duty examination because this was not an examination based on misconduct or discipline, and therefore, union representation was not required per the Master Agreement. Tr. at 128, 138. Warden Johns further testified the examination was based on a medical issue:

> [I]n the position of a correctional officer you have to be able to respond to perform your duties in certain manner. If you are physically incapable of providing a response, let's say to an emergency that could put both staff and inmate lives in danger. It goes along the same lines of mental health. If you are not capable of

> enforcing the rules and regulations or even providing a response, you could jeopardize lives especially in higher level facility.

Tr. at 129.

Further, as the NLRB pointed out, these medical examinations do not fall within the Weingarten right because they do not involve a "confrontation" between the employee and his employer. Id. In National Labor Relations Board v. Weingarten, Inc., 420 U.S. 251 (1975), the Supreme Court stated that, "A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." Fitness-for-duty examinations do not involve such a confrontation between the employer and employee. Ms.Carson was not examined by the Agency, but rather a third-party doctor who had no authority to either impose discipline or even recommend discipline.

As this element of employee-employer confrontation is missing from the doctor-patient relationship in fitness-for-duty examinations, having a union representation at the fitness-for-duty examinations does not serve the purpose behind the Weingarten right. As Mr. Honsted pointed out, "Because even if a union representative was entitled to go to the fitness for duty they are not going to be able to stop what's going on. The are there basically as another set of eyes. They would not be there to tell the doctor, hey, you can't do that. The doctor or psychiatrist is still going to evaluate the individual in their medical opinion and how they see fit based on our standards." Tr. at 217.

In addition, in Bureau of Prisons, Metropolitan Detention Center, Los Angeles., California, Case No. SF-CA-05-0586, the union also alleged that the Agency wrongfully denied their request for union representation during a fitness-for-duty examination. The FLRA found that the fitness-for-duty examination was not an examination in connection with investigation that would trigger the right to representation under section 7114(a)(2)(B) of the Federal Service Labor-Management

Relations Statute. Thus, the FLRA found that the Agency did not engage in a violation of section 7116(a)(1) and (8) when the Agency denied union representation during a fitness-for-duty examination.

In this case, Warden Johns testified that the fitness-for-duty examination was not in connection with any investigation:

> Q. And in this case there was no referral to OIA [Office of Internal Affairs] or SIS [Special Investigative Services] for an investigation?
>
> No.

Tr. at 151. Mr. Honsted also testified that, "An investigation, an SIS investigation is an actual investigation for a misconduct allegation or accusation. Tr. at 63. Melinda Skeete also testified that in Ms. Carson's case, there was no investigation and no misconduct issue involved. Tr. at 226.

Accordingly, as in Bureau of Prisons, Metropolitan Detention Center, Los Angeles, California and United States Postal Service and American Postal Service Union, AFL-CIO, Ms. Carson did not have any legal right to a Union representative during her fitness-for-duty examinations. Therefore, the Union's two grievances should be denied.

III. Allowing union representation at fitness-for-duty examinations would be contrary to public policy because it could interfere with the doctor-patient relationship.

Allowing Union representation at fitness-for-duty examinations would be contrary to public policy because it could interfere with the doctor-patient relationship. In fact, at another institution, an Agency employee, who was not authorized to attend the examination in his official capacity as a Union representative, accompanied an employee to a fitness-for-duty examination and interfered with the doctor's ability to conduct the examination so much so that the doctor's office called the Agency during the examination to complain. Tr. at 49.

CONCLUSION

For the reasons stated above, the Agency respectfully requests that the Union's two grievances should be denied.

DECISION AND REASONING

ARBITRABILITY

The Agency contends that the Grievance before us is not arbitrable for two reasons. The Agency asserts that it was not filed within contractual time limits. Furthermore, according to the Agency, the language found in the Grievance does not meet contractual standards with respect to clarity.

This assertion that the Grievance is not arbitrable was mentioned briefly in the hearing but little evidence was presented by either of the parties. Of course, the Employer has the burden of proof in such matters.

The Union asserted that the Grievance was filed and arbitration requested. The Agency responded that it never received these notices, or even if it had, the notices did not meet contractual standards.

Under some circumstances this Arbitrator has simply examined the documents and the contract language and ruled in favor of the Employer's position. But the circumstances in this case were anything but ordinary. The evidence shows that there was virtually no communication between Management and the Union. The problem was so great that the Union filed an Unfair Labor Practice charge against the Agency, and the evidence presented at the hearing indicated that the Union had good reason to do so.

The Arbitrator will not burden the record with all the details but a few facts should be considered. Ms. Carson's problems began on April 30,2004 when a fellow employee locked her in a room called "Tower # 4" for over two hours. Ms. Carson claimed, and I believed credibly, that this event caused her to panic and her emotional system has never completely recovered.

It should be noted that there was a Lieutenant and a Captain on duty, aware of her predicament, and they did nothing to help her. Also, they did not reprimand the guilty employee.

On May 17, 2005, Ms. Carson was locked in a room called the "corridor" by the same fellow employee. Again, she panicked as no one responded to her radio transmission or the door alarm. On May 18, 2005, Ms. Carson was placed on enforced leave status. On May 23 she was referred to Brian Boyd, Ph.D. for consultation with regard to the panic experienced on May 18, 2005

The Arbitrator appreciates that this recitation of events does not address the arbitrability issue. But it does point out that the Union began, at this early date, to help Ms. Carson, but it could not get the Agency's attention and cooperation.

The event which gave rise to the grievance occurred on December 7, 2005. This was when Ms. Carson submitted to a fitness-for-duty examination ordered by the Agency. The Grievant protested the Agency's refusal to allow her to have Union representation.

To this Arbitrator, is seems ironic that the Agency would seek to avoid adjudication of the merits of the case on the grounds that certain documents were not filed in a timely manner. The Union requested and was denied the right to accompany Ms. Carson on November 30, 2005. And it took the Union over a year and one-half to learn whether Ms. Carson's rights had been violated and whether she was entitled to an appropriate remedy.

When the Arbitrator reviewed the evidence with respect to the arbitrability issue, he had to agree with the Union's position. The Grievance was probably not as clear and as comprehensive as it might have been, but it seems obvious that the Agency knew exactly why the Grievant and the Union were complaining. With respect to the timing, the evidence shows that the Union submitted or attempted to submit the documents within the contractual deadline.

And the evidence is unclear as to whether the documents were received when the Union faxed them. As explained, Management has the burden of proof in these issues, and Management did not have clear and convincing evidence to support its claim.

ISSUE ON THE MERITS

The Arbitrator read carefully the Agency's arguments, in particular, with reference to the contract language and the cases on point. The Agency's focus was on the word "investigation," and it had persuasive argument that a fitness for duties exam is not an "investigation" within the meaning of that term in the contract or the law.

The Union's focus was on Ms. Carson's treatment while she was working and during her fitness for duty exam. It also argued, through not very persuasively that there is no reason to differentiate between and investigation that might lead to discipline and a fitness for duty exam that might lead to discharge.

At the hearing the Arbitrator made it known that he understood the issue and appreciated that he could deal with the issue if he received all necessary information. Incidentally, advocates often divided the mass of arbitrators into two categories. Some are "active' like NLRB hearing officers. Others are more like judges. They place virtually all responsibility upon the advocates to present sufficient evidence to support their position.

I consider myself in the latter category and acted accordingly in the instant case. But I could see that I was not receiving all the information I needed to make a decision which satisfied me or anyone else who might have a reason to read my decision.

Completely out of character, I interrupted the Advocates to express my frustration. The record will show that I surprised the Advocates by saying:

> I feel as though I have been watching a movie, and I missed some important issues when I went out to the lobby to get popcorn,

Then I recalled the Grievant to testify and started from he day she was hired and asked her to tell me everything that happened to up to her, including the fitness-for-duty exam and its consequences.

As I see this case, it is important to understand why Ms. Carson is no longer employed. One possibility is that she is simply tired of working and would prefer to be unemployed, living on some type of pension. It is also possible that she is unsuited for this type of work and is not fit for duty. Of course, the Union rejects both of these possibilities and contends that Ms. "Carson was a victim of various acts of mistreatment on Management's part which caused her to be virtually unable to return to work due to emotional problems.

It would be important to the Arbitrator's deliberations if he better understood the workplace, the work and everyone's responsibilities. For example, Ms. Carson was twice locked in rooms by the same fellow employee. And she claims that this frightening event left her with various emotional problems. I cannot fully evaluate Ms. "Carson's claim without knowing more about the circumstances surrounding these events.

I was told that this facility holds over 1000 inmates and over 400 of them are serving life terms. What were Ms. Carson's duties? Did she deal directly, person to person with any of the inmates? Are all inmates male or does this facility hold females as well. If Ms. Carson was the only female in the particular classification she held, did the male officers resent having females performing "their" work? Incidentally, I have handled cases wherein firefighters resented and mistreated female employees as they thought that it undermined the popular notion that this was (tough) man's work.

I could not help thinking of the firefighter's case when I heard that the employee, who twice locked Ms. Carson in rooms and allegedly seriously frightened her, was never disciplined. He

was not even told by Management to refrain from such "pranks," if that was how he viewed his actions. On the face of it, what happened to Ms. Carson appears to be "sexual harassment." And more serious, it was condoned by Management.

Now, turning to the contract language and the law: The Master Agreement, Article 6, Section b provides as follows:

In National Labor Relations Board v. Weingarten, 420 U.S. 251 (1975), the Supreme Court held that a private sector employee has a right to have a union representative at an investigatory interview which the employee reasonably believed might result in discipline. This right, often referred to as "Weingarten," became codified and applicable to the public sector in 5 U.S.C. § 7114(a)(2)(B). U.S. Customs Serv. Miami, Florida and Nat'l Treasury Employees Union, 2004 WL 3321041, at *14 FN4 (F.L.R.A. January 27, 2004).

Title 5, United States Code, Section 7114(a)(2)(B) provides, in relevant part:

An exclusive representative of an appropriate unit in an agency shall be given the

> opportunity to be represented at . . . **any investigation of an employee** in the unit by a representative of the agency **in connection with an investigation** if-
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> (I) the employee reasonably believes that the examination may result in **disciplinary action** against the employee; and
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5 U.S.C. § 7114(a)(2)(B) (emphasis added). Similarly, Article 6, Section f of the parties' Master Agreement provides:

> Unit employees, including probationary employees, have the right to a Union representative during any examination by, or prior to submission of any written report to, a representative of the Employer **in connection with an investigation** if:
>
> 3. the employee reasonably believes that the examination may result in **disciplinary action** against the employee; and
>
> 4. the employee requests representation.

Master Agreement, Article 6, section f (emphasis added).

"Disciplinary action" is defined in Article 30, section b of the Master Agreement as "written reprimands or suspensions of fourteen (14) days or less."

I read, and reread the Agency's brief set forth above. And it persuaded me that in many situations the Employer would be justified in its refusal to grant a request for Union representation at a fitness-for-duty exam. But I was also persuaded that some situations must be treated differently. For example, the Union representative should be present if an employee has reason to fear that the person providing the exam will not follow standard procedures whether due to lack of understanding of the employee's duties or possibly even bias.

In such cases, the Management and Union Representative could come to an understanding with respect to the Union's role at the exam, so the Union would have the information it needed without having interfered with the procedure or the individual involved,

The Agency's principal argument was: Ms. Carson had no reason to fear being disciplined if she submitted to the fitness-for-duty exam. This argument appears to ignore the facts. A review of the events affecting Ms. Carson suggests that she had ample reason to fear that she was being set up to be discharged.

During her career Ms. Carson never gave the Agency any reason to consider her a malingerer or a troublemaker. She was hired in 1995 as a recreation specialist, served as an educational specialist and then briefly as a secretary. Moreover, the record indicates that she accepted all assignments without complaint and received awards for outstanding service.

Ms. Carson's problems began on April 30, 2004 when she reported that Officer Cousson locker her in Tower #4 for over 2 hours. Ms. Carson's report (complaint) probably angered some members of Management because as she pointed out, Lt. Kleckner and Capt. Jenkins were on duty and did nothing to help her.

Rather than my describing Ms. Carson's problems following the above described incident, I will present the log which in her own words, she created when she realized that Management decided to punish her for the complaint on April 30,2004.

What follows is Ms. Carson's log:

TIME LINE

* April 30, 2004 Officer Cousson held me in tower 4 against my will for 2 hours 10 min Lt M Kleckner and Captain S. Jenkins were on duty and did nothing to assist me.

* 5/4/04 contacted Bass EEO, I requested BPT training through Lt K Rogers via e-mail so I could work OT on escort trips and Hospital duty

* Between 5/4/04 and 8/12/04 Bass attempted to resolve with Warden S. Yates

* 5/11/04 I was prevented from attending the annual AA APINA presentation of which I was the program manager of.

*6/16/04 By not being relieved by the Lieutenant I was denied attendance to the Inmate Sexual Offenders Committee Meeting which I was a committee member. I advised the Lieutenants via forwarding the email that I was designated to attend by the AW M. Potts. I had to withdraw from participation due to not being relieved to attend.

* 6/28/04 Lt K Rogers sent a e-mail to other AA program manager stating "effective immediately Jackie Carson is no longer an APINA program manager. Contact me if you have any questions at 6126."

* 7/22/04 AW D. Sweet issued a letter to Capt. S. Jenkins stating that Jackie Carson has not attended an AA meeting during the last Qrt and has missed 6 out of 8 meetings therefore not providing any contributions to the program. The subject of this MEMO was for my performance log.

* 7-23-04 Submitted a MEMO requesting advanced leave due to 24 month old child being hospitalized with Pneumonia. My husband was also hospitalized with MRSA and was receiving treatment. Warden Yates was made aware that without the advanced leave it would create a financial hardship for me and my family.

* 7/27/04 The request for advance leave disapprove by Warden Yates. I submitted a letter to Yates stating that it appears that he is discriminating against me for filing EEO.

* 7/ 04 was given AWOL by Lt Rogers in lieu of advanced leave.

* 7/ /04 husband requested advance leave due to MASA and was denied.

* 8/12/04 EEO complaint of discrimination was filed

* 11/9/04 contacted Pike and advised him that I had been removed as an AA program manager.

* 11/19/04 Pike Addressed Warden Holder regarding the AA removal. After investigation the matter Pike discovered that Carson had only missed 3 meetings 2 of which were held on her day off and the 3rd was held while she was assigned the MW shift and was not roster adjusted by the Lt so she could attend. It was found that several other program manager had missed more

meeting yet retained their positions. AW Sweet nor Lt Rogers had the authority to terminate Carson from her position.

*On 2/17/05 my Sick &Annual shift request was placed in the locked Admin. Lt.s box. Mine was lost by the Lt. I did not get to bid like all the other officers. Was made to work shifts and post not by seniority. When I called Captain Barat regarding the matter, he handed the phone to the Time & Attendance clerk who began speaking to Barat in Spanish about me while I was on the phone. Then she said to me "Captain Barat is on his way out and can't talk to you right now."

*3/7/05 Was denied GS-08 promotion. Warden Yates stated you have to have a Lt. In your pocket to get promoted as well as other offensive comments.

* 4/4/05 requested 8 ~~house~~ FMLA due to post traumatic stress to be used on 4/5/05 during the Jail and Bail. Approved on 4/4/05 by Barat.

* 4/20/05 received a Letter from Boyd summarizing my symptoms, diagnoses and prognosis regarding PST related to EEO incident.

* 5/2/05 submitted a CA2 and letter dated 4/20/05 by Boyd describing my condition PTSD to safety for OWCP. Did not request COP or accommodation. No work restrictions were noted by Boyd PHD, I was claiming OWCP to get my counseling bills paid. Lt. Rogers refused to sign my CA-1 so Joey Pitts had to sign as the supervisor.

* 5/10/05 denied promotion to sport specialist. Qualified by exception.

*5/10/05 I read a COA ALL email stating that Ron Gordon was the new safety spec. for OWPC. I immediately called Joey Pitts and told him to make sure that Ronald Gordon did not touch my OWCP file. I advised him that there was conflict between us and I suspected that he would sabotage my file.

*5/10/05Wrote memo regarding inappropriate behavior of Captain Barat with Officer York. Submitted it to SIS Arrington, Warden Peterson, Jennifer Merkle, Legal.

*5/11/05 Jennifer Merkle wrote me an email stating that she delivered the memo. Later I questioned her about it on _/__/05 and she told me that she hand delivered the memo to Personnel, specifically R. Pitcairn. At this time Captain Barat was working in Personnel for the past few weeks.

* 5/13/05 at 9:03 am memo dated 4/20/05 from Boyd was faxed from OWCP file to D Honsted Personal department.

*5/17/05 I was locked in the Corridor for several minutes by Officer Cousson the Control Room Officer who would not answer radio transmission on channel five or the door alarm. I began having panic and contacted the Lt. Grant. I called Personnel to ask if I qualified for the Volunteer Leave Program for PTSD if I needed it in the future. David Honstead stisted my

questions, wrote a memo and stated he had my letter from Dr. Boyd from my OWPC file laying around his desk. I asked him how he got it and he said he heard there was a letter and it was faxed to him from safety.

*5/18/05 I was relieve of duty and placed on enforced leave by the BOP due to the clinical summary from my OWCP file.

* 5/18/05 received letter signed by Pitcairn ordering a fitness for duty exam.

* 5/23/05 Pitcairn retracted the fitness for duty letter and issued a letter stating that information was needed to determine my work status. 8 point letter.

* 5/23/05 attended counseling with Brian Boyd PHD due to traumatic event that occurred on 5/17/05

*6/9/05 Submitted clinical summary dated 5/23/05 from B. Boyd, Ph.D. to Personnel as requested. Date stated stamped re'cd by D. Reyneveld. Only restriction noted was "should not return to current work setting due apparent ongoing workplace sexual harassment and relaliatory actions against her by current employer."

* 6/21/05 attended appointment with family doctor related to PSTD, anxiety, and VHD. Xanax was prescribed and a referral for a psychiatrist evaluation was given.

* 10/3/05 approved for 100% SS permanent disability due to work related injury of PTSD

*12/3/05 letter dated 12/3/05 was issued by Warden T. Johns denying official time for fitness for duty exam. Warden cited Official Time in Master Agreement asan explanation.

*

After hearing about and reading about Management's treatment of Ms. Carson following the April 30, 2004 incident, the Arbitrator must agree with the Union's position that she had reason to believe the fitness-for-duty exam was to be used as an excuse to terminate her employment. Hence, regardless of whether or not the Agency calls it an "investigation," I must rule in favor of the Union. Without doubt, the so called fitness-for-duty exam which Ms. Carson participated in was completely inappropriate.

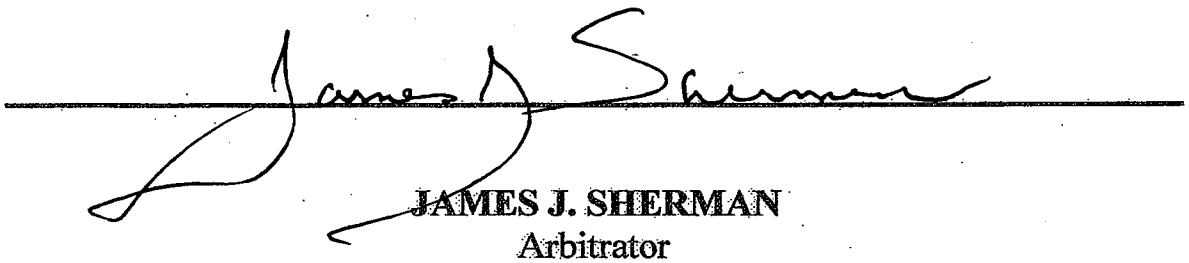
The directors appeared to lack all knowledge of Ms. Carson's duties. Hence, they had no knowledge about the tests that should have been given. Certainly, if she had had a Union Representative accompany her, Ms. Carson would not have had to endure a worthless examination.

AWARD

The Grievance is sustained. The Agency is directed to permit a Union Representative to accompany an employee, if the employee requests it, when the employee is sent for a fitness-for-duty examination.

Provided Further:

The Union requested that the Arbitrator award damages and other specified relief. The Arbitrator cannot honor this request without further information. Hence, I shall retain jurisdiction for 6 months to resolve any disputes if the Parties are unable to reach final agreement in this matter.



JAMES J. SHERMAN
Arbitrator
Tampa, Florida
June 6, 2004