

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF JUSTICE WASHINGTON, DC and U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL WASHINGTON, DC	
Respondents And AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party/Union	Case No. WA-CA-80156

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before:
OCTOBER 19, 1998, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

GARVIN LEE OLIVER

Administrative Law Judge

Dated: September 16, 1998
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM
1998

DATE: September 16,

TO: THE FEDERAL LABOR RELATIONS AUTHORITY

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
WASHINGTON, DC

and

U.S. DEPARTMENT OF JUSTICE
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON, DC

Respondents

CA-80156 And Case No. WA-

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the motions, exhibits, and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, DC 20424

U.S. DEPARTMENT OF JUSTICE WASHINGTON, DC and U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL WASHINGTON, DC	Case No. WA-CA-80156
Respondents And AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party/Union	

Harry E. Jones
Counsel for the Respondent

Christopher M. Feldenzer
Patricia Armstrong
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The issue in this unfair labor practice case is whether the Respondents failed to comply with section 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7114(a)(2)(B), in violation of section 7116(a)(1) and (8) of the Statute, when the U.S. Department of Justice, Office of the Inspector General special agents denied the request of Immigration and Naturalization Service bargaining unit employee Tae Johnson

for Union representation at an examination in connection with an investigation.

Subsequent to the filing of the complaint and the answer, Counsel for the General Counsel moved for summary judgment¹, and Counsel for the Respondents filed a response to the motion and a cross-motion to dismiss the complaint.

Considering all the pleadings, affidavits, and exhibits, it appears that there are no genuine issues of material fact and that the General Counsel is entitled to summary judgment as a matter of law. Accordingly, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Parties and Their Components

The Respondent, U.S. Department of Justice, Washington, DC, (DOJ), is an agency under 5 U.S.C. § 7103(a)(3). The Respondent, U.S. Department of Justice, Office of the Inspector General (OIG), Washington, DC and the U.S. Department of Justice, Immigration and Naturalization Service (INS), Baltimore, Maryland, are components and organizational entities of DOJ.

The American Federation of Government Employees, AFL-CIO (AFGE), National Immigration and Naturalization Service Council (Immigration Council), is the exclusive representative of a unit of INS employees appropriate for collective bargaining. AFGE, Local 2756 is an agent of the AFGE, Immigration Council for purposes of representing employees of the INS facility in Baltimore, Maryland.

OIG Investigation of Theft from INS

Based upon a report from INS in August 1996, OIG initiated a criminal investigation into the apparent theft of approximately \$2,600 from a safe at the INS Caton Center detention facility. The missing money belonged to individuals who had been detained there by the INS.

As part of its investigation from April to July 1997, OIG interviewed and administered polygraph examinations to

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The General Counsel also moved to withdraw the allegations of the complaint involving the Respondent Immigration and Naturalization Service. The General Counsel's unopposed motion is granted, and the caption of the case is changed accordingly to remove INS as a Respondent.

several individuals including Tae Johnson, an employee under 5 U.S.C. § 7103(a)(2) and a member of the bargaining unit. Johnson is employed as an INS Detention Enforcement Officer.

Criminal Prosecution Declined; Administrative Investigation Continues

On or about October 15, 1997, the results of the investigation were presented to the U.S. Attorney, who declined prosecution. At that point, OIG converted the criminal investigation into an administrative investigation.

OIG Special Agent Mari McCann arranged with INS Baltimore for another interview of Johnson. Early on the morning of October 22, 1997, INS Baltimore told Johnson to report to the OIG Washington, DC, field office for an interview. Johnson immediately contacted AFGE, Local 2756 shop steward Gary Neuerburg and asked Neuerburg to accompany him to the interview. Johnson picked up Neuerburg at the INS Baltimore office and the two proceeded to Washington, DC.

Union Representation Not Allowed

Johnson and Neuerburg were met in the OIG Washington field office reception area by OIG Special Agent McCann. Johnson introduced Neuerburg to McCann as his Union representative.

McCann ascertained that Neuerburg was a representative of AFGE, Local 2756 and then informed Johnson and Neuerburg that Johnson was not permitted to have a union representative present during the interview in accord with U.S. Department of Justice, Washington, DC et al. v. FLRA, 39 F.3d 361 (D.C. Cir. 1994) (DOJ). Neuerburg responded that a Fifth Circuit decision allowed such union representation. McCann replied that they were not within the Fifth Circuit's jurisdiction and were following the decision of the D.C. Circuit. McCann provided Neuerburg with a copy of relevant portions of the Inspector General's Manual, which explained that, due to the conflicting court decisions, OIG's obligation to honor an employee's request for union representation depended in part on where the interview took place. McCann also furnished Neuerburg an article from the Federal Times newspaper, which discussed the D.C. Circuit opinion.

Neuerburg advised Johnson that OIG would not allow him to represent Johnson during the interview. Neuerburg then left the office and waited in the lounge near the entrance to the building.

The Johnson Examination

The interview of Johnson was conducted by both OIG Special Agent McCann and OIG polygrapher Glenn Powell and lasted approximately 1 ½ hours. The meeting was an examination in connection with an investigation surrounding the theft of property from the safe at the Caton Center facility. It was reasonable for Johnson to believe that the examination could result in disciplinary action. Johnson was required to sign a form which provided that failure to answer any question could be used for disciplinary action or termination of his employment. During the course of the interview, Johnson repeatedly denied any involvement in the theft.

OIG Jurisdiction

OIG investigates waste, fraud, and abuse in DOJ programs and operations as well as allegations of misconduct and criminal wrongdoing on the part of DOJ employees in components other than the Drug Enforcement Administration and the Federal Bureau of Investigation. In this case, the employee being investigated worked for INS, a DOJ component, and INS could use the OIG report of the allegations and facts collected during the investigation as the basis for taking administrative action against the employee.

OIG within DOJ, as within other specified agencies, was established by the Inspector General Act of 1978, as amended, 5 U.S.C. app. §§ 1-12 (1988), to, among other things, "create independent and objective units -- (1) to conduct and supervise audits and investigations relating to the programs and operations" and "(3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies[.]" 5 U.S.C. app. § 2(1) and (3). The Inspector General (IG) is appointed by the President with the consent of the Senate. 5 U.S.C. app. § 3. The IG has the duty and responsibility "to provide policy direction for and to conduct, supervise, and coordinate" investigations. 5 U.S.C. app. § 4(a)(1). The IG reports to and is under the general supervision of the Attorney General and Deputy Attorney General, but neither they nor anyone else in the Department can "prevent or prohibit the Inspector General from initiating, carrying out, or completing" any investigation. 5 U.S.C. app. § 3 (a). Further, the Attorney General may intervene in an OIG investigation only in specific circumstances set forth in the Inspector General Act, generally involving national security, 5 U.S.C. app. § 8E(a)(1) and (2), none of which is present in the instant case.

Special Agent McCann, as the lead agent on the case, was at no time directed to take any action or to defer from taking any action by anyone outside of the OIG.

Discussion and Conclusions

Sections 7114(a) (2) (B) and 7116(a) (1) & (8) of the Statute

Section 7114(a) (2) (B) provides:

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--

* * *

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if--

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

(ii) the employee requests representation. . . .

Section 7116(a) (1) and (8) provides:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * *

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Elements of the Examination

There is no dispute that Johnson, an INS employee in the unit represented by AFGE, Local 2756, was examined by OIG agents in connection with an investigation and

reasonably believed that his examination by OIG agents could result in disciplinary action against him.

Further, the record establishes that Johnson effectively requested representation and that it was denied by an OIG agent. Consistent with section 7114(a)(2)(B), an employee's request for representation need not be made in a specific form, but must be sufficient to put the respondent on notice of the employee's desire for representation. Norfolk Naval Shipyard, Portsmouth, Virginia, 35 FLRA 1069, 1073-74 (1990); U.S. Immigration and Naturalization Service, U.S. Border Patrol, Del Rio, Texas, 46 FLRA 363, 373 (1992); U.S. Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, New York, 27 FLRA 874, 879-80 (1987). In this case, Johnson brought Union representative Neuerburg from Baltimore to Washington, DC, for the interview and specifically introduced Neuerburg to OIG Agent McCann as his Union representative. After McCann ascertained that Neuerburg was a representative of AFGE, Local 2756, McCann made clear that Johnson was not permitted to have a union representative present during the interview. The totality of the circumstances leave no doubt that OIG was on notice of Johnson's desire for representation and denied that representation based on its policy of following the decision of the D.C. Circuit in DOJ, supra.

OIG Violated the Statute as Representative of the Agency

The fundamental issue presented is whether the OIG Special Agents who conducted the examination of employee Johnson on October 22, 1997, were acting as representatives of DOJ, the agency that was the employer of the appropriate unit in which Johnson was employed.

Respondent OIG's position is that it complied with section 7114(a)(2)(B) as interpreted by the D.C. Circuit in DOJ. In that case, the court held that the OIG is not the "agency" for purposes of section 7114(a)(2)(B) and that no right to union representation attaches when an OIG agent conducts an investigatory interview.

In Headquarters, National Aeronautics and Space Administration, Washington, D.C. and National Aeronautics and Space Administration, Office of the Inspector General, Washington, D.C., 50 FLRA 601 (1995) (NASA), enf'd sub nom. FLRA v. National Aeronautics and Space Administration, Washington, DC et al. v. FLRA, 120 F.3d 1208 (11th Cir. 1997), the Authority, after a thorough analysis of the Statute, rejected the D.C. Circuit's position in DOJ, and held that NASA-OIG was a "representative of the agency"

within the meaning of section 7114(a)(2)(B). The Authority in NASA concluded:

(1) the term "representative of the agency" under section 7114(a)(2)(B) should not be so narrowly construed as to exclude management personnel employed in other subcomponents of the agency; (2) the statutory independence of agency OIGs is not determinative of whether the investigatory interviews implicate section 7114(a)(2)(B) rights; and (3) section 7114(a)(2)(B) and the IG Act are not irreconcilable.

50 FLRA at 614.

It is also noted that the OIG examination at issue was conducted as part of an administrative investigation, and the OIG report of that investigation could be furnished to INS, Baltimore for its use in determining whether to proceed with disciplinary action. See also Department of Defense, Defense Criminal Investigative Service, Defense Logistics Agency and Defense Contract Administration Services Region, New York, 28 FLRA 1145 (1987), enf'd sub nom. Defense Criminal Investigative Service, Department of Defense v. FLRA, 855 F.2d 93, 100 (3rd Cir. 1988) and U.S. Department of Justice, Office of the Inspector General, Washington, DC, and U.S. Immigration and Naturalization Service, El Paso, Texas, 47 FLRA 1254, 1261 (1993). But see Federal Labor Relations Authority v. U.S. Department of Justice, Washington, DC et al., 137 F.3d 683 (2nd Cir. 1997).

Accordingly, in this case, I conclude that OIG is a representative of DOJ within the meaning of section 7114(a)(2)(B), and unit employee Johnson of INS, Baltimore, another component of DOJ, was entitled to have union representation at the examination conducted by OIG agents. By denying the requested union representation, OIG failed to comply with section 7114(a)(2)(B), interfered with this right under the Statute, and violated section 7116(a)(1) and (8) of the Statute, as alleged.

DOJ Violated the Statute

Respondent DOJ urges that no violation can be found against DOJ because the General Counsel has not established any facts which demonstrate that DOJ had any involvement in, or responsibility for, the examination of Tae Johnson on October 22, 1997. Respondent asserts that dismissal of DOJ would be consistent with the Authority's holding in U.S. Department of Justice, Washington, DC and U.S. Immigration

and Naturalization Service, Northern Region, et al., 46 FLRA 1526 (1993), vacated and remanded on other grounds sub nom. U.S. Department of Justice, Washington, DC et al. v. FLRA, 39 F.3d 361 (D.C. Cir. 1994).

In NASA, the Authority announced that it would no longer follow Authority precedent declining to hold an agency headquarters responsible for the statutory violations of its Inspector General. The Authority stated, in part:

[OIG's][i]nvestigative information is shared with the agency head and other subcomponents of the agency and is a basis upon which disciplinary action is taken. Thus, the OIG represents not only the interests of the OIG, but ultimately NASA, HQ and its subcomponent offices.

Moreover, the IG Act specifically provides that IGs report to and are under the supervision of the head of the agency. 5 U.S.C. app. § 3(a). . . Accordingly, NASA, HQ is responsible for the statutory violations committed by its OIG in this case.

50 FLRA at 621.

As noted, the OIG information obtained in this case may be similarly shared with DOJ, INS for administrative purposes. In light of the Authority decision in NASA, I conclude DOJ was responsible for the manner in which OIG conducted the examinations in the subject case. Id. at 622. Accordingly, I conclude that DOJ violated section 7116(a)(1) and (8) of the Statute, as alleged.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S. Department of Justice, Washington, DC, and the U.S. Department of Justice, Office of the Inspector General, Washington, DC, shall:

1. Cease and desist from:

(a) Requiring any bargaining unit employee of the U.S. Department of Justice, Immigration and Naturalization Service to take part in any examination conducted by the U.S. Department of Justice, Office of the Inspector General, without allowing the American Federation of Government Employees, National Immigration and Naturalization Service Council, or any other exclusive collective bargaining representative of the employee, to participate in such examination, when such representation has been requested by the employee and the employee reasonably believes that the examination may result in disciplinary action against him or her.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) U.S. Department of Justice shall order the U.S. Department of Justice, Office of the Inspector General to comply with the requirements of section 7114(a)(2)(B) of the Statute when conducting investigatory examinations of U.S. Department of Justice, Immigration and Naturalization Service, bargaining unit employees.

(b) U.S. Department of Justice, Office of the Inspector General shall comply with the requirements of section 7114(a)(2)(B) of the Statute when conducting investigatory examinations of bargaining unit employees.

(c) U.S. Department of Justice, Washington, DC, shall ensure that no disciplinary action is taken against Immigration and Naturalization Service employee Tae Johnson as a result of any information obtained as a result of the examination by agents of the Office of the Inspector General on October 22, 1997, when Tae Johnson requested and was denied union representation by the American Federation of Government Employees, Local 2756, AFL-CIO.

(d) **Post at all locations of the Immigration and Naturalization Service copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Attorney General, U.S. Department of Justice and by the Inspector General, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees of the**

Immigration and Naturalization Service are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director of the Washington Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

3. Respondents' cross-motion to dismiss the complaint is denied.

Issued, Washington, DC, September 16, 1998.

GARVIN LEE OLIVER
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Justice, Washington, DC and U.S. Department of Justice, Office of the Inspector General, Washington, DC, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

We hereby notify employees of the U.S. Department of Justice, Immigration and Naturalization Service, that:

WE WILL NOT require any bargaining unit employee of the U.S. Department of Justice, Immigration and Naturalization Service to take part in any examination conducted by the U.S. Department of Justice, Office of the Inspector General, without allowing the American Federation of Government Employees, National Immigration and Naturalization Service Council, or any other exclusive collective bargaining representative of the employee, to participate in such examination, when such representation has been requested by the employee and the employee reasonably believes that the examination may result in disciplinary action against him or her.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured them by the Federal Service Labor-Management Relations Statute.

THE ATTORNEY GENERAL WILL order the U.S. Department of Justice, Office of the Inspector General to comply with the requirements of section 7114(a)(2)(B) of the Statute when conducting investigatory examinations of U.S. Department of Justice, Immigration and Naturalization Service bargaining unit employees.

U.S. Department of Justice
Washington, DC

Office of the Inspector
General, Washington, DC

By: _____

By: _____

—
ATTORNEY GENERAL

INSPECTOR GENERAL

Date: _____

Date: _____

—

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Washington Regional Office, Federal Labor Relations Authority, whose address is: 1255 22nd Street, NW., Suite 400, Washington, DC 20037, and whose telephone number is: (202) 653-8500.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. WA-CA-80156, were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

Christopher Feldenzer, Esquire
Federal Labor Relations Authority
1255 22nd Street, NW, Suite 400
Washington, DC 20037

P168-059-593

Patricia Armstrong, Esquire
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7527 Wharfinger Court
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REGULAR MAIL:

Bobby Harnage, President
AFGE, AFL-CIO
80 F Street, NW.
Washington, DC 20001

CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: SEPTEMBER 16, 1998
 WASHINGTON, DC