

**66 FLRA No. 94**

NATIONAL TREASURY  
EMPLOYEES UNION  
(Union)

and

UNITED STATES  
DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
(Agency)

0-AR-4765

DECISION

February 22, 2012

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 Jerome H. Ross filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator found that investigators from the Office of Personnel Management (OPM) were not representatives of the Agency under § 7114(a)(2)(B) of the Statute (§ 7114(a)(2)(B)) when conducting certain interviews of Agency employees.<sup>1</sup> For the reasons discussed below, we grant the exceptions in part and deny them in part. We remand the award to the parties for resubmission to the Arbitrator, absent settlement, for an appropriate remedy.

<sup>1</sup> Section 7114(a)(2)(B) states, in pertinent part:

An 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.

**II. Background and Arbitrator's Award**

The Agency requires incoming employees to undergo background investigations and, at times, investigatory interviews. *See* Award at 2; Joint Stipulation (J. Stip.) at 4. The employees at issue here are subject to these interviews and fall into two categories. Employees in one category (covered employees) hold positions that are subject to OPM suitability determinations.<sup>2</sup> *See* Award at 2, 10; J. Stip. at 3-6, 9-10. *Accord* 5 C.F.R. § 731.101(a)-(b) (§ 731.101).<sup>3</sup> Employees in the other category (excepted employees) hold positions that are *not* subject to OPM suitability determinations.<sup>4</sup> *See id.*; *see also* J. Stip. at 3-5, 9. However, excepted employees who undergo investigations can be removed by the Agency. J. Stip. at 9-10.

Previously, the Agency used its own investigators to interview both covered employees and excepted employees. *See* Award at 2; J. Stip. at 3-4. The Agency operated under its own authority when investigating excepted employees, J. Stip. at 5, but operated under authority delegated from OPM when investigating covered employees, *see* Award at 2; J. Stip. at 9; *accord* 5 C.F.R. § 731.103.<sup>5</sup>

Subsequently, the Agency decided not to request that OPM continue delegating its suitability-related authority with respect to covered employees. *See* Award

<sup>2</sup> More specifically, covered employees include: (1) employees with positions in the competitive service; and (2) employees with positions in the excepted service where the incumbent can be noncompetitively converted to the competitive service. *See* 5 C.F.R. § 731.101; *see also* J. Stip. at 9.

<sup>3</sup> Section 731.101(a) states, in pertinent part:

The purpose of this part is to establish criteria and procedures for making determinations of suitability and for taking suitability actions regarding employment in covered positions . . . . Section 3301 . . . directs consideration of "age, health, character, knowledge, and ability for the employment sought." E.O. 10577 . . . directs OPM to examine "suitability" for competitive Federal employment. This part concerns only determinations of "suitability," that is, those determinations based on a person's character or conduct that may have an impact on the integrity or efficiency of the service.

<sup>4</sup> Excepted employees hold positions in the excepted service where the incumbent cannot be noncompetitively converted to the competitive service. *See* § 731.101; *see also* J. Stip. at 3, 9.

<sup>5</sup> Title 5 C.F.R. § 731.103 states, in pertinent part, that OPM "delegates to the heads of agencies authority for making suitability determinations and taking suitability actions." 5 C.F.R. § 731.103(a). It further states that OPM "may, in its discretion, exercise its jurisdiction under this part in any case it deems necessary." 5 C.F.R. § 731.103(g).

at 2. As a result, the suitability-related authority that OPM had delegated to the Agency lapsed. *See id.*; J. Stip. at 5, 9. Once this happened, in June 2008,<sup>6</sup> OPM assumed responsibility for investigating new covered employees, and began using its own investigators and contractors to interview them. *See Award at 2*; J. Stip. at 8. Also, in part because it was more efficient for the Agency, OPM assumed the task of investigating and interviewing the Agency's new excepted employees. *See Award at 2*; J. Stip. at 3-6; Exceptions at 31-33; Exceptions, Attach., Tab 20, Tr. at 86-87; Opp'n at 17-18.

Upon assuming responsibility for interviewing new Agency employees, OPM decided, as a matter of policy, that it would not permit Union representatives to attend its investigators' interviews. *See Award at 10*. Once OPM stopped permitting Union representatives to attend the interviews, the Agency stopped granting Union representatives official time to attend them. *See id.* at 2-3. In response, the Union filed grievances, which were unresolved and submitted to arbitration. *See id.* at 1-2.

The parties stipulated to the issues before the Arbitrator. *See id.* at 3-4. The primary issue, as relevant here, was whether OPM's investigators were "acting as representatives of [the Agency]" under § 7114(a)(2)(B), the parties' agreement (CBA),<sup>7</sup> or the parties' side agreements (MOUs), when they interviewed Agency employees. *Id.* If so, then additional stipulated issues required the Arbitrator to consider: (1) whether the Agency violated § 7116(a)(1) and (8) of the Statute, the CBA, or the MOUs by "not permitting . . . [U]nion representative[s] to participate in . . . [the] interviews conducted by OPM investigators of excepted . . . and competitive . . . employees," and by denying Union representatives official time to do so; (2) whether the Agency violated § 7116(a)(1) and (5) of the Statute by ending a past practice of granting official time to Union representatives to attend the interviews; and, if any violations were found, then (3) what the remedy should be. *Id.* at 4.

<sup>6</sup> We note that effective June 16, 2008, OPM amended part 731 to indicate that it applies to individuals who can be noncompetitively converted to the competitive service. *See* 73 Fed. Reg. 20,149, 20,149, 20,155 (April 15, 2008). As the award does not indicate that the actions giving rise to the grievance occurred before June 16, 2008, *see Award at 2*, and in light of the fact that the parties rely on the regulations as amended, *see J. Stip. at 9*, we apply the amended regulations in this matter.

<sup>7</sup> The Arbitrator cited two contractual provisions as being relevant here: Article 5.4.I.1 and Article 9.2.C.7. *Award at 3*. Article 5.4.I.1 entitles employees to be represented by the Union in an examination conducted by the Agency or a representative of the Agency. *Id.* Article 9.2.C.7 grants official time for "examinations of employees in the unit by a representative of the [Agency]." *Id.*

In resolving the primary issue, the Arbitrator found that OPM has a "legal mission" to "perform background investigations of federal employees," *id.* at 9, and that these investigations are carried out to make suitability determinations, *see id.* at 2, 10 n.6. (citing 5 C.F.R. § 731.104).<sup>8</sup> The Arbitrator found that OPM may delegate that function, but that at all times relevant here, OPM had not delegated it to the Agency. *See id.* at 9. The Arbitrator also found that OPM acted independently of the Agency, stating that he saw "no basis or authority for [the Agency] to tell OPM how its investigators should go about conducting their investigatory interviews." *Id.* at 10. Further, the Arbitrator stated that once OPM made a policy determination "not to permit [U]nion representatives to participate in its background investigations . . . [t]here [was] nothing [the Agency] . . . [could] do about it." *Id.* In addition, the Arbitrator found that OPM's investigators are "legally independent" and thus are unlike: (1) investigators in an agency's office of inspector general (OIG); or (2) contractors performing an agency's "tasks and functions," such as an agency's employee-assistance program or equal-employment-opportunity program. *Id.* at 9. Based on these findings, the Arbitrator determined that OPM investigators are not representatives of the Agency. *Id.* The Arbitrator stated that "it follows then that Union representatives have no claim to official time." *Id.* at 10.

With regard to the past-practice issue, the Arbitrator found that the "evidence is insufficient to establish that [the Agency] unlawfully changed a binding and enforceable past practice." *Id.* Having rejected the Union's arguments, the Arbitrator denied the grievances. *See id.* at 11.

### III. Positions of the Parties

#### A. Union's Exceptions

The Union contends that the Arbitrator's determination that OPM's investigators are not representatives of the Agency is contrary to § 7114(a)(2)(B). *See Exceptions at 2, 4*. Although the Union concedes that the Authority has not previously addressed whether an investigator from one agency can be a representative of another agency, *see id.* at 21, the Union asserts that the Arbitrator should have resolved the dispute by relying on *NASA v. FLRA*, 527 U.S. 229, 240 (1999) (*NASA*), *aff'g FLRA v. NASA*, 120 F.3d 1208 (11th Cir. 1997), *granting pet. for enforcement of Headquarters NASA, Wash., D.C.*, 50 FLRA 601 (1995) (*NASA HQ*). In particular, the Union argues that the

<sup>8</sup> Title 5 C.F.R. § 731.104 states, in pertinent part: "To establish a person's suitability for employment, appointments to covered positions identified in § 731.101 require the person to undergo an investigation by OPM or by an agency with delegated authority from OPM to conduct investigations."

Arbitrator should have considered the extent to which OPM's interviews were conducted "'with regard to, and on behalf of,]" the Agency. Exceptions at 24 (quoting *NASA*, 527 U.S. at 240). See also *id.* at 26-27. The Union also asserts that the award "undermines" the United States Supreme Court's "concern that an agency might evade the right to representation by using 'investigative conduits' outside the bargaining unit." *Id.* at 33 (quoting *NASA*, 527 U.S. at 234).

Additionally, the Union asserts that the Authority has found that outside contractors hired as investigators "can be considered agency representatives." *Id.* at 24-25 (citing *Pension Benefit Guar. Corp., Wash., D.C.*, 62 FLRA 219 (2007) (Chairman Cabaniss dissenting) (*PBGC*); *SSA, Office of Hearings & Appeals, Bos. Reg'l Office, Bos., Mass.*, 59 FLRA 875 (2004) (Chairman Cabaniss dissenting) (*SSA*), *granting mot. for reconsider. as to remedy*, 60 FLRA 105 (2004); and *Def. Logistics Agency, Def. Depot Tracy, Tracy, Cal.*, 39 FLRA 999 (1991)). Further, the Union asserts that the Arbitrator should have considered other "relevant indicia identified by the case law . . . such as the agency's role in compelling employee cooperation" in an investigation, "the use of the agency's facilities, submission to the agency of the investigative file, and its use of that file." *Id.* at 22. See also *id.* at 25 (citing *PBGC*, 62 FLRA at 223-24).

In the alternative, the Union argues that even if OPM's investigators are not representatives of the Agency in all instances, OPM's investigators are representatives of the Agency when interviewing excepted employees. See *id.* at 31. This is so, the Union asserts, because "OPM is not exercising its own legal authority when it investigates excepted . . . employees." *Id.* Rather, the Union asserts, the Agency is responsible for investigating excepted employees and for removing excepted employees based on information obtained through the investigations. See *id.* (citing *J. Stip.* at 5, 9-10).

Finally, the Union asserts that if the Authority finds that OPM's investigators were representatives of the Agency, then it should find that the Agency violated § 7116(a)(1) and (8) of the Statute, the CBA, and the MOUs, by "denying union representation and official time." *Id.* at 36. The Union requests that the Authority remand the matter to the Arbitrator to award an "appropriate remedy." *Id.*

#### B. Agency's Opposition

The Agency asserts that the Union has not demonstrated that the award is contrary to law, arguing that the Union merely disagrees with the Arbitrator's factual findings. See *Opp'n* at 9-10. As to OPM's authority, the Agency argues that OPM conducts

background investigations "pursuant to its direct assignment of investigative activity." *Id.* at 14 (citing Exec. Order No. 10,450, 18 Fed. Reg. 2,489 (Apr. 27, 1953), *reprinted as amended as a note to* 5 U.S.C. § 7311 (2011) (E.O. 10,450)).<sup>9</sup> Additionally, the Agency argues that the Arbitrator's legal conclusion is not inconsistent with *NASA*, see *id.* at 13-14, and that the policy concerns expressed in *NASA* do not indicate that the award is deficient, see *id.* at 21.

In response to the Union's alternative argument, the Agency asserts that OPM has "authority to investigate excepted . . . employees." *Id.* at 17. Specifically, the Agency contends, OPM has "authority to conduct background investigations for [excepted employees'] initial or continuing eligibility for an identity credential." *Id.* at 17 (citing 15 U.S.C. § 278g-3(a); 40 U.S.C. § 11331; 44 U.S.C. § 3543(a); Exec. Order No. 13,467 § 2.3(b), 73 Fed. Reg. 38103 (June 30, 2008) (E.O. 13,467); Homeland Sec. Presidential Directive 12 (HSPD-12); Fed. Info. Processing Standards 201-1 (FIPS 201-1); Implementation of [HSPD-12] - Policy for a Common Identification Standard for Fed. Emps. &

<sup>9</sup> E.O. 10,450, "Security Requirements for Government Employment," states, as relevant here, that the "investigation of persons entering or employed in the competitive service shall primarily be the responsibility" of OPM. E.O. 10,450 § 8(b). It also states that the "investigation of persons . . . entering employment of, or employed by, the Government other than in the competitive service shall primarily be the responsibility of the employing department or agency." *Id.* § 8(c).

Contractors (Aug. 5, 2005) (OMB Memo 05-24)).<sup>10</sup> In addition, the Agency argues that “OPM has the authority to conduct background investigations to examine suitability for competitive [f]ederal [e]mployment.” *Id.* (citing E.O. 10,450; Exec. Order No. 10,577, 19 Fed. Reg. 7,521 (Nov. 22, 1954), *reprinted as amended as a note to* 5 U.S.C. § 3301 (E.O. 10,577)).<sup>11</sup>

#### IV. Analysis and Conclusions

When an exception involves an award’s consistency with law, the Authority reviews any question of law raised by the exception and 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

<sup>10</sup> Title 15 U.S.C. § 278g-3(a), “Computer standards program,” states that the National Institute of Standards and Technology shall have the mission to develop standards for information systems, including minimum requirements for providing adequate information security for all agency operations and assets.

Title 40 U.S.C. § 11331, “Responsibilities for Federal information systems standards,” states that the Director of the Office of Management and Budget (OMB) shall promulgate information security standards pertaining to federal information systems.

Title 44 U.S.C. § 3543, “Authority and functions of the Director,” states that the Director of OMB shall oversee information security policies and practices. 44 U.S.C. § 3543(a).

E.O. 13,467, “Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information,” states, as relevant here, that the Director of OPM will “continue to be responsible for developing and implementing uniform and consistent policies and procedures to ensure the effective, efficient, and timely completion of investigations and adjudications relating to determinations of suitability and eligibility for logical and physical access.” E.O. 13,467 § 2.3(b).

HSPD-12 directs the U.S. Secretary of Commerce to develop a “standard for secure and reliable forms of identification.” Exceptions, Attach., Tab 16 at 1 (HSPD-12).

FIPS 201-1 “describes the minimum requirements for a Federal personal identity verification system that meets the control and security objectives of [HSPD-12].” Opp’n, Attach. 4 at iii (FIPS 201-1). Its goal is to “achieve appropriate security assurance for multiple applications by efficiently verifying the claimed identity of individuals seeking physical access to Federally controlled government facilities and electronic access to government information systems.” *Id.*

OMB Memo 05-24 provides implementing instructions for HSPD-12 and FIPS 201-1. OMB Memo 05-24 at 1. *Accord* 70 Fed. Reg. 53,346-01, 53,346-47 (Sept. 8, 2005).

<sup>11</sup> E.O. 10,577, “Amending the Civil Service Rules and Authorizing a New Appointment System for the Competitive Service,” establishes standards with respect to suitability, § 2.1(a), and authorizes investigation of the suitability of applicants for positions in the competitive service, § 5.2.

legal conclusions are consistent with the applicable standard of law. *See U.S. Dep’t of Def., 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. *See id.* When a grievance under § 7121 of the Statute involves an alleged unfair labor practice (ULP), the arbitrator must apply the same standards and burdens that would be applied by an administrative law judge in a ULP proceeding under § 7118. *See NTEU*, 64 FLRA 462, 464 (2010).

The Union claims that the award is contrary to § 7114(a)(2)(B). In relevant part, § 7114(a)(2)(B) states that a union representative shall be given the opportunity to be represented at an “examination of an employee . . . by a representative of the agency . . .” 5 U.S.C. § 7114(a)(2)(B). As the Authority has found virtually identical wording in § 7114(a)(2)(A), “representatives of the agency,” to have the same meaning as § 7114(a)(2)(B)’s “representative of the agency,” the Authority has found precedent under both subsections relevant in assessing who is a representative of the agency. *See PBGC*, 62 FLRA at 223.

The Authority previously has considered the representative status of two types of investigators: those employed in an agency’s OIG, and those who are outside contractors who have been hired to perform an agency function. The Union relies primarily on *NASA*, an OIG case. *See Exceptions* at 26-27. In *NASA*, the United States Supreme Court upheld the Authority’s determination that an investigator in the agency’s OIG was a representative of the agency, even though the OIG operated with significant autonomy within the agency. *See NASA*, 527 U.S. at 234, 240-41; *NASA HQ*, 50 FLRA at 614-15. *See also, e.g., Dep’t of Def., Def. Criminal Investigative Serv.*, 28 FLRA 1145, 1149 (1987) (investigative component of the agency was a representative of the agency) (*DCIS*), *aff’d sub nom. DCIS v. FLRA*, 855 F.2d 93, 100 (3d Cir. 1988) (investigators employed by agency and investigating employee misconduct were representatives of the agency, regardless of degree of supervision that agency had over investigators).

The Union also cites decisions involving outside contractors. *See Exceptions* at 24-25. In those decisions, the Authority considered whether the investigator was “performing a function that otherwise would have been performed by the agency, and whether the [agency] exercised any control over the” investigator. *PBGC*, 62 FLRA at 223-24 (citing *SSA*, 59 FLRA at 879-80).

As the Union concedes, *see Exceptions* at 21, the Authority has not previously addressed whether an investigator from one agency can be a representative of another agency. Because this matter involves

investigators who are not employed by the Agency, we find most relevant the Authority decisions involving outside contractors. Consistent with those decisions, we consider whether OPM's investigators performed an Agency function, and whether they acted under the Agency's control. *See PBGC*, 62 FLRA at 223-24. We address the two categories of employees at issue here – covered and excepted – separately below.

#### A. Covered Employees

Regarding covered employees, the Arbitrator found that OPM's investigators were carrying out OPM's "investigative function" in connection with making suitability determinations. Award at 10 & n.6 (citing 5 C.F.R. § 731.104). *See also id.* at 2 (background investigations were conducted "in connection with making 'suitability' determinations"). *Accord Harris v. King*, No. 98-5826, 2000 WL 353676 at \*1 n.1 (6th Cir. Mar. 29, 2000) (unpublished) (OPM is the "governmental agency responsible for conducting suitability determinations" for covered employees). Accordingly, when OPM's investigators were interviewing and investigating covered employees – employees subject to OPM suitability determinations – they were performing an OPM function, not a function or task of the Agency. *See Award* at 9-10.

Regarding who controlled the investigators when interviewing covered employees, the Arbitrator found that OPM's investigators were "legally independent" of the Agency. Award at 9. *See also id.* at 2, 10. The Arbitrator found that there was "no basis or authority for [the Agency] to tell OPM how its investigators should go about conducting their investigatory interviews," and found that there was "nothing [the Agency] . . . [could] do" to change OPM's policy decision "not to permit [U]nion representatives to participate in" the interviews. *Id.* at 10. These findings, which are not challenged as nonfacts (or on any other ground), support a conclusion that OPM's investigators did not act under the Agency's control when interviewing covered employees. Further, the parties stipulated, J. Stip. at 9, and do not dispute, *see Exceptions* at 17-18, that OPM has authority to "make suitability determinations and to take suitability actions" and that OPM "may, in its discretion, exercise its jurisdiction . . . in any case it deems necessary," J. Stip. at 9. *Accord* § 731.103(g).

Moreover, the Union does not demonstrate that the Arbitrator's failure to consider other factors indicating an outside contractor's representative status – such as the Agency's role in compelling employee participation, the use of the Agency's facilities, and the Agency's access to investigatory files – render the award deficient. Even if the Arbitrator had considered those factors, the Union does not demonstrate

that they outweigh the other factors indicating that OPM's investigators performed an OPM function, and acted under OPM's control. *See Exceptions* at 22, 25.

In sum, OPM's investigators were performing an OPM function, and acting under OPM's control, when interviewing covered employees. Accordingly, we find that OPM's investigators were not representatives of the Agency under § 7114(a)(2)(B) of the Statute when interviewing those employees, and we deny the Union's exceptions concerning those employees.

#### B. Excepted Employees

Regarding whose function the investigators were performing when interviewing excepted employees, there is no indication that OPM's investigators were carrying out an OPM function. In this regard, "OPM's suitability regulations are specifically limited in scope" to covered employees. *Hunter v. Dep't of Justice*, 73 M.S.P.R. 290, 294 (1997). Further, the parties stipulated before the Arbitrator, *see J. Stip.* at 5, and do not dispute before the Authority, *see Opp'n* at 17-18, that it is the Agency that is "primarily responsible for the conduct of background investigations" of excepted employees, J. Stip. at 5. Thus, the record indicates that OPM's investigators were effectively performing an Agency function when interviewing excepted employees. *See PBGC*, 62 FLRA at 223.

With regard to who controlled OPM's investigators when interviewing excepted employees, there is no indication that OPM's investigators were acting under OPM's authority when interviewing those employees. *See* 5 C.F.R. §§ 731.101, 731.103. However, the parties stipulated before the Arbitrator, *see J. Stip.* at 5, 9-10, and do not dispute before the Authority, *see Opp'n* at 17-19, that the Agency is primarily responsible for the conduct of the investigations, J. Stip. at 5, and that the Agency "has the authority to remove . . . excepted [employees] based on information collected during the . . . investigations," J. Stip. at 9-10. This supports a conclusion that OPM's investigators were acting under the Agency's authority when interviewing excepted employees. *See id.* at 5, 9-10.

The Agency asserts that OPM has authority to "conduct background investigations for excepted service employees' . . . eligibility for an identity credential." *Opp'n* at 17 (emphasis added). There is no claim or indication that OPM investigators were interviewing excepted employees to determine their eligibility for government identification. *See Award* at 2, 9-10. Rather, OPM investigators were interviewing excepted employees to investigate their backgrounds and, ultimately, to let the Agency determine whether they should be removed. *See J. Stip.* at 5, 9-10. Thus, the Agency's assertion does not demonstrate that OPM's

investigators were carrying out an OPM function, or acting under OPM's authority, when interviewing excepted employees. Further, the Agency does not explain a connection between the information-security-related authorities – 15 U.S.C. § 278g-3(a); 40 U.S.C. § 11331; 44 U.S.C. § 3543; HSPD-12; FIPS-201-1; and OMB Memo 05-24 – and the interviews that OPM's investigators were performing. With regard to E.O. 13,467, that Order pertains to suitability determinations, which do not apply to excepted employees. Likewise, while the Agency asserts that E.O. 10,450 and E.O. 10,577 indicate that “OPM has the authority to conduct background investigations to examine *suitability for competitive [f]ederal [e]mployment*,” the Agency does not explain how these authorities apply to OPM investigatory interviews of excepted employees, who are not subject to OPM suitability determinations. Opp'n at 17 (emphasis added). *See also* E.O. 10,450 § 8(c) (agencies primarily responsible for investigating excepted employees).

resubmission to the Arbitrator, absent settlement, for an appropriate remedy.

Finally, even though there is no dispute that OPM “controlled” the terms of the investigations, *see* Award at 10, that is so only because the Agency delegated its authority to investigate excepted employees to OPM, *see* J. Stip. at 5, 9-10. Permitting the Agency to delegate its authority to investigate excepted employees without holding the Agency responsible for its obligations under § 7114(a)(2)(B) of the Statute, would permit the Agency to evade those obligations and would therefore be contrary to Authority precedent. *See PBGC*, 62 FLRA 223 (citing *NASA*, 527 U.S. at 234).

In sum, OPM's investigators were performing an Agency function, and acting under the ultimate control of the Agency, when they interviewed excepted employees. Accordingly, we grant the Union's exceptions insofar as they relate to excepted employees, and find that the Agency violated § 7116(a)(1) and (8) of the Statute, and Articles 5.4.I.1 and 9.2.C.7 of the CBA, as alleged.<sup>12</sup> Further, pursuant to the Union's request, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to determine an appropriate remedy. *Cf. U.S. Dep't of the Treasury, IRS Accounts Mgmt. & Compliance Servs., Wage & Invs. & Small Bus./Self Employed Div.*, 66 FLRA 186, 191 (2011) (remanding for remedy for agency's violation of the Statute and the parties' agreement).

## V. Decision

The exceptions are granted in part and denied in part. The award is remanded to the parties for

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<sup>12</sup> In this connection, there is no dispute that if OPM's investigators were representatives of the Agency, then the Agency violated the Statute and the CBA as alleged. *See* Award at 3-4; Exceptions at 36; Opp'n at 2, 8-9, 21.