

**JAMES J. SHERMAN,
Arbitrator**

**In the Matter of Arbitration
Between**

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AFGE LOCAL 596)

and)

DEPARTMENT OF JUSTICE)
FEDERAL BUREAU OF PRISONS)
FEDERAL CORRECTIONAL)
COMPLEX COLEMAN FLORIDA)

**Grievance No. 06*54089I
Union Representation at
Fitness for Duty
Examination**

DATES OF HEARING: March 15 and 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

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

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

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

20 C. The Actions At Issue

21 Specifically, the Grievant in this case, Ms. Carson, was ordered, by the Agency, to attend a fitness for duty
 22 examination on December 7, 2005 and again on February 7, 2006. (U. Ex. A.) On both occasions, the Grievant
 23 requested Union representation at the fitness for duty examination(s). (U. Ex. B and L, 6.) Grievant was denied
 24 Union representation on both occasions. (U. Ex. C, D and L, 8.).
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26 As was presented during the hearing of March 15 & 16, 2007, there was much more to the Grievant story
 27 leading up to the actual fitness for duty examination(s). When reviewed in the larger sense, it is apparent as to why she
 28 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.

1 On May 17, 2005, the first day that Ms. Carson was told she was being placed on enforced leave, Ms. Carson
 2 was working in a special housing unit (a secure room with inmate property) as a property officer. (Tr. 44). That
 3 morning, the Grievant arrived for duty only to be harassed by a staff member with whom she had previously had
 4 problems and of which had been reported to management at the time of their occurrence. (Tr. 44). Sometime that same
 5 morning, Ms. Carson attempted to contact someone at the Personnel department and ultimately spoke with Dave
 6 Honsted, a manager in personnel. (Tr. 44) Ms. Carson described the incident of that morning with him and asked Mr.
 7 Honsted a series of questions regarding the Agency's Volunteer Leave Program. (Tr. 44-45) Mr. Honsted asked Ms.
 8 Carson a series of questions and then admitted that he had a copy of Ms. Carson's medical summary from her personal
 9 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
 10 had this document in his possession, at which point he stated that he has heard it was in her file and was curious about
 11 it. (Tr. 45).

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

17 Later that same day, Ms. Carson attended an Affirmative Action Committee function at the Complex Training
 18 Center. (Tr. 46-47) Ms. Carson was then pulled out of that function by Mr. Honsted and Mr. Carmona. (Tr. 47) At that
 19 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).
 20 The Grievant went as far as to ask whether she needed a Union representative at the time she spoke to Mr. Honsted and
 21 Mr. Carmona. (Tr. 47; 117). The Grievant was told "no, we're done." (Tr. 47; 117).

22 In that the Grievant was placed in leave status against her will, it is safe to say that the Grievant was placed on
 23 an enforced leave by the Agency-BOP, which is in fact by definition,
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1 an adverse employment action and amounts to discipline of the Grievant. 5 C.F.R. § 752.402(c)

2 states:

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

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

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

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

20 During cross-examination, Mr. Honsted was unable to recall any conversation with the
21 Grievant on May 17, 2005, as indicated in the Grievant's testimony, or even how he came into
22 possession of the medical summary in question from the Grievant's personal doctor, in the first
23 instance. (Tr. 176-177) Documentation in the form of the Grievant's medical summary, dated April
24 20, 2005, would seem to indicate that it was faxed to Mr. Honsted on May 13, 2005, at 9:03 a.m.
25 (U. Ex. 1-A; Tr. 175). This date and time can be seen in the top left hand corner of the document.
26 This was approximately four (4) days before Mr. Honsted's confrontation with Ms. Carson.

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28 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

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

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

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

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

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

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

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

7 Ms. Carson attended the fitness for duty examination, as compelled, on December 7, 2005 and without
8 representation. (Tr. 52) Upon arrival, Ms. Carson was told to sign a form in which she would agree to bear the costs of
9 the examination. (Tr. 58-59) In fact, the burden is on the Agency to pay for fitness for exams examinations. When the
10 Grievant challenged the assertion that she was responsible for the cost of the examination, she was told that, should she
11 refuse to sign the form, she would be considered as "non-compliant" and that the examination would not continue. (Tr.
12 59-60) She was further told that the Agency would be contacted and advised of her "non-compliance" as well. (Tr. 59-
13 60) In that the Grievant believed she would be perceived as disobeying the order of the Agency and possibly
14 disciplined, she reluctantly signed the form. (Tr. 59)

15 Upon completion of this and other forms, the fitness for duty examination was conducted. (Tr. 61) Ms. Carson
16 testified that Dr. Corwin only met with her for a short time and then only administering the actual hands-on
17 examination. (Tr. 81) The Grievant had no further contact with Dr. Corwin. (Tr. 81-82) The Grievant was then given
18 the physical portion of the examination by Laura Southern. (Tr. 48) The Grievant was unclear as to Ms. Southern's
19 actual position with Lake Center Rehabilitation, but the Grievant believed that Ms. Southern was possibly a nurse. (Tr.
20 48; 70)

21 The Grievant was then administered a series of physical acuteness tests over the course of several hours. (Tr.
22 61) The Grievant soon realized that those acts being administered were not within the guidelines provided by the
23 standards of employment, or at least not as the Grievant understood the guidelines based on the information the
24 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 1/2 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

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

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

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

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

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

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

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

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

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

19 Mr. Honsted was questioned about the business relationship between the Agency and the Lake Center
20 Rehabilitation clinic. (Tr. 199-200) Honsted testified that there is a contractual relationship between the two and that
21 Lake Center Rehabilitation conducted fitness for duty examinations on a case by case basis for the Agency. (Tr. 199-
22 200; 201) The Agency pays for the services of Lake Center Rehabilitation. (Tr. 201). Honsted testified that Lake
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1 Center provides the final written report to the Agency based on which an employee may be disciplined. (Tr. 202).

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

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

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

17 It is clear, by the Grievant's testimony, that Lake Center Rehabilitation did not follow any standards of
18 employment, at least as found in Program Statement 3000.02, for conducting said examination. (Tr. 60-61). It appears
19 that, in fact, Lake Center Rehabilitation was left to its own devices when creating criteria for conducting fitness for duty
20 examinations on Bureau employees, as was testified by Mr. Honsted and Ms. Skeete. (Tr. 205-206; 232-235).
21 Therefore, it is abundantly evident that a Bureau employee, although having an expectation that the
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1 standards of employment would be a basis for a fitness for duty examination, enters into a fitness for duty examination
2 stripped of that expectation. 2. Firearms Portion of the Examination

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

7 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,
8 75).

9 The weapons were loaded by the range owner, with the 9 mm pistol being loaded with three (3) rounds, the
10 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
11 Grievant. (Tr. 70-76)

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

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

- 16 (1) She did not fire this weapon at the three (3) and seven (7) yard line
17 (2) She did not fire at a moving target but fired down the range at a wall
18 (3) She fired two (2) or three (3) rounds
19 (4) She was not given a score at the conclusion at firing this weapon.

20 (Tr. 71-72, 73)

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

- 24 (1) A safety talk
25 (2) Explanation of the nomenclature of the weapon

1 (3) Loading the weapon

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

(5) Emergency reload

4 (6) Firing, at a moving target

5 (7) Receiving a score upon completion of firing (70% passing) (U. Ex.

6 1; Tr. 147-148).

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

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

9 (2) She fired one (1) round

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

11 (Tr. 72-74)

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

14 (1) A safety talk

15 (2) Explanation of the nomenclature of the weapon

16 (3) Loading the weapon

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

18 (5) Firing at a target

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

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

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

25 Upon questioning, Mr. Honsted on the way the Grievant was made to qualify on these weapons
26 during the fitness for duty examination, he was unaware that this portion
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3 4 was even being conducted as part of the fitness for duty examination. (Tr. 206, 215) Mr. Honsted stated that
5 6 the shooting range was not contracted by the Agency but, rather, probably through Lake Center
7 8 Rehabilitation. (Tr. 206) Mr. Honsted did not believe that Ms. Southern, who conducted the firearms portion
9 of the fitness for duty examination, or the range owner, were Bureau certified firearms instructors. (Tr. 215)
10 In fact, they are not. Mr. Honsted was vague in his knowledge of the firearms portion of the fitness for duty
11 examination. (Tr. 206, 214, 215)

12 The Grievant further testified that during the firearms portion of the fitness for
13 duty examination, she was sexually harassed while firing the weapons and thereafter. (Tr.
14 76-80) Ms. Carson related how the range owner told her a story about a real estate sales
15 woman who had been dragged into a bedroom of a house she was showing and raped. (Tr.
16 76-78) Ms. Carson was initially told this story while Ms. Carson was firing the 9MM
17 weapon. (Tr. 76-77)

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

26 At this point the Grievant left the shooting range. (Tr. 80) Carson testified that this
27 incident occurred in the presence of Ms. Southern. (Tr. 79-80) Yet, Ms. Southern did
28 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).

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

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

14 E. Pre Arbitration Procedural History

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

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

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

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

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

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

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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 February 22, 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).

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

2 The Grievant was examined by staff of Lake Center Rehabilitation, acting as representatives of the Agency, at
3 a Doctor's office located in Leesburg, Florida, on December 7, 2005 and again on February 7, 2006.¹ It is clear and
4 undisputed that both examinations were "conducted under unworn declaration," as the examination was ordered by the
5 Agency, and that there was no compliance with the Grievant's *Weingarten* Rights.

6 As a bargaining unit member, Grievant had a right to Union representation. Grievant was denied Union
7 representation during an examination, which was required by the Master Agreement (U. Ex. I) and by statute, *see* 5
8 U.S.C. § 7114(a)(2)(B) (codifying and applying to
9

10 ¹ Agency is defined as "the fiduciary relation which results from the manifestation of consent
11 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
12 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
13 the agent. Id. § 1(3). The facts of this situation make clear that Lake Center Rehabilitation was hired by BOP as its agent
14 to perform the physical fitness for duty examination on Ms. Carson. In this situation the agency was such that Mr. BOP
15 was the principal and Lake Center Rehabilitation was the agent. Agency could either be general or special. Rest. 2d
16 Agency § 3. A special agent is an agent authorized to conduct a single transaction or a series of transactions not
17 involving continuity of service. Rest. 2d Agency § 3(1). In this case, it appears that Lake Center Rehabilitation was a
18 special agent of the BOP for the purpose of conducting a physical fitness for duty examination on Ms. Carson. As
19 such, it is irrelevant that the fitness for duty "examination" was conducted by Lake Center Rehabilitation, rather than
20 BOP as the examination was done at the insistence and direction of BOP, was financed by BOP, and was required of
21 Ms. Carson precisely as the employee of BOP. The legal effect of the examination conducted by Lake Center
22 Rehabilitation, as part of a larger investigation by BOP, under agency principles is equivalent to the examination
23 having been performed by BOP itself. The same is true of the February 7, 2006 examination by Dr. Nandimandalm.
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