**65 FLRA No. 22**

UNITED STATES
NUCLEAR REGULATORY COMMISSION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 208
(Union)

0-AR-4400

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DECISION

September 23, 2010

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

## I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Stephen E. Alpern filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator found that the Agency violated the parties' agreement and § 7114(a)(2)(B) of the Statute by restricting a Union representative's participation in an investigatory interview. For the following reasons, we deny the exceptions.

## II. Background and Arbitrator's Award

The Agency's employees are required to hold a security clearance in order to remain employed with the Agency. Award at 7. The Agency conducted an interview with an employee to determine whether the employee's security clearance should be withdrawn. *Id.* At the employee's request, a Union representative was present. *Id.* The Agency's representative "sought to restrict [the Union representative's] assistance of [the employee] during the interview." *Id.* Specifically, the Agency instructed the Union representative "not to communicate with [the employee] while [the employee] was responding to questions[,]" and instructed the employee that "he could only consult with [the Union representative] after a question was answered and that after he consulted with [the Union representative] he could not 'come back and redirect the question.'" *Id.* at 7-8. On a later date, the Agency sent further questions to the employee by email without notifying the Union representative.[1] *Id.*

The Union filed a grievance alleging that the Agency violated § 7114(a)(2)(B) of the Statute and Article 3.3 of the parties' agreement.[2] The grievance was unresolved and submitted to arbitration where, absent a stipulation of the issues by the parties, the Arbitrator framed the issues, in pertinent part, as follows:[3] "Are employees entitled to *Weingarten* rights[4] in examinations held to determine whether an employee's security clearance[s] should be revoked or suspended? . . . If so, were the employee's rights denied in this case? . . . If so, what shall the remedy be?" Award at 2.

The Arbitrator noted that the parties did not dispute that the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988)

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1. The employee's security clearance was suspended and then revoked, and the employee "was apparently removed from the service and his removal was unsuccessfully challenged." Award at 8. Before the Arbitrator, the parties "stipulated that no remedy is available" to the employee. *Id.*

2. The pertinent wording of § 7114(a)(2)(B) is set forth below. Article 3.3 of the parties' agreement provides, in pertinent part, that "[t]he Union shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of [the Agency] in connection with an investigation if: . . . [t]he employee reasonably believes that the examination may result in disciplinary action against the employee; and . . . [t]he employee requests representation." Award at 3.

3. The Arbitrator also framed issues regarding a "past practice" grievance, but those issues are not relevant here and will not be discussed further. Award at 6.

4. *Weingarten* rights are set forth in § 7114(a)(2)(B) of the Statute. In this regard, § 7114(a)(2)(B) "is intended to provide rights to Federal sector bargaining unit employees consistent with those provided in the private sector by the National Labor Relations Board (Board) in interpreting and applying the National Labor Relations Act and the Supreme Court's decision in *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) (*Weingarten*)." *Headquarters, NASA., Wash., D.C.*, 50 FLRA 601, 606 (1995), *enforced* 120 F.3d 1208 (11th Cir. 1997), *aff'd* 527 U.S. 229 (1999).

(*Egan*) "precludes reviewing authorities from involving themselves in the substance of security clearance determinations." Award at 20. The Arbitrator also noted that "[i]f the purpose of the examination of [the employee] was solely to determine whether [his] clearance should be revoked, one could argue that" § 7114(a)(2)(B) of the Statute would not apply, "because revocation of a security clearance is not a disciplinary action." *Id.* However, the Arbitrator found that the record demonstrated that the interview "was an examination which could have resulted in disciplinary action, even if a determination had been made not to revoke [the employee's] clearance." *Id.* at 21. In this regard, the Arbitrator noted that, during the hearing, the Agency's counsel "acknowledged that information obtained in the course of a security clearance interview could be used in a disciplinary proceeding." *Id.* Thus, the Arbitrator concluded that "an employee has a reasonable fear that discipline, unrelated to security clearance matters, might result from the examination." *Id.*

The Arbitrator then stated:

> This is especially significant as, due to the potential broad scope of security clearance issues, all but the most minor of employee transgressions could become the subject of security clearance investigations. There is nothing in the Agreement to prevent the [Agency] from conducting all investigations into potential employee conduct under the umbrella of a security clearance investigation. Because of the fact that all [Agency] employees must have a security clearance, the [Agency] would have the ability to almost totally erode the rights, granted by both statute and the Agreement, to union representation in investigatory interviews.

*Id.* The Arbitrator concluded, in these circumstances, that the employee was entitled to Union representation during the interview. *Id.* at 22.

Next, the Arbitrator determined that the Agency "unduly restricted" the Union representative with regard to what he was permitted to do during the interview and that

> [t]hese undue restrictions included instructing [the Union representative] not to speak to [the employee] until [the employee] had completely answered a question; not allowing [the employee] to consult with [the Union representative] until after a question had been answered and then not permitting [the employee] to further answer the question; instructing [the Union representative] not to point to documents while [the employee] was answering questions; and, posing questions to [the employee] by e-mail without notifying [the Union representative].

*Id.*

In sum, the Arbitrator concluded that the Agency violated Article 3.3 of the parties' agreement and § 7114(a)(2)(B) of the Statute by restricting the Union representative's participation during the interview and by subsequently sending the employee the email. *Id.* at 23. To remedy the violations, the Arbitrator issued an order directing the Agency to: cease and desist from violating § 7114(a)(2)(B); and post a notice.

## III. Positions of the Parties

### A. Agency's Exceptions

The Agency asserts that the award is based on nonfacts because no evidence supports the Arbitrator's finding that most "employee transgressions" can be the subject of security-clearance investigations and that, as a result, the Agency could "totally erode" *Weingarten* rights by precluding union representation during security-clearance-related examinations. Exceptions at 31, 32. In this regard, the Agency asserts that the security-clearance process may not be used in connection with misconduct that lacks national-security implications. *Id.* at 33-34 (citing Executive Order (E.O.) 12,968, § 2.1(a); the Privacy Act, 5 U.S.C. § 552a(a)(7); and 10 C.F.R. § 10.2).[5] Also in this regard, the Agency contends that "the law presumes that Government

5. E.O. 12,968 Section 2.1(a) provides: "Determinations of eligibility for access to classified information shall be based on criteria established under this order. Such determinations are separate from suitability determinations with respect to the hiring or retention of persons for employment by the government or any other personnel actions." 10 C.F.R. § 10.2 provides, in pertinent part: "The criteria and procedures in this part shall be used in determining eligibility for [Agency] access authorization and/or employment clearance[.]" 5 U.S.C. § 552a(a)(7) provides, in pertinent part, that "the term 'routine use' means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected[.]"

officials will comply with the law and act in good faith in performing their duties." *Id.* (citing *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, *reh'g denied* 541 U.S. 1057 (2004) (*Favish*)). According to the Agency, but for the Arbitrator's alleged error, he would have reached a different conclusion. "For similar reasons[,]" the Agency asserts that the award is contrary to E.O. 12,968, the Privacy Act, 10 C.F.R. § 10.2, and *Favish*. *Id.* at 36 n.31.

In addition, the Agency argues that the award is contrary to law because, as a result of *Egan*, *Weingarten* rights do not apply to Agency determinations as to whether individuals are eligible for security clearances. In this connection, the Agency contends that § 7114(a)(2)(B) does not contain "any specific indication" that it applies in security-clearance-related examinations, and that *Egan* held that security-clearance examinations are not disciplinary in nature. *Id.* at 9. The Agency also contends that representation rights in security-clearance-investigatory interviews derive not from § 7114(a)(2)(B) but from E.O. 12,968 and 10 C.F.R. § 10.22(c), which do not incorporate *Weingarten* rights into the security-clearance process.[6] *Id.* at 13-14. Additionally, the Agency asserts that its security-clearance interview procedures "specifically prohibit cross-examination by the employee's representative, something that would be permissible in interviews where *Weingarten* rights apply." *Id.* at 14.

Further, the Agency claims that the award is contrary to law insofar as the Arbitrator found that the Agency unduly restricted the Union representative's conduct during the interview. *Id.* at 15. The Agency asserts that it is "not challenging the Arbitrator's factual determination[s]" regarding the interview. *Id.* at 20 n.21. However, the Agency contends that the Arbitrator's legal conclusion is erroneous because the Agency was entitled to insist on hearing the employee's own account of the matter under investigation, and it imposed reasonable restrictions to achieve this goal. *Id.* at 17-20 (citing *Dep't of the Treasury v. FLRA*, 707 F.2d 574, 580-81 (D.C. Cir. 1983) (*Treasury*); and *Headquarters, NASA, Wash., D.C.*, 50 FLRA 601 (1995) (*NASA*)). In this connection, the Agency asserts that it "did not impose any restriction before the interview . . ., but only did so after the Union representative's conduct substantially interfered with the Agency's right and interest in obtaining spontaneous answers" from the employee. *Id.* at 21-22. Specifically, the Agency states that its "witness testified that before the ground rules were imposed there were a 'handful of times' of [the Union representative] 'trying to stop [the employee] from answering questions, leaning over and cupping his hand, and whispering in [the employee's] ear and trying to actually answer questions for [the employee].'" *Id.* at 22 n.23. "On other occasions," the Agency claims, "the Union representative directed the employee's attention to text in documents by pointing." *Id.* at 4. According to the Agency, "[a]fter several instances of this behavior on the part of the Union representative, the Agency did insist that [the Union representative] refrain from speaking with or otherwise coaching the employee *while a question was pending*." *Id.* at 22 n.23. *Accord id.* at 21 ("after the Union representative repeatedly had been asked not to interject while a question was pending, the Agency made it clear on the record that once a question was asked, the employee was expected to answer the question unassisted."). However, the Agency contends that it did not prohibit the employee and the Union representative from consulting with each other after a question was answered or from taking breaks as needed. *Id.* at 22.

Moreover, the Agency argues that the award impermissibly expands the *Weingarten* right by applying it to questions sent to the employee by email. Exceptions at 22-27. Specifically, the Agency contends that most, "if not all[,]" of the requirements for finding a § 7114(a)(2)(B) violation are not met in connection with that incident. *Id.* at 25.

Finally, the Agency contends that the award is contrary to management's rights to determine internal-security practices and to discipline employees under § 7106 of the Statute. *Id.* at 27-31. To support its internal-security argument, the Agency cites *United States Nuclear Regulatory Commission v. FLRA*, 25 F.3d 229 (4th Cir. 1994) (*NRC*).

B. Union's Opposition

The Union argues that the award is not based on nonfacts. In this regard, the Union asserts that the Arbitrator determined that *Weingarten* rights applied because the employee reasonably feared discipline, and the Arbitrator's statements challenged by the Agency are "merely dicta[]" and were disputed before the Arbitrator. Opp'n at 57.

6. 10 C.F.R. § 10.22 provides, in pertinent part, that an "individual whose eligibility for an access authorization and/or an employment clearance is in question[]" must be presented with "[a] notification letter[]" that informs the individual "[t]hat the individual has the right to be represented by counsel or other representative at their own expense[.]" 10 C.F.R. § 10.22(c).

The Union also argues that the wording and legislative history of § 7114(a)(2)(B) of the Statute demonstrate that Congress did not exempt security-clearance interviews from the coverage of that statutory section. *Id.* at 17. In addition, the Union contends that *Egan* and its progeny do not apply because those decisions foreclose review of the merits of security-clearance determinations, not the procedural aspects of those determinations. *Id.* at 34.

Further, the Union contends that the Arbitrator correctly found that the Agency's restrictions on the Union representative's conduct during the interview violated § 7114(a)(2)(B). As an initial matter, the Union asserts that the Arbitrator found "a set of facts different than that portrayed in the Agency's exceptions," and that although "the Agency asserts it is not challenging the Arbitrator's factual determinations because the parties are largely in agreement as to what transpired during the interview, the Agency proceeds to do just that." *Id.* at 36, 35. With regard to the Agency's claim that it did not impose restrictions prior to the interview, the Union contends that there was conflicting testimony on that point, but that "[r]egardless of whether the restrictions were announced at the start of the interview or during the interview, the majority of the interview was clearly conducted under the ground rule." *Id.* at 40 n.9.

The Union acknowledges that, "[o]n several occasions, [its representative] did engage in efforts to confer, consult, or otherwise represent [the employee], but the Agency construed these attempts as interruptions and halted them." *Id.* at 5-6. "For example," the Union asserts, "at one point during the examination," the Union representative pointed to a document that had been written by the employee, in order to "tr[y] to remind [the employee] to discuss a particular fact so that [he] could provide a more complete answer." *Id.* at 6. According to the Union, when the Agency admonished the Union representative and told him that he could not give the employee answers, the employee stated, "He is not answering my questions. He is providing me representation." *Id.* The Union also acknowledges that the Union representative "whispered advice into [the employee's] ear[,]" but that, during the hearing, the Union representative explained that he was "just trying to ensure his answer's more complete; correct; accurate; and, more importantly, [that] favorable aspects that he was not completely answering" would be mentioned. *Id.* at 6-7. In addition, the Union contends that the Union representative was "even forbidden from communicating with the Agency before [the employee] completely answered the question[]" because when the Union representative "told the Agency that [the employee] wasn't finished answering a question, the Agency considered that to be an interruption." *Id.* at 41.

With regard to the Agency's claim that it did not prohibit the employee and the Union representative from consulting with each other after a question was answered or from taking breaks as needed, the Union asserts that "[o]mitted from the Agency's version of events is the Arbitrator's factual determination" that they could consult only "after questions were *completely* answered and the employee then *could not revise* his answer." *Id.* at 36. According to the Union, "[t]hese rules also applied to breaks[,]" and, consequently, the Union representative "was not able to clarify any questions to help the employee understand what he was being asked and assist the employee in answering." *Id.*

Moreover, the Union asserts that the award does not impermissibly expand the *Weingarten* right with regard to the email to the employee. *Id.* at 45. In this regard, the Union relies on the Authority's decision in *United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas*, 46 FLRA 363 (1992).

Finally, the Union contends that the award is not contrary to management's rights under § 7106 of the Statute because those rights "must be read in context with other parts of the Statute" and "cannot be read to trump *Weingarten* rights, as doing so would render § 7114(a)(2)(B) a nullity." *Id.* at 47-48 (citing *Fed. Bureau of Prisons, Wash., D.C.*, 55 FLRA 1250 (2000) (*Prisons*) (Member Cabaniss dissenting)).

**IV. Analysis and Conclusions**

A. The award is not based on nonfacts.

To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.*

The alleged nonfacts cited by the Agency involve the Arbitrator's findings that most "employee transgressions" at the Agency can become the subject of security-clearance investigations and that, as a result, the Agency could "totally erode" *Weingarten*

rights by precluding union representation during security-clearance-related examinations. Exceptions at 31, 32. The Arbitrator made the challenged findings only after he addressed the requirements of § 7114(a)(2)(B) – including the requirement that the employee reasonably feared discipline – and found those requirements met. *See* Award at 20-21. Thus, the challenged findings are dicta. *See Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891-92 (2010) (citation omitted) (dicta are statements separate from the award and do not provide a basis for finding an award deficient). As such, the findings do not provide a basis for finding the award deficient. *See id.* Thus, we deny the nonfact exception and the related exception alleging that the challenged findings are contrary to law.

B. The award is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an exception and the award *de novo*. *See NTEU Chapter 24,* 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA,* 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable legal standard. *See U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *Id.*

1. The Finding that § 7114(a)(2)(B) Applies to Security-Clearance Examinations

Section 7114(a)(2)(B) of the Statute provides, in pertinent part, that "[a]n exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at-- . . . any examination of an employee in the unit by a representative of the agency in connection with an investigation if . . . the employee reasonably believes that the examination may result in disciplinary action against the employee; and . . . the employee requests representation." The plain wording of § 7114(a)(2)(B) does not exclude security-clearance-related examinations from the definition of "examination[.]" In addition, the Agency does not cite any Authority or court decisions holding that § 7114(a)(2)(B) does not apply to security-clearance-related examinations. Although the Agency asserts that representation rights in security-clearance-investigatory interviews derive from E.O. 12,968 and 10 C.F.R. § 10.22(c), nothing in those authorities indicates that § 7114(a)(2)(B) is inapplicable to investigatory interviews that are conducted in connection with security-clearance investigations. *See supra*, notes 5 & 6. In addition, although the Agency asserts that its security-clearance interview procedures specifically prohibit "cross-examination" by the employee's representative, the Arbitrator did not find that the Union representative attempted to "cross-examin[e]" anyone. Exceptions at 14. As such, even assuming that the Agency's procedures could trump § 7114(a)(2)(B) in some circumstances, the Agency fails to demonstrate that § 7114(a)(2)(B) does not apply in this case.

In addition, the Agency's reliance on *Egan* is misplaced. In that decision, the Supreme Court held that the Merit Systems Protection Board lacks the authority to resolve the merits of an executive agency's security-clearance determination. 484 U.S. at 530-32. The Authority has held that, under *Egan*, neither arbitrators nor the Authority generally may review the merits of security-clearance determinations. *See IFPTE, Local 3*, 57 FLRA 699, 700 (2002); *P.R. Air Nat'l Guard, 156th Airlift Wing (AMC), Carolina, P.R.*, 56 FLRA 174, 181 n.10 (2000) (Chairman Wasserman dissenting in part). However, the Authority also has held that *Egan* does not preclude arbitrators from resolving issues that do not depend on a review of the merits of a security-clearance determination. *See AFGE, Local 1923*, 39 FLRA 1197, 1205 (1991); *U.S. Info. Agency*, 32 FLRA 739, 745-46 (1988) (*USIA*). For example, an arbitrator may review whether required procedural protections were satisfactorily provided to an employee in connection with the revocation of a security clearance. *See USIA*, 32 FLRA at 745.

The Arbitrator's assessment of whether the Agency violated § 7114(a)(2)(B) of the Statute did not involve a review of the merits of the Agency's security-clearance determination. In fact, as noted previously, the parties stipulated before the Arbitrator that no remedy was available to the employee in connection with the revocation of his security clearance. *See* Award at 8. Thus, nothing in *Egan* precluded the Arbitrator from assessing whether the investigatory interview violated § 7114(a)(2)(B).

For the foregoing reasons, we deny the exception.

2. The Finding that the Agency Denied the Employee the Right to Meaningful Union Representation

The Authority has held that "the purposes underlying [§] 7114(a)(2)(B) can be achieved only by allowing a union representative to take an active role in assisting a unit employee in presenting facts in his or her defense." *Bureau of Prisons, Office of Internal Affairs, Wash., D.C. & Phx., Ariz.*, 52 FLRA 421, 432 (1996) (Member Wasserman dissenting) (*Internal Affairs*) (quoting *NASA*, 50 FLRA at 607)). "A union representative's right to take an 'active role' includes not only the right to assist the employee in presenting facts but also the right to consult with the employee[.]" *Internal Affairs*, 52 FLRA at 432-33. In this connection, the Authority has held that "for the right to representation to be meaningful, the representative must have freedom to assist, and consult with, the affected employee." *Id.* at 433 (citation omitted). This is consistent with *Weingarten*,[7] where the 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[;]" and "[a] knowledgeable union representative could assist the employer by eliciting favorable facts[.]" *Weingarten*, 420 U.S. at 262-63.

However, "a union's representational rights under [§] 7114(a)(2)(B) may not interfere with an employer's legitimate interest and prerogative in achieving the objective of the examination or compromise its integrity." *NASA*, 50 FLRA at 607 (citing *FAA, New Eng. Region, Burlington, Mass.*, 35 FLRA 645, 652 (1990)). In *Weingarten*, the Court, in summarizing the Board's litigative position, stated that an employer "is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." 420 U.S. at 260.

This wording from *Weingarten* has been interpreted as being "directed toward avoiding a bargaining session or a purely adversary confrontation with the union representative and to assure the employer the opportunity to hear the employee's own account of the incident under investigation." *NLRB v. Texaco*, 659 F.2d 124, 126 (9th Cir. 1981) (*Texaco*). Thus, where a union representative disrupts an interview by engaging in interruptions that are "verbally abusive" and "arrogantly insulting," an employer does not violate *Weingarten* rights by limiting the representative's participation. *Yellow Freight Sys., Inc.*, 317 NLRB 115, 124 (1995) (*Yellow Freight*) (representative "not entitled to disrupt the process by verbally abusive and arrogantly insulting interruptions, by conduct that grossly demeaned [an individual's] managerial status in front of an employee and fellow manager and that consisted of violent desk pounding and shouted obscenities, and finally by point-blank falsely calling [an individual] a liar and . . . refusing to immediately leave the office."). In addition, an employer does not violate *Weingarten* rights when it limits the union representative's participation after the representative has counseled an employee to answer a question only once and has prevented the employer from questioning the employee by engaging in persistent objections and interruptions. *Id.* (citing *N.J. Bell Tel. Co.*, 308 NLRB 277 (1992)).

However, the Authority has rejected the position that an employer is entitled to question an employee without *any* interruptions or intervention by the union representative. For example, in *United States Customs Service, Region VII, Los Angeles, California*, 5 FLRA 297 (1981), the Authority adopted a judge's decision in which the judge rejected an argument that an investigator "was entitled to obtain a statement from the employee without interruption from her representative." *Id.* at 307. Specifically, the judge held that "some interruption, by way of comments re[garding] the form of questions or statements as to possible infringement of employee rights, should properly be expected from the employee's representative." *Id.* In this connection, "[t]he employer always retains the option to refrain from conducting the examination in the event it decides that the interview, in the presence of a union representative, is not efficacious." *Id.* In addition, the judge found that even prohibiting the union representative from "pass[ing] notes" to the employee during the interview would impermissibly "circumscribe[] the effectiveness of the representative." *Id.*

The Authority reached a similar conclusion in *Norfolk Naval Shipyard*, 9 FLRA 458 (1982). In that decision, the Authority adopted the judge's finding of a *Weingarten* violation where, by intimidating the employees and attempting to silence their union

7. In interpreting § 7114(a)(2)(B), the Authority has found it appropriate to consider private-sector precedent involving *Weingarten* rights, but "has noted Congress' recognition that the right to representation might evolve differently in the private and Federal sectors, and that Board decisions would not necessarily be controlling in the Federal sector." *NASA*, 50 FLRA at 608 n.5.

representatives, the investigator interfered with protected rights. *Id.* at 473. The judge found a *Weingarten* violation despite the fact that the stewards continued to object, counsel and confer with the unit employees after being told to remain quiet. *Id.*

In addition, the Authority has held that meaningful representation includes the right to make statements that are part of the official record. In this connection, even where a representative has been permitted to confer with an employee and make statements "off the record," the Authority has found no "meaningful representation[]" where there was no indication that off-the-record statements would be considered in making a final determination regarding discipline. *Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Jackson, Miss.*, 48 FLRA 787, 798, 799 (1993), *on recon.* 49 FLRA 171, *recon. denied*, 49 FLRA 701 (1994) (*VAMC Jackson*).

The Board has reached similar conclusions regarding a representative's right to actively participate in an investigatory interview. Specifically, the Board has held that an employer's "right to regulate the role of the representative at the interview . . . cannot exceed that which is necessary to ensure the 'reasonable prevention of such a collective-bargaining or adversary confrontation with the statutory representative.'" *U.S. Postal Serv.*, 288 NLRB 864, 867 (1988) (citation omitted) (*USPS*). The principle that the employer may regulate the role of the union representative "does not state that the employer may bar the union representative from any participation[,]" which would be "wholly contrary to other language in the *Weingarten* opinion which explains that the representative should be able to take an active role in assisting the employee to present the facts." *Texaco*, 659 F.2d at 126. Accordingly, the Board has found a *Weingarten* violation when an interviewer silenced the union representative whenever the representative interrupted the interviewer's questioning of the employee. *USPS*, 288 NLRB at 868. *See also San Antonio Portland Cement Co.*, 277 NLRB 338, 339 (1985) (employer violated *Weingarten* rights by "cut[ting] off [union representative's] attempt to elicit information from employee and telling representative that he was "merely [present] as a witness and was not supposed to speak[]"); *Greyhound Lines, Inc.*, 273 NLRB 1443, 1448 (1985) (employer violated *Weingarten* rights by telling union representative that he must remain silent during interview); *U.S. Postal Serv.*, 254 NLRB 703, 707 (1981) (employer violated *Weingarten* rights where union representative was "not permitted to consult with nor counsel [the employee] in any way or to make any utterance *during the questioning*[]") (emphasis added).

Here, allowing the Union representative to counsel the employee while questions were pending was necessary to afford meaningful representation, particularly given the Arbitrator's finding that, once the employee had answered the question without assistance from the Union representative, he could not "further answer the question[.]" Award at 2. In this connection, as stated previously, § 7114(a)(2)(B) allows a union representative to "take an active role in *assisting a unit employee in presenting facts* in his or her defense.'" *Internal Affairs*, 52 FLRA at 432 (emphasis added). This is consistent with the policies underlying *Weingarten*, which, as stated above, include the considerations that an employee "may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors[,]" and that "[a] knowledgeable union representative could assist the employer by *eliciting favorable facts*[.]" *Weingarten*, 420 U.S. at 263 (emphasis added). *Accord Texaco*, 659 F.2d at 126 (representative entitled to "take an active role in *assisting the employee to present the facts[]*") (emphasis added). In addition, as stated previously, there is no "meaningful representation[]" when there is no indication that statements made by an employee with a union representative's assistance will be part of the official record that the employer considers in deciding whether discipline is warranted. *VAMC Jackson*, 48 FLRA at 799.

By not allowing the Union representative to counsel the employee before he answered questions, and then precluding the employee from adding to his answers after he had answered them without assistance, the Agency did not allow the Union representative to assist the employee in presenting facts in his own defense. Any counseling that the Agency permitted after the answers were completed did not preserve the Union representative's ability to provide meaningful representation to the employee, as required by § 7114(a)(2)(B).

The Agency asserts that it did not impose limitations on the Union representative until the representative "substantially interfered with" the Agency's "right and interest in obtaining spontaneous answers" from the employee. Exceptions at 21-22. However, the Union argues that the evidence was disputed with respect to whether the Agency imposed the limitations prior to, or during, the interview, and that, in either case, "the majority of the interview was clearly conducted under" the restrictions imposed by

the Agency. Opp'n at 40 n.9. The Arbitrator did not make a factual finding that the Agency imposed its restrictions only after the start of the interview or after the Union representative interrupted the questioning. In addition, the Agency asserts that it is "not challenging the Arbitrator's factual determination[s]" regarding the interview. Exceptions at 20 n.21. Accordingly, there is no basis for the Authority to make a factual finding, not present in the award, that the Agency imposed the limitations only after the Union representative substantially interfered with the questioning.

Even assuming that the Agency imposed the limitations only after the Union representative intervened in some manner, the Agency's allegations regarding the nature of the alleged interventions do not support finding that the Union representative engaged in impermissible conduct during the interview. According to the Agency, the Union representative "directed the employee's attention to text in documents by pointing[,]" Exceptions at 4, and also engaged in "trying to stop [the employee] from answering questions, leaning over and cupping his hand, and whispering in [the employee's] ear and trying to actually answer questions for [the employee]." *Id.* at 22 n.23. However, the Agency does not corroborate this claim with any specific examples, and the Arbitrator did not make any findings that the representative acted as alleged. With regard to pointing to documents, the Union acknowledges that this occurred "at one point during the examination," but states that the document had been written by the employee himself and that the Union representative pointed to it only to "tr[y] to remind [the employee] to discuss a particular fact so that [he] could provide a more complete answer." Opp'n at 6. With regard to whispering in the employee's ear, the Union acknowledges that the Union representative whispered "advice" because he was "trying to ensure his answer's more complete; correct; accurate; and, more importantly, favorable aspects that he was not completely answering" would be mentioned. *Id.* at 6-7.

These circumstances provide no basis for finding that the Union representative: engaged in interruptions that were "verbally abusive" and "arrogantly insulting," *Yellow Freight*, 317 NLRB at 124; counseled the employee to answer questions only once, *id.*; prevented the Agency from questioning the employee by engaging in persistent objections and interruptions, *id.*; or attempted to convert the interview into "a bargaining session or a purely adversary confrontation[.]" *Texaco*, 659 F.2d at 126. In addition, although the Union representative attempted to assist the employee in answering questions, he did not preclude the Agency from "hear[ing] the employee's own account of the incident under investigation." *Id.* Further, as discussed previously, given the fact that the employee was not permitted to elaborate upon his initial answers to the Agency's questions, the only opportunity that the Union representative had to meaningfully elicit favorable facts from the employee was while questions were pending. Finally, *Treasury*, 707 F.2d 574, cited by the Agency, does not support setting aside the Arbitrator's finding of a violation, as that decision did not involve *Weingarten* rights under § 7114(a)(2)(B) of the Statute.

For the foregoing reasons, we conclude that the Arbitrator did not err by finding a violation of § 7114(a)(2)(B) in connection with the in-person interview.

With regard to the Arbitrator's finding that the Agency also violated § 7114(a)(2)(B) of the Statute by emailing the employee after the interview, the Authority has recognized that when an arbitrator bases an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient in order to demonstrate that the award is deficient. *See, e.g.*, *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 299 (2000). In such circumstances, if the excepting party does not demonstrate that the award is deficient on one of the grounds relied on by the arbitrator, then it is unnecessary to address exceptions to the other grounds. *See id.* As we have concluded that the Arbitrator did not err in finding a § 7114(a)(2)(B) violation with regard to the interview, and this finding provides a separate and independent basis for his finding of a § 7114(a)(2)(B) violation, we find it unnecessary to resolve the Agency's exceptions to the Arbitrator's finding regarding the email.

For the foregoing reasons, we deny the Agency's exceptions regarding § 7114(a)(2)(B).

3. Section 7106 of the Statute

The Agency asserts that the finding of a *Weingarten* violation is contrary to management's rights to determine internal security practices and discipline employees under § 7106 of the Statute. However, the Authority has stated that § 7106 "cannot be read as being so dominant that it negates congressionally-mandated, fundamental rights found in other parts of the Statute[,]" including "the *Weingarten* right to representation under [§] 7114(a)(2)(B)." *Prisons*, 55 FLRA at 1259 n.14.

As we have denied the exceptions to the Arbitrator's finding of a *Weingarten* violation, finding that the award is contrary to § 7106 would effectively "negate[]" the finding of that violation. *Id.* *NRC*, 25 F.3d 229, cited by the Agency, is inapposite because it involved an issue regarding whether proposals conflicted with the Inspector General Act, not § 7106 or § 7114(a)(2)(B) of the Statute. For these reasons, and consistent with *Prisons*, we deny the Agency's exceptions regarding § 7106 of the Statute.

## V. Decision

The exceptions are denied.[8]

8. As there are no exceptions to the Arbitrator's cease-and-desist order and the direction to post a notice, we adopt those remedies.