IN THE MATTER OF THE ARBITRATION BETWEEN

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, LOCAL 2554,

UNION

AND

DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS AND BORDER PROTECTION, U.S. BORDER PATROL, EL CENTRO SECTOR,

AGENCY

DECISION

AND

AWARD

FMCS CASE NO. 09-0519-56882-A
JOHN J. HERNANDEZ SUSPENSION

ARBITRATOR: John P. McCrory

APPEARANCES:

For the Union:

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The hearing for this matter was held at the El Centro Sector Headquarters of the U.S. Border Patrol, Imperial, California, on December 15, 2009. It was agreed that the parties would simultaneously submit post-hearing briefs, which have been received.

POST-HEARING MOTIONS

The Union submitted two post-hearing motions. The first was a request that I consider new evidence relating to an incident that occurred after the close of the evidentiary hearing. The request was granted for the limited purpose of receiving six sections of a supporting affidavit[1] describing an incident that occurred on December 16, 2009, and subject to the Agency's right to respond. Specifically, the sections state that El Centro Border Patrol agent James Mide was ordered to write a memorandum regarding a traffic accident he was involved in, in which a motorcyclist was seriously injured. The memorandum submitted contained a *Garrity* Preamble,[2] which he was ordered to remove under threat of insubordination. The Agency's response was received and the Union's request to reply to the response was denied.

The Union's second motion asked that references in the Agency's post-hearing brief to the Initial Decision of a Merit Systems Protection Board Administrative Law Judge relating to matters at issue in the present case be struck. Because the ALJ's findings and conclusion were not made on the basis of a full and adequate hearing, the parties were advised that I would disregard references to the Initial Decision.

THE ISSUE

The parties stipulated to the following statement of the issue:

> In accordance with Article 32 M of the parties' Agreement, was the disciplinary action in this case taken for just cause and only for reasons that will promote the efficiency of the service?

The disciplinary action was a 14-day suspension.

RELEVANT CONTRACT LANGUAGE

The section of the parties' collective bargaining agreement (Agreement) that is directly relevant to the dispute is Article 32, Disciplinary and Adverse Actions, Section M, which states:

> The parties agree that letters of reprimand, suspension of less than fifteen days, and other adverse actions will be taken only for appropriate cause as provided in applicable law. Such cause, in the case of actions which are not based on unacceptable performance, shall be just and sufficient and only for reasons as will promote the efficiency of the Service.

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[1] The affidavit was written and signed by Union Counsel Jason L. Aldrich.

[2] The *Garrity* Preamble is described below at pp. 3-4.

THE FACTS

The U.S. Border Patrol, which is within the Department of Homeland Security (DHS), has the mission of protecting the nation's borders. The El Centro, California, Sector (Agency), is one of 20 Sectors and is responsible for 70 miles of the border between the United States and Mexico. Much of the border area is desert.

The Grievant, John J. Hernandez, has been a Border Patrol Agent since 1994. At all times relevant to the dispute, he was assigned to the El Centro Sector. On August 5, 2007, the Grievant was on duty in a dessert area tracking suspected illegal aliens. The temperature was about 115 degrees Fahrenheit. At about 9:30 a.m. the Agency vehicle that he was driving became stuck in the sand. With the assistance of another agent, he attempted, unsuccessfully, to free the vehicle and in the process damaged the vehicle's bumper. At the Grievant's request, his immediate supervisor, Supervising Boarder Patrol Agent Omar S. Ribot, came to the scene with a camera. Mr. Ribot instructed the Grievant to return to the El Centro Station to write a memorandum describing the incident, which he did. Agents are required to submit memoranda documenting incidents that occur when they are on duty.[3]

When he returned to the El Centro Station, the Grievant was given a Notice of Right to Union Representation 31B notice by Supervisory Border Patrol Agent Roy B. Deaguero. The notice is given to agents before they write their memoranda.[4] The memorandum the Grievant wrote contained five paragraphs describing what he was doing when the incident occurred, i.e., tracking suspected illegal aliens, the damage to the vehicle and how it occurred. The first three paragraphs, however, contained what is known, and hereafter referred to, as the "*Garrity* Preamble." It states, in part:

> Therefore, I submit this memorandum at his order and recognizing it as a condition of employment, which I reasonably view as probable consequence of discipline or termination of employment. It is my belief and understanding the agency requires the memorandum solely and exclusively for internal purposes and will not release this document to any other agency, and/or foreign entity; to include and not limited to the Mexican Government Officials. Furthermore, it is my belief and understanding that this memorandum will not and cannot be used against me in any subsequent proceedings, including criminal proceedings, other than disciplinary proceedings within the confines of the CPB.
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> For any and all purposes, I hereby reserve all my right provided to me by the constitution of the Untied States, and especially under the fifth and fourteenth

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[3] It is undisputed that agents are required to submit memoranda when told to do so by a supervisor and that it would be insubordination to refuse. TR 89-90 (Carpenter).

[4] By its terms, the notice is given to agents when being examined by a representative of the Agency, pursuant to the Agreement and the Civil Service Reform Act, when the agent reasonably believes that the examination may result in disciplinary action.

amendments and any other rights prescribed by law. In addition, I reserve my rights afforded me under the doctrines set forth in Garrity vs. New Jersey, 385 U.S. 493 (1967), and Spevack vs. Klien 385 U.S. 511 (1967).

The Grievant gave his memorandum to Mr. Ribot, who later returned it and told him that the *Garrity* Preamble should be removed. When he refused, the Grievant was sent to speak with Acting Assistant Patrol Agent in Charge Roger P. Carpenter. The Grievant's and Mr. Carpenter's versions of their conversation differ. According to Mr. Carpenter, he asked the Grievant to take the *Garrity* Preamble out of his memorandum and, when he was hesitant said, "I can handle this at the station level, I believe, and, you know, this thing shouldn't go anywhere, its minor." [5] The Grievant seemed somewhat in agreement and left. The Grievant, on the other hand, said that after explaining his concerns, Mr. Carpenter assured him that it would not leave the Station and that there wouldn't be any type of disciplinary action.[6]

The following day, the Grievant gave Mr. Ribot a revised memorandum. The *Garrity* Preamble was removed and replaced with a statement indicating that Mr. Carpenter assured him that no disciplinary action would result from the August 5 incident.[7] The second memo was given to Mr. Carpenter who again met with the Grievant. He advised the Grievant that he could not make any guarantees regarding discipline and that the new paragraph should be removed.[8] The Grievant stated that he told Mr. Carpenter that he would change it back to his original memorandum.[9]

The Grievant resubmitted his memorandum to Mr. Ribot in its original form, containing the *Garrity* Preamble. He thereafter met with Acting Patrol Agent in Charge James A. Garvey and Mr. Carpenter. Mr. Garvey asked the Grievant if he was going to remove the *Garrity* Preamble and said if he did not he would be subjecting himself to insubordination.[10] The Grievant refused and Mr. Garvey gave him a direct order to remove the *Garrity* Preamble from his memorandum, which the Grievant chose to disobey. There is no dispute that the Grievant understood the order and intentionally disobeyed it. The accounts of the conversation given by the Grievant and Messrs. Carpenter and Garvey confirm that the Grievant said he was relying on his constitutional

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[5] TR 95-96. Joint Exhibit 2, the proposal to suspend notice given to the Grievant, states that Mr Carpenter directed him to remove the preamble.

[6] TR 191.

[7] Neither the Agency nor the Grievant produced a copy of the second memorandum. Witnesses testified as to their recollection of the new paragraph

[8] TR 98.

[9] TR 191.

[10] TR 102-103 (Carpenter)

rights in refusing to remove the preamble. [11]

On October 3, 2007, Assistant Chief Patrol Agent Frank M. Amarillas issued a proposal to suspend notice to the Grievant, advising that he was proposing a 14-day suspension because the Grievant's refusal to comply with Mr. Garvey's direct order to remove the *Garrity* Preamble from his memorandum constituted insubordination. During his oral reply to the proposal, the Grievant told Deputy Chief Patrol Agent Roy D. Villareal that he had the constitutional right to include the preamble in this memorandum.[12]

On February 8, 2008, Mr. Villareal issued the Agency's decision sustaining the 14-day suspension for insubordination. In determining the appropriate discipline he considered the seriousness of the misconduct, a prior 7-day suspension, which was given, in part, due to his refusal to remove the *Garrity* Preamble from a memorandum submitted in January 2007,[13] and the U.S. Customs and Border Protection Table of Offences and Penalties.[14] The latter specifies penalties ranging from a 14-day suspension to removal for a second and subsequent insubordination offense. He also considered that the Grievant's work performance had been satisfactory, and his tenure with the agency.

The Agency's witnesses explained the reasons for not permitting agents to include the *Garrity* Preamble in their memoranda. Mr. Villareal stated that it is superfluous and irrelevant to the information being solicited. He was concerned about reading multiple paragraphs unrelated to matters being investigated.[15] He further stated:

> [T]he harm here is not so much that I don't believe that it impacts on Mr. Hernandez's protections. It's the aspect of failing to follow an order. Again, it's not the issue of how minor the order is or how great it might be. It's the fact that he failed to follow an order, and that is unraveling our structure.[16]

Messrs. Villareal, Ribot and Carpenter all noted that the Border Patrol is a paramilitary organization and that following orders, minor or major, is critical. Mr. Ribot provided an

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[11] TR 192 (Hernandez). Joint Exhibits 8 and 9. Joint Exhibit 9 is a memorandum written by Mr. Garvey regarding events leading to the Grievant's suspension. Mr. Garvey did not testify, but the parties stipulated that if he would have been called as a witness his testimony would have been in accordance with the statement.

[12] TR 26 (Villareal).

[13] See Agency Exhibits 1 and 2.

[14] Joint Exhibit 13. TR 34-35.

[15] TR 24-25 and 54.

[16] TR 53-54.

example of the harm that would be done if an agent left a static position he was assigned to where there is a flow of illegal immigrants and illegal contraband. He also noted that if an agent is permitted to disobey an order, other agents may question their orders.

The Grievant was not disciplined as result of the August 5, 2007, incident and there was no criminal investigation relating to his conduct. The sole basis for the discipline at issue is his refusal to obey an order to remove the *Garrity* Preamble from his memorandum.

The Union offered evidence regarding the use of the *Garrity* Preamble in the Border Patrol's Tucson and San Diego Sectors. Union Exhibit 3 is a Memorandum of Understanding (MOU) between the Chief Patrol Agent for the Tucson Sector and the President of the Local Union representing the Sector's Border Patrol agents, dated May 21, 2003. The MOU states: "The agreement is entered into so that bargaining unit employees can reduce the amount of text on compulsory written statements, thereby saving time and resources." It proceeds with language that substantially mirrors the *Garrity* Preamble at issue in the present case. It also has a limitation regarding intentionally false or misleading statements.

Union Exhibit 4 is a collection of documents relating to an unfair labor practice charge (ULP) filed with the Federal Labor Relations Authority (FLRA) in May 2001. In the charge, the Local Union representing Border Patrol agents in the San Diego Sector alleged that the Sector committed ULPs when a supervisor instructed an agent to remove a *Garrity* statement from a memorandum he wrote. Specifically, it was alleged that the Sector interfered with the agent's statutory rights and failed to consult and negotiate with the Union. The Sector settled the case in October 2001. The settlement agreement provides, in part, that the Sector will not interfere with, restrain or coerce employees who exercise their rights under the Statute, including the right to exercise the rights afforded under "*Garrity*." It also required that the supervisor in question receive formal training regarding her duties and obligations under the Federal Service Labor-Management Relation Act.

The Union also submitted copies of so called "*Kalkines*" warnings used by agencies within DHS, including the Office of Inspector General (OIG) and Office of the Sector Investigator (OSI), when conducting investigations.[17] These documents state that the employee will be subject to discipline for not answering questions relating to performance of official duties and that answers given, or information or evidence gained from the statements, cannot be used in criminal proceedings, except for prosecution for false statements.

The Agency offered, as Agency Exhibit 5, documents relating to a ULP charge filed by the Grievant as the result of events associated with his 7-day suspension, which was imposed, in part, because he refused to remove the *Garrity* Preamble from the memo he wrote in January 2007. The charge alleged that the Agency changed conditions of employment by requiring that the preamble be removed. During the investigation of the charge, the FLRA determined that at times the Agency ordered the preamble removed and, at other times, allowed the preamble to

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[17] Union Exhibits 5-8. Authority for the *Kalkines* warnings is found in *Kalkines v. United States*, 473 F.2d 1391 (1973).

remain in statements. The Regional Director concluded that because there was no consistent past practice, the change of working condition refusal to bargain charge could not be sustained.

THE AGENCY'S POSITION

The Agency contends that it has proved the necessary elements of the charge that the Grievant was guilty of insubordination, in that: a lawful order was given; he disobeyed the order; and the disobedience was willful and intentional. If an employee is given an order that he disagree with, the appropriate response is to "obey now" and "grieve later." The narrow exceptions to this rule, i.e., obedience would put the employee in a dangerous situation or cause the employee irreparable harm, are not applicable in this case. The agency asserts that adherence to this rule is essential to the functioning of the Border Patrol, which is a paramilitary organization. More specifically it argues that:

- Compliance with Mr. Garvey's order would not have placed the Grievant in a dangerous situation.

- The Union's claim that the Grievant's compliance with Mr. Garvey's order to remove the *Garrity* Preamble from his memorandum would have caused waiver of his Fifth Amendment rights fails for three reasons: the Grievant's Fifth Amendment Rights were not at stake; the *Garrity* Preamble did not serve to protect those rights; and even if there was potential harm, it was not irreparable because of the availability of alternative processes to provide remedies.

- Employment cases interpreting *Garrity* have developed three preconditions that must be present for Fifth Amendment rights to be at stake. None are met in this case.

    - First, the statement must be made in response to a criminal, rather than an administrative, investigation. The present case involved an administrative investigation relating to damage to the vehicle the Grievant was driving while on duty.

    - Second, the employee must have a reasonable belief that the statement will be used in a criminal prosecution. The Grievant could not have such a reasonable belief because of minor damage that was done to the car he was driving. His purported belief that the memorandum could be used to prosecute him for not continuing to follow illegal aliens is so unlikely that it is not credible.

    - Third, after an employee refuses to provide a statement, the agency must compel the employee to waive the Fifth Amendment right against self-incrimination under threat of termination. The Grievant did not actually or reasonably believe that his memorandum was compelled under threat of discharge. No Agency official threatened him with termination and the Agency had no role in any impression the Grievant might have had that refusal would be met with termination of employment. He voluntarily submitted the memorandum without claiming the

Fifth Amendment privilege, thereby waiving it. By submitting the memorandum containing the *Garrity* Preamble, rather than remaining silent by refusing to submit the memorandum, he failed to take advantage of the only option he had and forever waived his Fifth Amendment privilege. The preamble itself does not exercise the privilege.

- The *Garrity* Preamble did not affect the Grievant's Fifth Amendment Rights. The Agency could find no case law that would support the conclusion that it is required to demonstrate compulsion, protect constitutional rights against waiver or benefit an employee in any way. The Grievant's subjective belief, or even substantial reason to believe, that Mr. Garvey's order was improper, would not justify disobedience.

- Assuming that the Grievant's Fifth Amendment rights were at stake and the *Garrity* Preamble had beneficial effect, removal would not have caused irreparable harm because he had alternative means to protect his rights.[18] First, he could have filed a ULP charge with the FLRA. Second, if his memorandum had been used in a criminal prosecution he could have filed a motion to suppress. Finally, the Grievant could have sought damages in a civil action against Agency officials for constitutional violations.

- A nexus exists between the Grievant's insubordination and the efficiency of the Border Patrol and its ability to accomplish its primary mission. There is no set of underlying circumstances that would entitle a Border Patrol Agent to disobey a supervisor's order to remove the *Garrity* Preamble from a memorandum because it is superfluous and unrelated to matters being investigated. The seriousness of the underlying incident is immaterial.

For the foregoing reasons, the Agency requests that the Grievant's 14-day suspension be sustained and the grievance be denied.

THE UNION'S POSITION

The Union contends that, in the context of the present case, inclusion of the *Garrity* Preamble was necessary to protect the Grievant's constitutional rights. It notes that Border Patrol agents are required to fulfill tasks assigned to them and they are subject to criminal penalties if their actions are perceived to be criminal. Agents routinely have assignments that give rise to such concerns. The Grievant had good faith concerns that the incident he was required to document in the memorandum at issue could have had criminal consequences and he was, therefore, entitled to disobey the order to remove the preamble. More specifically, the Union argues that:

- An exception to the "obey now" and "grieve later" rule provides that an employee need not comply with an order that may cause irreparable harm, which can only be determined considering the employee's reasonable belief at the time an order was disobeyed, not in

[18] The Agency cites the Blacks Law Dictionary definition of "irreparable injury" as harm that "cannot receive reasonable redress in a court of law."

hindsight. The Grievant had the right not to obey Mr. Garvey's order because it caused irreparable harm to his Fifth Amendment rights that are beyond the control of the Agency's administrative procedures to remedy. Inclusion of the preamble was the only way to document that the statement was compelled and therefore protected.

- The mandate of the "great privilege" against self- incrimination does not tolerate an attempt, regardless of the ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of loss of employment. The discipline that could have been imposed against the Grievant included termination. The constitutional violation in the present case is coercion to waive Fifth Amendment Rights. His refusal to remove the preamble from his memorandum has the same constitutional protection as a refusal to answer questions.

- Fifth Amendment protection does not require that an employee has a reasonable belief of possible criminal liability. The case law shows that the compulsion to waive immunity is the controlling factor.

- The Grievant was not adequately assured that statements made in his memorandum, or their fruits, would not be used in a criminal prosecution as required by the *Kalkines* case. The Union notes that: *Kalkaines* warnings and assurances are routinely given by DHS investigative agencies; *Garrity* assurances are routinely given to agents in the Tucson Sector under the terms of an MOU; and inclusion of a *Garrity* Preamble is permitted in the San Diego Sector.

- The Agency seeks to avoid the giving *Kalkines* assurances on the basis that the *Garrity* Preamble is extraneous and unrelated to the incident being investigated. In the present case, by so doing, it denied the Grievant his constitutional rights, making Mr. Garvey's order unlawful.

- The Grievant had legitimate concerns regarding use immunity for his memorandum because: he had routinely incorporated the *Garrity* Preamble in his memoranda in the past to document that they were compelled; he was concerned about a criminal investigation regarding the five aliens because he was unsure whether he requested that another agent follow them; Mr. Carpenter's change in stance regarding the potential use of his memorandum; and without the *Garrity* Preamble, it would be difficult to establish use immunity for his memorandum.

For the foregoing reasons, the Union requests a finding that there was not just cause for the 14-day suspension of the Grievant. The remedy sought is cancellation of the suspension and an award of back pay to the Grievant for all pay and benefits lost as a result his suspension, in accordance with the federal Back pay Act, codified at 5 U.S.C. § 5596. The Union also requests a finding that it shall be entitled to move the Arbitrator for attorney's fees and costs to which it may be entitled, pursuant to the federal Back pay Act, codified at 5 U.S.C. § 5596.

DECISION

The Agency has the burden of proof to establish, by a preponderance of the evidence, that the Grievant was suspended for just cause and only for reasons that will promote the efficiency of the Agency. The parties strongly believe in the correctness of the respective positions and have advocated their positions extremely well. On the basis of the evidentiary record and arguments presented, I find that the Agency has not satisfied its burden and that the grievance should be sustained. Findings and conclusions regarding determinative issues are set forth in the Decision that follows.

Statements Need Not Be Made in Response to a Criminal Investigation

Contrary to the Agency's assertion, statements need not be made in response to a criminal investigation to be within the protection of the Fifth Amendment. The privilege against self-incrimination can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, where the witness reasonably believes that the statement may be used against him in a criminal proceeding. *Kastigar v. United States*, 406 U.S. 441, 444-445 (1972); *Ashford v. Department of Justice*, 6 M.S.P.R. 458, 465 (1981). Since the test is whether the person providing a statement might later be subject to criminal prosecution, the privilege is available in civil as well as criminal proceedings. *Lefkowitz v. Cunningham*, 431 U.S. 801, 804-805 (1997).

The Grievant Did Not Waive His Fifth Amendment Rights

The Agency contends that the Grievant waived his Fifth Amendment Rights by submitting his memorandum, even though it contained the *Garrity* Preamble. It argues that he had to choose between remaining silent and submitting the memorandum and by doing the latter he failed to take advantage of the one option he had preserve his right to the privilege.

There is no special formula for asserting or claiming the Fifth Amendment privilege and an employee need not have the skill of a lawyer to invoke its protection. *Quinn v. United States*, 349 U.S. 155, 162-163 (1955). The clause must be given a liberal construction in favor of the right it is intended to secure. Id.; *Kastigar* at 444-445. A layman cannot be expected to know what lawyer and judges argue about. *Kalkines v. United States*, 473 F2d 1391 1396 (1973).[19]

In the present case, the Grievant's memorandum clearly stated that he was asserting his Fifth Amendment rights in terms that should be clear to anyone reading it. Mr. Garvey's order placed him in the position of choosing between removing the *Garrity* Preamble and, in his view, foregoing his constitutional rights by not documenting that the memorandum was compelled, or being disciplined for insubordination. Mr. Villareal, who issued the Grievant's suspension decision, acknowledged that the best way for an agent to document that a memorandum is

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[19] The Agency cross-examined the Grievant to establish that he is not an expert on constitutional law.

compelled, and cannot be used in a criminal proceeding, is in the memorandum itself.[20]

The government cannot penalize the assertion of the privilege. *Lefkowitz* at 806. Mr. Garvey's order placed the Grievant in the position of choosing between a "rock and the whirlpool," which is not permitted. *Garrity v. State of New Jersey*, 385 U.S. 493, 495 (1967). The protection of the Fifth Amendment is not limited to situations where the person asserting its privilege has remained silent. *Garrity*. Accordingly, I find that the Grievant asserted the privilege and reject the Agency's argument that he failed to exercise it and, thereby, waived his constitutional rights.

Exceptions to Obey and Grieve Rule

There is no question that the "obey now" and "grieve later" rule is important to the Agency in carrying out its mission. The hypothetical example offered by the Agency during Mr. Ribot's testimony, regarding an agent abandoning his duty assignment provides an excellent example. However, there are important exceptions to the rule. A recognized exception is an order given by a supervisor that the agency is not entitled to have obeyed because of the significant adverse impact of compliance on the employee. Orders that cause the surrender of constitutional rights, violate the attorney work product privilege, and cause invasion of an employee's privacy rights are examples. *Fleckenstein v. Department of the Army*, 63 M.S.P.R. 470, 473-474 (1994); *Cooke v, United States Postal Service*, 67 M.S.P.R. 401, 407-408 (1995); *Pedeleose v. Department of Defense,* 110 M.S.P.R. 508, 514-515 (2009); *Harris v. Department of the Air Force*, 62 M.S.P.R. 524, 529 (1994).

Under this exception, to prove a charge of insubordination when an employee offers an explanation for his failure to obey, the agency must show that the employee willfully refused to obey an order entitled to be obeyed. *Fleckenstein* at 473. An employee's failure to show that harm would have resulted from compliance with an order does not relieve the agency of its burden of proving that the order was one it was entitled to have obeyed. Id. at 474.

This is not a case of an agent refusing to carry out a duty assignment, like the hypothetical example given by Mr. Ribot, or alleged unacceptable performance.[21] The case involves constitutional rights and falls within the exception discussed above. Accordingly, the Agency has the burden of showing that Mr. Garvey's order was entitled to be obeyed. For reasons discussed in this decision, I conclude that the agency has not met that burden.

The Grievant's Reasonable Belief of Termination

The Grievant was advised that he would be disciplined for insubordination if he refused Mr. Garvey's order. Under the Table of Offenses and Penalties, he was subject to removal for that offense and removal was considered by Mr. Villareal. Although Mr. Villareal decided to suspend the Grievant, he could not have known that at the time he disobeyed the order. The

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[20] TR 47 and 49-50.

[21] See Article 32, Section M of the Agreement.

constitutional protections at issue have been applied in situations like the present one, where removal was an option, but the penalty imposed was a suspension. *Fleckenstein* at 473-475.

On the basis of the record in this case, I find that the Grievant had a reasonable expectation or belief that termination could result from disobeying Mr. Garvey's order. In addition, I find that the Agency, by the actions of its supervisor, had a direct role in causing that expectation or belief.

The Grievant's Reasonable Belief of Criminal Consequences

The Agency argues that the Grievant's purported concerns that his memorandum could be used to prosecute him for not continuing to follow illegal aliens is so unlikely that it is not credible. It also contends that it was never put in the position of determining if there was a reasonable belief because the Grievant did not exercise his constitutional rights.

There is specific reference in the Grievant's memorandum to tracking illegal aliens. The Grievant testified that he didn't know what had happened to them and was concerned for their safety because of the heat. He said he was also concerned about accountability if something happened to them because he could not recall reporting that he could not continue tracking them after his vehicle became stuck in the sand.[22] This influenced his decision to insert the *Garrity* Preamble.

There is testimony from Agency and Union witnesses that an agent who cannot continue tracking illegal aliens who may be at risk in the desert should report the situation so other agents can assist to ensure their safety.[23] The Agency's BORSTAR team has the specific mission of rescuing individuals who are at risk. I conclude that the Grievant's stated concerns are credible and sufficient to support a finding that he had a reasonable belief regarding the potential for criminal consequences flowing from his memorandum. The Agency's waiver rational for not having addressed the question is unpersuasive.

Alternative Means of Protecting Fifth Amendment Rights

The Agency argues that the Grievant could not suffer irreparable harm from the order to remove the *Garrity* Preamble from his memorandum because he had alternative means to protect his Fifth Amendment rights. Specifically, it is asserted that he could have filed a ULP charge with the FLRA, could have filed a motion to suppress if the memorandum had been used in a criminal prosecution, or sought damages in a civil action against Agency officials

It is recognized that irreparable harm can occur where the Agency's actions cause harm that "would not readily be cured during the course of the appeal of any effected disciplinary action because it could have been very broad and deep, and beyond the scope of the pending disciplinary action." *Cooke* at 407-408; *Fleckenstein* at 474. This has specific application in the

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[22] TR at pp. 193-194 (Hernandez).

[23] TR pp. 78-82 (Ribot), pp. 115-116 (Carpenter) and pp. 133-134 (Moran).

present case. The Grievant should not be exposed to the potential cost and inconvenience of a criminal prosecution or a suit for damages against Agency officials. By comparison, granting immunity to the Grievant or permitting him to keep the *Garrity* Preamble in his memo would have been relatively costless to the Agency. *Uniformed Sanitation Men Association v. City of New York*, 426 F.2d 619, 628 (1970).

Regarding the Grievant's option to file a ULP charge, he chose instead to exhaust his remedies under the parties' collective bargaining agreement. This was an appropriate choice.

For the foregoing reasons, I find no merit in the claim that the Grievant could not have suffered irreparable harm because alternative means were available to protect his rights.

The Agency's Policy Regarding the *Garrity* Preamble

Formative Fifth Amendment cases in the employment area, including *Garrity* and *Gardner,* involved police officers who, like the Grievant and other El Centro Border Patrol agents, were required to give statements regarding incidents occurring while they were on duty. The Border Patrol is a paramilitary agency and its agents perform duties that are similar to those performed by police officers. Their required statements or memoranda regarding incidents or events that occurred while on duty, like required statements made by police officers, could contain incriminating statements or statements that could lead to incriminating evidence. Border Patrol agents, like police officers, are afforded full Fifth Amendment rights.

The policy or rule the agency is enforcing is uncategorical. The Agency asserts that there is no set of underlying circumstances that would entitle an agent to disobey a supervisor's order to remove the *Garrity* Preamble from his memorandum, because it is superfluous and unrelated to matters being investigated. The concern is with following an order irrespective of its context or significance. I find this limitation on the rights of agents, which was enforced in the present case, to be at odds with Fifth Amendment protections documented in *Garrity*, *Gardner*, and cases that have followed their lead.

The Agency has "relatively costless" alternative courses of action that would address its stated concerns without infringing the rights of agents. It could follow the Tucson Sector example and acknowledge that all memoranda are compelled and accord agents the *Garrity* protections. As the Tucson MOU states, this would have the benefit of reducing the amount of text in memoranda. An appropriate statement could be provided to agents with the 31b notice that is routinely provided, like the *Kalkines* warning used by the OIG and OSI.

The Agency could also simply permit agents to include the *Garrity* Preamble in their memoranda. The dismissal notice for the Grievant's ULP charge shows that there was not a consistent practice regarding requiring its removal from memoranda.[24] This undermines concerns that inclusion of the preamble significantly undermines the efficiency of the Agency.

[24] Other evidence in the record supports this conclusion.

The experience in the San Diego Sector is also relevant. Although, the ULP settlement was not the result of adjudicating the merits if the charge, it does demonstrate that the constitutional rights of agents must be respected and accommodated. The Border Patrol is a national organization and the present case concerns constitutional considerations that apply in all of its sectors.

Conclusion

In accordance with the findings and conclusions in the foregoing decision, and under the specific circumstances of this case, I find that the Agency has not met the required burden of proof to establish just cause for the Grievant's suspension or that the suspension was only for reasons as will promote the efficiency of the Agency. The denial of constitutional rights cannot be the foundation for just cause and cannot reasonably be shielded by the claim that it will promote the efficiency of the Agency.

AWARD

The grievance is sustained. There was not just cause for suspending Border Patrol Agent Hernandez for refusing to obey the order to remove the *Garrity* Preamble from his memorandum. The suspension shall be withdrawn by the Agency and Agent Hernandez shall be accorded the applicable remedies provided for in 5 U.S.C. § 5596, including compensation for lost pay and benefits caused by his suspension.

The request that I become involved in the Union's effort to seek attorney's for the Union under the provisions of 5 U.S.C. § 5596 is denied.

March 29, 2010

John P. McCrory

John P. McCrory, Arbitrator