**70 FLRA No. 138**

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL VETERANS AFFAIRS COUNCIL #53
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
(Agency)

0-AR-5347

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DECISION

July 11, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

## I. Statement of the Case

Today we address the role of collective bargaining and union representatives in matters concerning, and issues arising out of, Inspector General investigations. This is a significant issue because Inspectors General operate independently, under statutory authority, and their responsibilities under that authority *may not* be compromised through collective bargaining.

During an audit of the Agency's operations, the Agency's Office of Inspector General (OIG) gave a survey to, and conducted follow-up interviews with, certain employees. Arbitrator Stuart Lipkind found that the Agency: (1) did not violate the parties' collective-bargaining agreement by failing to notify the Union of, and bargain over, the OIG survey; and (2) did not violate the agreement or § 7114(a)(2)(A) of the Federal Service Labor-Management Relations Statute (the Statute)[1] by failing to notify the Union of, and allow it to be represented at, the follow-up interviews. There are two main questions before us.

The first question is whether the Arbitrator erred by finding no violation with respect to the OIG survey. Because that finding is consistent with the Inspector General Act of 1978 (the IG Act),[2] the answer is no.

The second question is whether the Arbitrator's finding with regard to the follow-up interviews is contrary to § 7114(a)(2)(A) of the Statute. Because the interviews did not concern a grievance, personnel policy, or other general condition of employment, they did not constitute "formal discussion[s]" under § 7114(a)(2)(A).[3] Thus, even if the other requirements of § 7114(a)(2)(A) were met – an issue that the Arbitrator did not, and we need not, decide – the Union was not entitled to participate in the interviews. Thus, the award is not contrary to § 7114(a)(2)(A).

## II. Background and Arbitrator's Award

Through its medical facilities, the Agency provides patient care to veterans. The OIG's "Office of Audit and Evaluations" began auditing certain Agency facilities.[4] During the audit, the OIG surveyed, and conducted individual follow-up interviews with, employees working as "schedulers,"[5] who assist patients in making medical appointments. The purpose of the audit was to determine whether "supervisors [or] outside health[care] providers" had been instructing the schedulers to cancel appointments without patient approval or to maintain a "secret waiting . . . list."[6]

The Union filed a grievance alleging that the Agency violated: (1) Article 49, Section 8 of the parties' agreement (Section 8) by failing to notify the Union of, and bargain over, the OIG survey;[7] and (2) Article 49, Section 3 of the agreement (Section 3) and § 7114(a)(2)(A) of the Statute by failing to notify the Union of, and allow it to be represented at, the follow-up interviews.[8] Both Section 3 and § 7114(a)(2)(A) provide the Union with the right to be represented at certain

[1] 5 U.S.C. § 7114(a)(2)(A).

[2] *Id.* App. 3 §§ 1-13.
[3] *Id.* § 7114(a)(2)(A).
[4] Award at 2.
[5] *Id.* at 3.
[6] *Id.* at 24; *see also id.* at 3-4.
[7] Section 8 provides, as relevant here, that the Agency "will not communicate directly with bargaining[-]unit employees through verbal or written surveys and questionnaires regarding conditions of employment without prior notification to the Union and bargaining where appropriate." *Id.* at 8 (quoting Collective-Bargaining Agreement (CBA) Art. 49, § 8).
[8] Section 3 states, in relevant part, that the Union "will be provided reasonable advance notice of, [and] be given the opportunity to be present at, . . . any formal discussion between one or more representatives of the [Agency] and one or more employees in the unit . . . concerning any grievance, personnel policy or practice, or other general condition of employment." *Id.* at 7 (quoting CBA Art. 49, § 3).

"formal discussion[s]" between an Agency representative and one or more bargaining-unit employees.[9]

The grievance went to arbitration, where the parties stipulated to the following issues:

> 1. Did the [Agency] violate . . . Section 8 . . . [with] respect [to the OIG] surveys . . . ? If so, what shall be the remedy?
>
> 2. Were any rights of the Union under . . . Section 3 . . . or 5 U.S.C. § 7114(a)(2)(A)[] violated [with] respect [to the follow-up] . . . interviews . . . ? If so, what shall be the remedy?[10]

Regarding the first issue, the Arbitrator found that the Agency did not give the Union notice of, and an opportunity to bargain over, the survey. However, the Arbitrator also found that the OIG administered the survey "in furtherance of its authority to audit Agency operations" under the IG Act and that, under the IG Act, the OIG had broad authority to "independently determine" the scope, timing, and means of its audit.[11] The Arbitrator stated that if he interpreted Section 8 as prohibiting the OIG from administering the survey until the Agency notified and bargained with the Union, Section 8 would "improperly constrain"[12] the OIG's "statutory power."[13] Thus, he concluded that the Agency did not violate Section 8.

As for the second issue, the Arbitrator noted that, under Section 3 and § 7114(a)(2)(A) of the Statute, the Union had a right to be represented at certain "formal discussions."[14] In order for a union to have representation rights under § 7114(a)(2)(A), it must establish, among other things, that the discussion at issue concerned "any grievance or any personnel policy or practice or other general condition of employment."[15]

The Arbitrator found that during the follow-up interviews, the OIG simply "gather[ed] factual information,"[16] as part of its audit, to determine whether supervisors or outside healthcare providers had asked the schedulers to change appointments without patient knowledge or to maintain a secret appointment list. The Arbitrator determined that the interviews "did not concern a grievance" or "any specific personnel policy or practice or other general condition of employment."[17] Accordingly, he concluded that they were not formal discussions and that the Agency did not violate either Section 3 or § 7114(a)(2)(A) of the Statute. Because the interviews were not formal discussions, the Arbitrator found it unnecessary to address § 7114(a)(2)(A)'s other requirements.

On January 19, 2018, the Union filed exceptions to the award, and, on January 29, 2018, the Agency filed an opposition to those exceptions.

## III. Analysis and Conclusions

### A. The award is consistent with the IG Act.

Citing the IG Act, the Union contends that the Arbitrator erred by concluding that Section 8 did not apply to the survey.[18] Under the IG Act, Congress granted "the Inspector General in each agency . . . with the responsibility of auditing and investigating the agency, a function which may be exercised *in the judgment of* the Inspector General as each deems it 'necessary or desirable.'"[19] Accordingly, and as relevant here, the courts have held that "collective[-]bargaining agreements '*may not* impose restrictions on the manner in

[9] 5 U.S.C. § 7114(a)(2)(A); Award at 7 (quoting CBA Art. 49, § 3).
[10] Award at 6.
[11] *Id.* at 19.
[12] *Id.*
[13] *Id.* at 20.
[14] *Id.* at 22 (noting that "[t]he Union's right to be represented at formal discussions is grounded in the [Statute] and corresponding contractual provisions"); *see* 5 U.S.C. § 7114(a)(2)(A) (a union shall be given the opportunity to be represented at "any formal discussion between one or more representatives of the agency and one or more [unit] employees . . . concerning any grievance or any personnel policy or practices or other general condition of employment").
[15] *E.g.*, *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 174 (2009) (*Kirtland*) (citation omitted) (to have these representation rights, there must be a discussion, which is formal, between one or more representatives of the agency and one or more unit employees or their representatives, concerning any grievance or any personnel policy or practice or other general condition of employment). It is undisputed that Section 3 does not provide any rights that differ from those in § 7114(a)(2)(A) of the Statute.
[16] Award at 24-25.
[17] *Id.* at 23.
[18] Exceptions Form at 4; Exceptions Br. at 3-4.
[19] *U.S. Nuclear Regulatory Comm'n, Wash., D.C. v FLRA*, 25 F.3d 229, 234 (4th Cir. 1994) (*NRC*) (emphasis added) (quoting 5 U.S.C. App. 3 § 6(a)(2)).

which . . . Inspectors General conduct investigations.'"[20] Thus, we stress that unions and agencies "can neither add to nor subtract from" an Inspector General's investigatory authority through collective bargaining.[21]

Here, the Union alleges that Section 8 does not conflict with the IG Act, because Section 8 requires *the Agency* – not the OIG – to notify and bargain with the Union.[22] However, even under that interpretation, Section 8 would prohibit the OIG from administering a survey as part of an audit *until* the Agency and Union completed bargaining. Such a restriction would impermissibly compromise the OIG's independent "authority to . . . determine *when* and how to investigate."[23] Therefore, the Arbitrator correctly determined that Section 8 could not lawfully apply to the OIG survey,[24] and we deny this exception.[25]

B. The award is not contrary to § 7114(a)(2)(A) of the Statute.

The Union argues that the award is contrary to § 7114(a)(2)(A)[26] because the Arbitrator erred by finding that the follow-up interviews "did not relate to a personnel policy or practice or other general condition of employment."[27] As noted above, in order for a union to have representation rights under § 7114(a)(2)(A), the discussion at issue *must* concern "any grievance or any personnel policy or practice or other general condition of employment."[28]

The Union does not argue that the follow-up interviews concerned a grievance. And although the Union contends that the interviews concerned a personnel policy or practice,[29] it does not identify any specific policy or practice that was discussed.

As to whether the follow-up interviews concerned a "general condition of employment," the Authority has stated that formal discussions "are limited to those discussions (except grievance meetings) which concern conditions of employment affecting employees in the unit generally."[30] Here, the purpose of the interviews was not to make or announce changes,[31] or to discuss other matters generally affecting bargaining-unit employees.[32] Rather, the OIG conducted the interviews to "gather factual information" to determine, as part of its audit, whether any *supervisors* or *outside healthcare providers* had engaged in improper scheduling practices.[33]

Because the follow-up interviews focused *solely* on the conduct of supervisors and outside healthcare

[20] *Nat'l R.R. Passenger Corp. v. Fraternal Order of Police, Lodge 189, Labor Comm.*, 855 F.3d 335, 339 (D.C. Cir. 2017) (*Nat'l R.R.*) (second alteration in original) (emphasis added) (citations omitted); *see also U.S. DHS, U.S. CBP v. FLRA*, 751 F.3d 665, 668 (D.C. Cir. 2014) (*DHS*) (stating that "proposals concerning Inspector[-]General-investigation procedures are not 'appropriately the subject of bargaining,' because to allow such bargaining 'would impinge on the statutory independence of the'" Inspector General (quoting *NRC*, 25 F.3d at 234)).

[21] *DHS*, 751 F.3d at 671.

[22] Exceptions Br. at 4-5.

[23] *DHS*, 751 F.3d at 672 (emphasis added) (quoting *NRC*, 25 F.3d at 234); *see* 5 U.S.C. App. 3 § 2(1) (Inspectors General "conduct and supervise audits and investigations relating to [agency] programs and operations").

[24] *See Nat'l R.R.*, 855 F.3d at 340 (stating that "collective[-]bargaining agreements may not regulate an Inspector General's investigatory authority" (citation omitted)); *NRC*, 25 F.3d at 235 (parties may not "compromise, limit, [or] interfere with the independent status of [an] Inspector General").

[25] The Union also argues that the award fails to draw its essence from the parties' agreement because nothing in the agreement excludes the OIG from Section 8's requirements. Exceptions Br. at 2. However, as established above, Section 8 cannot lawfully apply to the OIG survey. As a result, the Union's essence exception does not provide a basis for finding that Section 8 should apply here or for finding the award deficient.

[26] Exceptions Form at 4; Exceptions Br. at 6-9.

[27] Exceptions Br. at 6.

[28] *Kirtland*, 64 FLRA at 174 (citation omitted).

[29] Exceptions Br. at 7.

[30] *U.S. GPO, Pub. Documents Distrib. Ctr., Pueblo, Colo.*, 17 FLRA 927, 929 (1985) (*GPO*) (citation omitted).

[31] *E.g., Kirtland*, 64 FLRA at 174-75 (announcement of a reorganization constituted a formal discussion); *DOD, Nat'l Guard Bureau, Tex. Adjutant Gen.'s Dep't, 149th TAC Fighter Grp. (ANG) (TAC), Kelly Air Force Base*, 15 FLRA 529, 533 (1984) (a meeting called by the agency "for the purpose of outlining a change in the employees' workweek" constituted a formal discussion).

[32] *E.g., U.S. Dep't of the Army, New Cumberland Army Depot, New Cumberland, Pa.*, 38 FLRA 671, 677 (1990) (finding that the "subject matter of safety concerns a general condition of employment").

[33] Award at 24-25.

providers,[34] and how their conduct affected the Agency's operations, we conclude that the interviews did not concern a "general condition of employment" within the meaning of § 7114(a)(2)(A).[35] Therefore, those interviews did not constitute formal discussions,[36] and it is unnecessary to address § 7114(a)(2)(A)'s other requirements.[37] Accordingly, we deny this exception.

## IV. Decision

We deny the Union's exceptions.

**Member DuBester, dissenting:**

The majority incorrectly interprets and applies § 7114(a)(2)(A) of the Federal Service Labor-Management Relations Statute[1] when they conclude that the follow-up interviews that the IG's auditors conducted *did not* concern a "general condition of employment."[2]

As the majority acknowledges, "[t]he purpose of the audit was to determine whether 'supervisors [or] outside health[care] providers' had been instructing the schedulers to cancel appointments without patient approval or to maintain a 'secret waiting . . . list.'"[3] Clearly, discussions concerning how the Agency's "schedulers" (employees responsible for assisting veterans in making medical appointments) are being directed to do their work, and whether those directions are in any way improper, concern general conditions of employment in the unit.[4]

I would therefore reach the remaining issues under § 7114(a)(2)(A), including whether the IG's auditors function as "representatives of the agency," similar to the agency-representative function of IG investigators under § 7114(a)(2)(B).[5]

[34] *Cf. GSA*, 50 FLRA 401, 405 (1995) (discussion that involved, among other things, a supervisor's conduct; employees' "misuse of government vehicles"; "employee morale"; and employees' "social relationships," constituted a formal discussion).
[35] 5 U.S.C. § 7114(a)(2)(A).
[36] *See GPO*, 17 FLRA at 929 (a discussion that served "no more than a routine monitoring function" did not constitute a formal discussion); *IRS (Dist., Region, Nat'l Office Unit)*, 14 FLRA 698, 700-01 (1984) (no formal discussion where agency was "merely attempting to gather factual information to determine whether its case[-]assignment procedures were working as envisioned").
[37] *Cf. AFGE, Local 1592 v. FLRA*, 836 F.3d 1291, 1297 (10th Cir. 2016) (finding it unnecessary to determine whether the Air Force Office of Special Investigations was a representative of the Department of the Air Force under § 7114(a)(2)(B) to resolve the dispute).

[1] 5 U.S.C. § 7114(a)(2)(A).
[2] Majority at 5-6.
[3] *Id.* at 2 (quoting Award at 24).
[4] *See, e.g.*, *GSA*, 50 FLRA 401, 404-05 (1995) (holding that a discussion with several bargaining-unit employees about a supervisor's conduct, as well as the "general environment in the office, including matters involving employee morale and social relationships," concerned general conditions of employment).
[5] *See NASA v. FLRA*, 527 U.S. 229, 237-43 (1999) (rejecting agency's argument that agency inspector general's independence under Inspector General Act rendered inspector general's employees incapable of acting as agency representatives when conducting investigatory interviews under § 7114(a)(2)(B)); *see also PBGC, Wash., D.C.*, 62 FLRA 219, 223-24 (2007) (finding agency's equal employment opportunity contract investigator to be agency representative under § 7114(a)(2)(A)); *SSA, Office of Hearings & Appeals, Boston Reg'l Office, Boston, Mass.*, 59 FLRA 875, 879-80 (2004) (same).