71 FLRA No. 105

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
UNITED STATES PENITENTIARY MCCREARY
PINE KNOT, KENTUCKY

And

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX COLEMAN
COLEMAN, FLORIDA
(Respondents)

AND

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
AFL-CIO, LOCAL 614

And

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
AFL-CIO, LOCAL 506
(Charging Parties)

CH-CA-16-0547
AT-CA-16-0835

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DECISION AND ORDER

January 30, 2020

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

Decision by Member Abbott for the Authority

I. Statement of the Case

The Agency filed exceptions to the attached decision by Administrative Law Judge Richard A. Pearson (the Judge), who found the Agency committed an unfair labor practice (ULP) under § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute)[1] when it denied nonemployee Union representatives access to the prison lobbies for the purpose of observing shift changes to gather information in connection with pending grievances.

This case presents three questions: (1) whether the Judge erred by denying the Agency "due process" when he found the Agency had violated the Statute on a "legal theory" not argued at the hearing; (2) whether the Judge erred by creating a nonexistent Statutory right for non-employee Union counsel to be present during regular Agency operations; and (3) whether the Judge erred by violating the Agency's right to determine internal security matters. We find the answer to all three questions is no, and we therefore adopt the Judge's recommended decision.

II. Background and Judge's Decision

We summarize the relevant facts only briefly here, as they are set out in more detail in the Judge's decision.

For nearly thirty years, the parties have litigated a number of cases under the Fair Labor Standards Act (FLSA)[2] and the Portal-to-Portal Act[3] regarding whether employees performed additional compensable work at the beginning and end of their shifts. While litigating a 2014 grievance on this issue,[4] the Union's attorneys sought access to prison lobbies at two facilities, U.S. Penitentiary McCreary (McCreary) and Federal Correctional Complex Coleman (Coleman) to observe shift changes, in order to determine whether there was merit to claims that certain positions were entitled to additional compensation. In a series of incidents in March-May 2016, the Agency asked the Union attorneys to leave and forbade them from accessing the lobbies.

On September 2, 2016, the local unions at McCreary (Local 614) and Coleman (Local 506) filed similar charges alleging that the Agency violated § 7116(a)(1), (5), and (8) of the Statute when it refused to allow the Union's attorneys to observe the shift changes and "hinder[ed] the Union from adequately engaging in the arbitration process by preventing the Union from conducting activities necessary for the preparation of its case."[5] On November 30, 2016, both amended their charges to also allege that the Agency had violated § 7116(a)(2).[6]

After investigating the charges, the General Counsel (GC) issued a consolidated complaint

[1] 5 U.S.C. § 7116(a)(1), (5).

[2] 29 U.S.C. §§ 201-219.

[3] *Id.* §§ 251-262.

[4] The grievances were still pending at the time of the ULP hearing. *See* Judge's Decision at 8.

[5] *See* GC's Ex. 1(a)-1(b).

[6] *See* GC's Ex. 1(c)-1(d).

on May 16, 2017, which alleged that the Agency had refused the Union's request to have its attorneys observe shift changes in the front lobbies "for reasonable periods and at reasonable times."[7] The complaint alleged that, in doing so, the Agency had failed and refused to negotiate in good faith, in violation of § 7116(a)(1) and (5) of the Statute.[8] The complaint also alleged that, by refusing the Union's request, the Agency had failed and refused to comply with § 7114(b)(4) of the Statute, thereby violating § 7116(a)(1), (5), and (8).[9]

The Agency filed a motion to dismiss the complaint, arguing that the GC's complaint failed to state a claim under the Statute or Authority precedent.[10] In particular, the Agency claimed that it did not have sufficient notice of the complaint's allegations because the Union did not have a statutory right to have its representatives observe shift changes in the lobby.[11] The GC opposed the motion, maintaining that the Agency was put on notice – by the complaint and the GC's pre-hearing disclosures – that both the Union and the GC alleged that the Agency had violated the Statute by refusing to allow the Union's attorneys to observe the shift changes.[12] The Judge denied the motion, stating that the complaint clearly alleged that the Agency failed to negotiate in good faith and interfered with the Union's ability to seek "effective counsel" by refusing to give the Union's attorney access to the front lobby for observing shift changes and processing grievances.[13]

In July 2017, the Judge conducted a two-day hearing where both parties were represented by counsel and afforded the opportunity to present evidence and examine witnesses.[14] In his decision, the Judge noted that the GC mainly focused on the allegation that the Agency refused to comply with § 7114(b)(4) of the Statute; however, he found at the onset of his decision that the Agency's acts of denying the Union access to the front lobby for performing representational duties were straightforward violations of § 7116(a)(1) and (5) of the Statute.[15] He explained that the Agency's actions violated § 7116(a)(1) and (5) of the Statute because the Agency wrongfully impeded union officials from completing their representational duties. Furthermore, the Judge reasoned that the conduct at issue had been fully and fairly litigated, as paragraphs sixteen and twenty of the consolidated complaint put both parties on notice that "that the issue in this case is whether Unions are entitled under the Statute to have access to the front lobbies of the prisons in order to observe shift changes."[16]

The Judge relied on established Authority case law that nonemployee union representatives have a right of reasonable access to an agency's facilities, and that a union has the right to determine who shall act as its representative.[17] He further found that the Union had a very strong interest in observing the shift changes to investigate and litigate its grievances, and noted that the Agency had not rebutted Union testimony that the first-hand observations proved useful.[18] The Judge also noted that the Union sought access to carry out its representational duties, not to solicit membership or organize unrepresented employees.

The Judge acknowledged that "a federal prison's interests in security and safety are of 'paramount importance.'"[19] However, he found that the Agency had failed to demonstrate a reasonable connection "between their asserted security concerns and the need to keep Union attorneys out of the front lobbies."[20] The Judge found that Union attorneys have undergone security screening upon first entering the facility and repeated background checks, that their addresses are known to the Agency, and that they are accompanied by a Union officer. He found it relevant that the Union was seeking access to a non-secure, more public location, i.e., the lobbies, where the attorney and Union official would not interfere with, or disturb, the Agency's business.[21] He also found that a number of nonemployee visitors, including inmate visitors, contractors, and vendors are often in the lobbies

[7] GC's Ex. 1(e) at 3.
[8] *Id.*
[9] *Id.*
[10] GC's Ex. 1(h).
[11] *Id.*
[12] GC's Ex. 1(i).
[13] GC's Ex. 1(j) at 1.
[14] Judge's Decision at 3.
[15] *Id.* at 16-17.
[16] *Id.* at 17 n.7 (citing GC's Exs. 1(a)-1(e); *Air Force Material Command, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 54 FLRA 1529, 1531 n.2 (1998); *Dep't of VA, VA Med. Ctr., Wash., D.C.*, 51 FLRA 896, 900 (1996); *U.S. DOL, Wash., D.C.*, 51 FLRA 462, 467 (1995)); *see also* GC's Ex. 1(e) at 3.
[17] Judge's Decision at 18-19 (citing *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 713, 713-14 (1999) (*Leavenworth*); *Bureau of Indian Affairs, Isleta Elementary Sch., Pueblo of Isleta, N.M.*, 54 FLRA 1428 (1998) (*Isleta*); *Food & Drug Admin., Newark Dist. Office, W. Orange, N.J.*, 47 FLRA 535, 566 (1993); *U.S. Air Force Logistics Command, Tinker Air Force Base, Okla. City, Okla.*, 32 FLRA 252 (1988); *Dep't of HHS, Food & Drug Admin., Region II, N.Y. Reg'l Lab.*, 16 FLRA 182 (1984); *Phila. Naval Shipyard*, 4 FLRA 255 (1980) (*Shipyard*)).
[18] He also found that the security camera footage the Agency offered to provide was inadequate. *Id.* at 26.
[19] *Id.* at 27.
[20] *Id.*
[21] *See id.* at 28 ("At the hearing, the Respondents did not offer any evidence that Union attorneys had ever engaged in solicitation or improper activity while handling grievances at the prisons; accordingly, I cannot give any weight to their claim that attorneys standing in the lobby posed any danger of disrupting the work of employees.").

"for more-than-insignificant periods of time,"[22] including during shift changes. He also held that that as the exclusive representative, the Union had "statutory rights and obligations over and above those of routine visitors."[23] The Judge concluded that the Agency failed to make a reasonable connection between its asserted security concerns and the presence of attorneys in the lobby, and that it interfered with the Unions' investigation and litigation of grievances, in violation of § 7116(a)(1) and (5) of the Statute.[24]

The Agency filed exceptions to the Judge's decision on October 1, 2018, after being granted an extension of time. The Union filed an opposition on October 23, 2018, and the General Counsel filed an opposition on October 25, 2018.

III. Analysis and Conclusions

A. The Judge did not deny the Agency "due process."

In its exceptions, the Agency argues that the Judge denied "due process" by deciding the matter on a different theory than the one presented by the General Counsel and litigated by the parties.[25] Specifically, the Agency asserts that the "sole theory advanced . . . at [the] hearing" was that the Agency had violated § 7114(b)(4), and that the Agency was not on notice of any independent charge under § 7116(a)(1) and (5).[26]

As an initial matter, we note that the Agency has no due process rights under the Fifth Amendment.[27] Nor are we aware of any statutory notice requirement that would apply where an agency is the respondent in a ULP proceeding.[28] Nonetheless, it is a "basic principle of justice . . . that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights," even where the party in question is a government entity.[29] Accordingly, we reaffirm that a respondent agency in a ULP proceeding is entitled to adequate notice of the charges against it, and that the Authority will dismiss a complaint against an agency if the required notice is not given.[30]

The Authority has noted that "[w]hat constitutes adequate notice will depend on the circumstances of each case."[31] In each instance, however, this notice must afford the respondent "a meaningful opportunity to litigate the underlying issue."[32] Where a complaint is silent or ambiguous about specific issues that are later raised at the hearing, the Authority may still consider and dispose of those issues if the record shows that they were fully and fairly litigated.[33] The Authority has interpreted "fully and fairly litigated" to "mean that all parties understood (or objectively should have understood) the issues in dispute and had a reasonable opportunity to present relevant evidence."[34]

But, here, the consolidated complaint was not silent. The consolidated complaint alleged that the

[22] *Id.* at 29; *see also id.* ("management often arranges for groups of visitors to take tours of its institutions, including the front lobbies"); *id.* at 30 ("if, in the fifteen-to-thirty minutes that visitors sit or stand in the lobby waiting to go into the prison, or in the thirty or forty-five minutes that vendors sometimes wait in the lobby, they are not jeopardizing the prison's security, *a fortiori* the Union attorneys pose little or no legitimate security risks").

[23] *Id.* at 30*; see also id.* at 28.

[24] Contrary to the Agency's exceptions, the Judge did not find that the Agency violated § 7116(a)(8).

[25] Exceptions at 6.

[26] *Id.* at 7.

[27] *See U.S. v. Cardinal Mine Supply, Inc.*, 916 F.2d 1087, 1089 (6th Cir. 1990) ("[T]he United States appropriately concedes that it has no right to due process[.]") (footnote omitted); *In re Scott Cable Commc'ns, Inc.*, 259 B.R. 536, 543 (D. Conn. 2011) ("Government entities have no right to due process under the Fifth Amendment's due process clause."); *In re Trembath*, 205 B.R. 909, n.6 (Bankr. N.D. Ill. 1997) ("The due process clause does not apply to governmental entities[.]").

[28] The Authority has cited 5 U.S.C. § 554(b)(3) for the general proposition that respondents in a ULP proceeding must be adequately notified of the "matters of fact and law asserted." *AFGE, Local 2501, Memphis, Tenn.*, 51 FLRA 1657, 1660 (1996) (*Memphis*) (quoting 5 U.S.C. § 554(b)(3)). However, the right to notice under § 554(b)(3) applies to "[p]ersons" and not to government agencies. 5 U.S.C. § 554(b); *see also id.* § 551(2) (defining "person" to include "an individual, partnership, corporation, association, or public or private organization *other than an agency*") (emphasis added).

[29] *City of New York. v. New York, N.H., & H.R. Co.*, 344 U.S. 293, 297 (1953).

[30] *U.S. DOJ, Fed. BOP, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 393 (1999) ("The Authority has repeatedly affirmed the importance of giving a respondent adequate notice of the allegations against it, and has dismissed complaints where such notice was not given.") (citation omitted).

[31] *Id.* (quoting *Memphis*, 51 FLRA at 1660).

[32] *Id.*

[33] *See Dep't of the Treasury, IRS, Office of the Chief Counsel*, 71 FLRA 281, 282-83 (2019) (*OCC*) (Chairman Kiko dissenting) ("[T]he sufficiency of a complaint is not judged on the basis of rigid pleading requirements."); *SPORT Air Traffic Controllers Org.*, 70 FLRA 554, 557 (2018) (*SPORT Air*) (Member DuBester concurring) (holding that the union had sufficient notice of the allegation that it failed to negotiate in good faith when the record reflected that this issue was a central aspect of the hearing); *U.S. Dep't of VA, VA Med. Ctr., Richmond, Va.*, 68 FLRA 882, 886 (2015) (*VA Richmond*) (Member Pizzella concurring) (noting that under Authority precedent a party has sufficient notice of alleged violations so long as the matter is fully and fairly litigated at the hearing).

[34] *SPORT Air*, 70 FLRA at 557 (quoting *Memphis*, 51 FLRA at 1661).

Agency "has refused to grant [the Union's] request for access to the front lobbies . . . to observe unit employee shift changes for reasonable periods and at reasonable times."[35] Based on that conduct, the complaint alleged that the Agency violated § 7114(b)(4), thus committing a ULP under § 7116(a)(1), (5), and (8).[36] However, the complaint also independently alleged, based on the same conduct, that the Agency "has been failing and refusing to negotiate in good faith" with the Union, in violation of § 7116(a)(1) and (5) of the Statute.[37] It is clear from the language of the complaint that the charged violation of § 7116(a)(1) and (5) was not entirely dependent on a finding of a § 7114(b)(4) violation.[38]

Moreover, even if the complaint had been unclear on this point, we would have no difficulty concluding that the alleged violation of § 7116(a)(1) and (5) was fully and fairly litigated. While the Agency asserts that the General Counsel's sole theory *at the hearing* was the § 7114(b)(4) violation, the cited transcript page also refers to "a breach of the duty to bargain under [§ 7116(a)](1) and (5)."[39] Therefore, the Agency was on sufficient notice that access to the front lobby by the Union's attorney, a failure to negotiate in good faith, and § 7116(a)(1) and (5) were at issue from the outset of the case,[40] and there is no demonstration that the Judge erred when he determined the Agency was not denied a reasonable opportunity to present relevant evidence on these issues.

In sum, we find that the Agency had sufficient notice of the allegations against it, including the conduct that violated the Statute, and a meaningful opportunity to litigate the issues.

B. The Judge did not create a nonexistent right.

The Agency argues that there is not any Authority precedent to support the Judge's conclusion that a union has a *statutory* right to select a nonemployee as its representative.[41] The Agency also contends that the Judge's decision is a "significant erosion of management's rights" because he "unlawfully expand[ed] the right of the Union to have counsel present during regular Agency operations so long as those operations are alleged to be unlawful."[42]

The Authority has long held that the Statute protects a union's right to designate its own representative, including a nonemployee representative.[43] A union's right to designate its own representative also encompasses a union representative's capability to access the agency's premises for processing grievances and conducting representational activities.[44] Furthermore, the Statute protects union representatives from agency interference when they are engaged in union activity.[45] Consequently, the Authority has also held that union representatives "must be granted freedom to process

[35] GC's Ex. 1(e) at ¶¶ 10, 12.
[36] *Id.* at ¶¶ 13, 15, 17, 19.
[37] *Id.* at ¶¶ 14, 16, 18, 20.
[38] We also note, upon review of the entire record, that the Agency was on notice from the date that the initial charges were filed that the challenged conduct was denying the Union's attorneys access to the prison lobbies to observe shift change. *See* Tr. at 25; GC's Ex. 1(a)-(d). The Authority has long held that charges merely initiate investigations and that the relationship between the charge and the complaint need only be related. *VA Richmond*, 68 FLRA at 886; *U.S. DOJ, BOP, Allenwood Fed. Prison Camp, Montgomery, Pa.*, 40 FLRA 449, 455 (1991) ("[T]he purpose of a charge is merely to set in motion the machinery of an inquiry; and that the investigation may deal with [ULPs] that are related to those alleged in the charge and grow out of those allegations while the processing is pending."). Nonetheless, the Agency here has not offered any caselaw to support its emphatic argument that sufficient notice to a respondent of an alleged ULP *begins* with the GC's opening statement at the hearing; nor did we find any. *See* Exceptions at 6 ("When a complaint is ambiguous and the record *does not* clearly show that the respondent otherwise understood (or should have understood) what was in dispute, fairness requires that any doubts about due process be resolved in favor of the respondent." (quoting *BOP, Office of Internal Affairs, Wash., D.C. & Phx., Ariz.*, 52 FLRA 421, 431 (1996)) (emphasis added)); *U.S. DOL, Wash, D.C.*, 51 FLRA 462, 467 (1995) ("The test is one of 'fairness under the circumstances of each case—whether the employer knew what conduct was in issue and had a fair opportunity to present his defense.'") (quoting *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981)). We also note that the Agency argues that its post-hearing brief contained only arguments to counter the legal theory the GC focused on at the hearing, namely the § 7114(b)(4) data request seeking "raw" data. Exceptions at 7. We fail to see how that strategic decision expunges the notice of conduct, challenged as a violation of the Statute, in the first charge. *See* GC's Ex. 1(a)-(d). As the Judge found, email exchanges between the Agency and the Union's attorneys also demonstrate that the Agency was aware that the Union's objections surrounded the denial of permission to its representatives to stand in the lobby. Judge's Decision at 9; Joint Exs. 6-19.
[39] Tr. at 26.
[40] *See* GC's Ex. 1(e) at ¶¶ 10, 12, 14, 16, 18, 20; GC's Ex. 1(c)-1(d); *Memphis*, 51 FLRA at 1660 ("Where a complaint is silent or ambiguous about specific issues that are later raised at the hearing, we may still consider and dispose of those issues if the record shows that they were fully and fairly litigated.").
[41] Exceptions at 19-20.
[42] *Id.* at 20-21.
[43] *Isleta*, 54 FLRA at 1438.
[44] *Id.*
[45] *Shipyard*, 4 FLRA at 266 (affirming that "a union official must be granted freedom to process grievances or otherwise represent employees, and he may not be harassed in the pursuit of these endeavors"); *see generally U.S. Dep't of VA, St. Petersburg Reg'l Benefit Office*, 70 FLRA 586, 589 n.30 (2018) (Member DuBester dissenting on other grounds).

grievances or otherwise represent employees"[46] and an interference with this right constitutes a violation of § 7116(a)(1) and (5) of the Statute.[47]

However, a union's right to access an agency's premises is not absolute and, as detailed more fully below, may be limited in "special circumstances," including management's right to determine its internal security practices under § 7106(a)(1) of the Statute.[48] Because the Judge appropriately applied Authority precedent in finding that the Union's statutory right to designate a nonemployee representative is limited by management's right to determine its internal security practices at correctional facilities,[49] we deny this exception.

C. The Judge properly balanced the Agency's security concerns against the Union's interest in accessing the lobby.

The Agency argues that the Judge's decision interferes with management's right to determine its internal security practices under the Statute.[50] In particular, the Agency claims that it did not violate the Statute when it denied the Union's representative access to the lobbies because of a "general [security] concern" regarding any nonemployee who visits the correctional facility to witness shift changes.[51] Furthermore, the Agency argues that security concerns are of "paramount importance,"[52] that it is entitled to more deference with regard to security practices concerning a "correctional environment,"[53] and that the Agency was "concern[ed]" about general reports that attorneys with background checks brought contraband into other correctional facilities.[54]

Unlike other federal facilities, correctional institutions have special concerns that make security of paramount importance.[55] Consequently, as aforementioned, management's right to determine its internal security practices at correctional facilities is one of the few special circumstances that restrict a designated representative's capability to access an agency's premises for processing grievances.[56] However, the Authority has also held that when an agency asserts its § 7106(a)(1) right to determine its internal security practices, it must establish a reasonable connection between its objective of safeguarding its personnel, property or operations and the technique designed to implement that objective.[57] Consequently, in the context of a ULP, the Authority has balanced an agency's assertion of its right to determine its internal security practices against a union's right to designate a representative.[58]

The Agency correctly asserts that security concerns are of paramount importance in correctional facilities, but, it has failed to demonstrate that the Judge erred when he found that the Agency failed to establish a reasonable connection between its security concerns and preventing the Union's attorneys from observing shift changes at the Agency's lobbies. The Judge found that the lobbies at the Agency's correctional facilities are more public areas and nonemployee visitors have remained in the lobbies for extended periods of time without complaint from the Agency.[59] Furthermore, he determined that the individuals who attempted to access the Agency's lobbies are Union officers and Union attorneys who undergo repeated background checks.[60] Also, the Judge found that the Agency's lobbies are spacious areas that are noisy during shift changes.[61] He noted that the Agency did not offer any evidence demonstrating that the Union's attorneys posed any actual security risk, had ever solicited in the lobby, or attempted any other improper activity that may distract

[46] *Shipyard*, 4 FLRA at 266.
[47] *Leavenworth*, 55 FLRA at 713.
[48] *Id.* at 713-14.
[49] Judge's Decision at 27.
[50] Exceptions at 11-12.
[51] *Id.* at 17.
[52] *Id.* at 14 (citing *Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 856 (1999)).
[53] *Id.* at 13 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Fed. Satellite Low, La Tuna, Tex.*, 59 FLRA 374, 377 (2003)).
[54] *Id.* at 17.
[55] *Leavenworth*, 55 FLRA at 713-14.
[56] *See U.S. DHS, Border & Trans. Sec. Directorate, U.S. CBP, El Paso, Tex.*, 62 FLRA 241, 245 (2007) (*DHS*) (citing *Leavenworth*, 55 FLRA at 713-74). The Agency also argues in its exceptions that it did not violate the Statute because it offered to provide video footage to the Union's attorneys of the shift changes in the lobbies. Exceptions at 20 n.9. However, the Authority has found that denying a union's designated representative access to the agency's *premises* to conduct representational activities violates the Statute, absent special circumstances. *See DHS*, 62 FLRA at 245 (citing *Leavenworth*, 55 FLRA at 713). Furthermore, the Agency does not challenge the Judge's findings that the video footage is of "poor quality" and of "negligible evidentiary value." Judge's Decision at 7, 26.
[57] *See Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 56 FLRA 398, 403-04 (2000) (holding that the agency did not violate § 7106(a)(1) and (5) of the Statute because it established a reasonable connection regarding its internal security practice); *SSA, Balt., Md.*, 55 FLRA 498, 502-03 (1999) (holding that the agency violated § 7106(a)(1) of the Statute because it did not establish a reasonable connection regarding its internal security practices).
[58] *See Leavenworth*, 55 FLRA at 714 ("We find that, in the particular facts and circumstances of this case, the Respondent has demonstrated 'special circumstances' warranting its refusal to grant the president access to the institution for representational purposes.").
[59] Judge's Decision at 29-30.
[60] *Id.* at 28.
[61] *Id.*

Agency employees.[62] Furthermore, the Agency has not challenged any of these factual findings and they are supported by substantial evidence in the record as a whole.[63]

In *U.S. Penitentiary Leavenworth, Kansas* (*Leavenworth*), the Authority found that an agency did not violate § 7116(a)(1) and (5) of the Statute by preventing a union's designated representative from accessing a penitentiary because the representative "allegedly made several inflammatory statements that the Respondent deemed likely to lead to inmate disturbances."[64] Unlike *Leavenworth*, the Agency here has failed to support its exceptions with evidence that it had any specific concerns to justify preventing the Union's attorneys from accessing the lobby.[65] In its exceptions, the Agency only supports its arguments by citing to "general concern[s]" about any nonemployee visitor and general, nonspecific reports concerning attorney misconduct at other prisons.[66] Additionally, the Judge found that the Union's attorneys sought access to the lobby for processing the grievances of Union members.[67] As discussed in Part III.B. above, a union's right to access the agency premises for processing grievances and conducting representational activities is a longstanding statutory right that has been recognized by the Authority.[68] Given the particular circumstances of the instant case and the Judge's findings, the Agency's "general concerns" do not demonstrate that the Judge erred in his decision.[69] While the Agency may have general security concerns which justify preventing a member of the public or a particular union representative[70] from observing shift changes in a public lobby setting, it has failed to demonstrate that the Judge erred when he concluded that the Agency's stated general security concerns do not outweigh the Union's interest in having its attorneys properly advance grievances.

Therefore, we deny this exception.

IV. Order

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that:

A. The Department of Justice, Federal Bureau of Prisons, United States Penitentiary McCreary, Pine Knot, Kentucky (Respondent), shall:

1. Cease and desist from:

(a) Refusing to allow nonemployee representatives of the American Federation of Government Employees, AFL-CIO, Local 614 (the Union) to stand in the lobby of its institution at reasonable times in order to gather information from observing shift changes in connection with pending grievances.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining-unit employees in the exercise of the rights assured them by the Statute.

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

(a) Permit nonemployee representatives of the Union to stand in the lobby of its institution at reasonable times in order to gather information from observing shift changes in connection with pending grievances.

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[62] *Id.*

[63] *See OCC*, 71 FLRA 281, 284 n. 36 ("Member Abbott again notes, as he did in *SPORT Air*, that he does not agree that the Authority should apply a preponderant review of administrative law judge (ALJ) determinations and that arbitrators and regional directors should not be accorded greater deference than ALJs."); *SPORT Air*, 70 FLRA at 556 n.15 (2018); *U.S. Dep't of VA, William Jennings Bryan Dorn VA Med. Ctr., Columbia, S.C.*, 69 FLRA 644, 649 (2016) (Dissenting Opinion of Member Pizzella) ("As a federal quasi-judicial administrative review agency, the Authority should review decisions of our administrative law judges with the deferential 'substantial evidence' standard."); *U.S. Dep't of the Air Force, 12th Flying Training Wing, Randolph Air Force Base, San Antonio, Tex.*, 63 FLRA 256, 263 (2009) (Separate Opinion of Member Beck) ("The Authority is legally permitted to use a 'substantial evidence in the record' standard when reviewing ALJ findings of fact, and it has stated in previous decisions that it will apply this standard. Further, as a practical matter, this is the appropriate standard to use when the Authority acts as an appellate tribunal rather than the initial trier-of-fact.").

[64] 55 FLRA at 714.

[65] Exceptions at 17.

[66] *Id.*

[67] Judge's Decision at 30.

[68] *See* Part III.B.

[69] *See Shipyard*, 4 FLRA at 268 (finding that the agency violated the Statute by preventing a union negotiator from accessing the agency's premises to negotiate a collective bargaining agreement).

[70] *See DHS*, 62 FLRA at 245 (an agency can preclude a particular individual from serving as the union's designated representative only where the agency can demonstrate "special circumstances" that warrant precluding a particular individual from serving in this capacity; however, such "special circumstances" will be construed narrowly to preserve the union's prerogatives (citing *Fed. BOP, Office of Internal Affairs, Wash., D.C.*, 54 FLRA 1502, 1513 (1998)).

(b) Post at its facilities where bargaining unit employees are located, 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 Warden, and shall be posted and maintained for sixty (60) consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) In addition to physical posting of paper notices, the Notice shall be distributed electronically to all bargaining unit employees, on the same day as the physical posting, through email, posting on an intranet or internet site, or other electronic means used to communicate with employees.

(d) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Atlanta Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what compliance actions have been taken.

B. The Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex Coleman, Coleman, Florida (Respondent), shall:

1. Cease and desist from:

(a) Refusing to allow nonemployee representatives of the American Federation of Government Employees, AFL-CIO, Local 506 (the Union) to stand in the lobby of its institution at reasonable times in order to gather information from observing shift changes in connection with pending grievances.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining-unit employees in the exercise of the rights assured them by the Statute.

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

(a) Permit nonemployee representatives of the Union to stand in the lobby of its institution at reasonable times in order to gather information from observing shift changes in connection with pending grievances.

(b) Post at its facilities where bargaining unit employees are located, 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 Warden, and shall be posted and maintained for sixty (60) consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) In addition to physical posting of paper notices, the Notice shall be distributed electronically to all bargaining unit employees, on the same day as the physical posting, through email, posting on an intranet or internet site, or other electronic means used to communicate with employees.

(d) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Atlanta Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what compliance actions have been taken.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Justice, Federal Bureau of Prisons, United States Penitentiary McCreary, Pine Knot, Kentucky, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT refuse to allow nonemployee representatives of American Federation of Employees, AFL-CIO, Local 614 (the Union) to stand in the lobby of our institution at reasonable times in order to gather information from observing shift changes in connection with pending grievances.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining-unit employees in the exercise of the rights assured them by the Statute.

WE WILL permit nonemployee representatives of the Union to stand in the lobby of our institution at reasonable times in order to gather information from observing shift changes in connection with pending grievances.

_____
_____
(Agency/Activity)

Dated:_____ By: _____
(Signature) (Title)

This Notice must remain posted for sixty (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 its provisions, they may communicate directly with the Regional Director, Atlanta Region, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, Georgia 30303, and whose telephone number is: (404) 331-5300.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex Coleman, Coleman, Florida, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT refuse to allow nonemployee representatives of American Federation of Employees, AFL-CIO, Local 506 (the Union) to stand in the lobby of our institution at reasonable times in order to gather information from observing shift changes in connection with pending grievances.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining-unit employees in the exercise of the rights assured them by the Statute.

WE WILL permit nonemployee representatives of the Union to stand in the lobby of our institution at reasonable times in order to gather information from observing shift changes in connection with pending grievances.

_____
(Agency/Activity)

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for sixty (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 its provisions, they may communicate directly with the Regional Director, Atlanta Region, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, Georgia 30303, and whose telephone number is: (404) 331-5300.

Member DuBester, concurring:

I concur with the Decision to adopt the Judge's recommended decision and to deny the Agency's exceptions.

Office of Administrative Law Judges

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
UNITED STATES PENITENTIARY MCCREARY
PINE KNOT, KENTUCKY

And

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX COLEMAN
COLEMAN, FLORIDA
RESPONDENTS

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 614

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 506

CHARGING PARTIES

Case Nos. CH-CA-16-0547
AT-CA-16-0835

The American Federation of Government Employees and its affiliated local unions, representing correctional officers and other employees at federal prisons around the country, have been engaged for decades in litigation with the Federal Bureau of Prisons regarding the proper compensation for employees for work performed at or near the start and finish of their workday. An employee's entitlement to compensation depends, in large part, on when the employee's workday starts and finishes; this, in turn, depends on the tasks they perform when they enter and leave the workplace, the amount of time taken in those tasks, and whether they are closely related to the employee's principal work activity. The case at hand involves one set of two linked grievances that AFGE Locals 614 and 506 filed on this issue, and the Unions' attempt to perform fact-finding at the prisons to ascertain what tasks employees were performing when they entered and left the workplace.

Specifically, the law firm hired by the Unions to handle their grievances sought to visit the prisons and stand in the front lobby of each facility during shift changes, so that the attorneys could make records of what tasks each employee was performing as he or she entered and left the Control Center at the back of the lobby. The lawyers believed that this practice, which they had performed at a number of federal prisons in the past, was an invaluable tool in enabling them to investigate the grievances and to identify what claims were valid and what claims weren't. But when the lawyers attempted to do so in March of 2016 at these two institutions, they were forbidden to stand in the lobbies by the wardens and the prisons' lawyers.

Thus, the case involves a struggle between two competing sets of rights and interests: the right of the Unions to effectively pursue their grievance and the right of the Respondents to maintain the safety, security, and efficient operations of their high-security federal prisons. Case law instructs us that this type of dispute cannot be resolved simply by saying the doors of the agency are always open or always closed; rather, the rights of unions and the rights of agencies must be evaluated on a case-by-case basis and accommodated, with as little destruction of one as is consistent with the maintenance of the other.

In performing such an evaluation in this case, I conclude that while the Respondents have a paramount interest in protecting internal security and safety, those interests were not imperiled by the presence of an attorney in the lobbies of these institutions. The attorneys' observations, however, were an important investigative tool for the Unions in pursuing their grievances, and there was no adequate substitute for them to obtain this information. Therefore, I conclude that the Respondents violated their duty to bargain in good faith with the Unions in denying the attorneys access to the lobbies to observe the shift changes.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute (the Statute), Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On September 2 and November 30, 2016, the American Federation of Government Employees, AFL-CIO, Local 614 (Local 614 or the Union) filed an unfair labor practice (ULP) charge and an amended charge, respectively, against the Department of Justice, Federal Bureau of Prisons, United States Penitentiary McCreary, Pine Knot, Kentucky (the Agency,

Respondent, or USP McCreary) in Case No. CH-CA-16-0547. GC Exs. 1(a), 1(c). On the same dates, the American Federation of Government Employees, AFL-CIO, Local 506, (Local 506 or the Union) filed a virtually identical charge and amended charge against the Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex Coleman, Coleman, Florida (the Agency, Respondent, or FCC Coleman) in Case No. AT-CA-16-0835. GC Exs. 1(b), 1(d). After investigating the charges, the Regional Director of the FLRA's Atlanta Region issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on May 16, 2017, on behalf of the General Counsel (GC), alleging that the Respondents violated §§ 7114(b)(4) and 7116(a)(1), (5), and (8) of the Statute by refusing to grant the Unions' requests for access to the front lobbies of the Respondents' facilities in order to observe employee shift changes. GC Ex. 1(e). The Respondents filed their Answer to the Consolidated Complaint on June 9, 2017, denying that they violated the Statute. GC Ex. 1(f).

The Respondents subsequently filed a Motion to Dismiss, arguing that the Complaint failed to state a claim under the Statute. GC Ex. 1(h). This motion was denied. GC Ex. 1(j). A hearing was held in this matter on July 11 and 12, 2017, in Atlanta, Georgia. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and the Respondent filed post-hearing briefs, which I have fully considered. Based on the entire record, including my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondents, USP McCreary and FCC Coleman, are activities within the Federal Bureau of Prisons (BOP) and agencies within the meaning of § 7103(a)(3) of the Statute. The American Federation of Government Employees, AFL-CIO (AFGE), a labor organization within the meaning of § 7103(a)(4) of the Statute, is the certified exclusive representative of a nationwide consolidated unit of BOP employees, which includes employees of the Respondents. Locals 614 and 506, labor organizations within the meaning of § 7103(a)(4) of the Statute, are agents of AFGE for the purpose of representing bargaining unit employees at USP McCreary and FCC Coleman, respectively. The AFGE and the BOP are parties to a nationwide collective bargaining agreement, known as the Master Agreement.

USP McCreary is a high-security prison located in Kentucky, with about 420 employees; approximately 1200 inmates are housed there, along with another 150 at an attached satellite camp. Tr. 386. FCC Coleman is a complex of four facilities in Florida (a low-security and a medium-security prison, and two high-security penitentiaries), with a satellite camp affiliated with the medium facility. Tr. 216. It is, according to one witness, the largest federal prison in the country. Tr. 219.

The dispute in this case focuses on the front lobbies of each facility at McCreary and Coleman. Each of FCC Coleman's facilities has its own front lobby, which constitutes the sole entry and exit point for all employees and visitors, but they all have the same basic layout, as does the lobby at USP McCreary. *See* GC Ex. 2; *see also* Tr. 67, 217. The security check-in procedures at the lobby are also the same at all the facilities. Tr. 217. The lobby is a large, mostly-open, room, usually opening out to the facility's parking lot. Toward the front of the lobby is a large desk, staffed by a correctional officer. Tr. 278. That officer checks the identity of everyone entering (both employees and visitors) and makes sure that they walk through a metal detector; personal items are emptied into a tray and inspected in an x-ray machine. Tr. 61-62, 77, 277, 428. The metal detector and screening equipment are located to one side of the lobby desk – in some facilities the screening equipment is to the left of the desk, and in other facilities it is to the right (Tr. 77, 358-59) – and the traffic flow of employees and visitors entering the prison passes to that side of the desk and to the rear of the lobby. Also in the front of the lobby, on the side opposite the screening equipment, is an area with lockers, chairs, a vending machine, and restrooms. Tr. 78-79, 285-86. At each facility, to the rear of the front desk, there are corridors containing offices going to the right and left of the lobby, but access to these corridors is restricted. Tr. 271.

Finally, at the rear of the lobby is the Control Center, a glass-enclosed, locked area which monitors or controls most activities in the prison. Employees reporting to their posts pick up their equipment there, exchanging an identifying chit for the equipment, and pass through a sally port with sealed doors at both ends, before going to the various posts within the secured area of the institution. Tr. 61-63, 68-69. Staff in the Control Center operate the doors to let people in one end and out the other end of the sally port; monitor security cameras positioned throughout the facility, as well as radio traffic and other communications; remotely open other doors throughout the facility; and maintain the inmate count. Tr. 60-61. People visiting inmates also enter and exit past the front lobby desk and through the screening equipment and Control Center sally port, after which they are escorted to a separate waiting room inside the secured area of the prison. Tr. 71-72, 189-94, 222, 290-91.

Most employees at the prisons work one of three shifts: 8:00 a.m. to 4:00 p.m., 4:00 p.m. to

midnight, or midnight to 8:00 a.m.; however, some employees work from 6:00 a.m. to 2:00 p.m. or 2:00 to 10:00 p.m. Tr. 209-10, 274. During the shift changes (also called shift exchanges), the lobby area becomes crowded and busy, as incoming employees line up at the lobby desk to be screened and at the Control Center to obtain their equipment and go through the sally port, and as employees finishing work line up at the other side of the Control Center to turn in their equipment, go through the sally port, and leave. Tr. 218-19, 282-83. Inmate visiting hours are from 8:00 a.m. to 3:00 p.m. on weekends and holidays, so visitors frequently gather in the front lobby while the 8:00 a.m. and 2:00 p.m. employee shift changes are occurring. Tr. 191, 193, 222, 290-91.

Since at least the early 1990s, the BOP and its AFGE locals have been engaged in litigation under the Fair Labor Standards Act[1] (FLSA) and the Portal-to-Portal Act[2] regarding the proper compensation due to employees for work performed at or near the start and finish of their workday.[3] The Supreme Court held, in *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956), that "[a]ctivities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed . . . ." This ruling naturally focused the attention of litigants, arbitrators, and courts on what an employee's "principal activities" are, and on what other activities are "integral and indispensable" to those principal activities. With regard to federal employees, the U.S. Office of Personnel Management has promulgated regulations that entitle them to compensation for "preparatory or concluding activity" which is "closely related" and "indispensable" to the employee's principal activity, but only when the preparatory or concluding activity exceeds ten minutes per day. 5 C.F.R. § 551.412.

As a result of the statutory, regulatory, and case law concerning an employee's entitlement to pay for hours worked, the attention of litigants has focused further on how closely an activity is related to the individual employee's principal activity, and how much time is spent performing preparatory or concluding activities. The *USP Coleman II* case, which was heard by an arbitrator in May of 2012 and decided by the Authority in October of 2014, illustrates both of these principles. The Authority held, among other things, that certain correctional officers began performing their principal activity once they passed through three sets of sally ports and entered "the gate," even though they had not yet reported to their assigned posts. Once the officers were among inmates and had to respond to security incidents, they were performing their principal activity. 68 FLRA at 55-56. The Authority also held that other officers were not entitled to compensation for preparatory and concluding activities, because those activities did not exceed ten minutes per day. *Id.* at 56-57.

Thus, there is a fine line between a successful portal grievance and an unsuccessful one, as demonstrated by comparing the Authority's ruling in *USP Coleman II* to its decision in *U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Atwater, Cal.*, 68 FLRA 857 (2015) (*USP Atwater*). In both cases, correctional officers sought compensation for the time spent traveling in the secured area of the prison to their assigned post. The claim was upheld in *USP Coleman II*, because evidence showed that "officers . . . have been called upon to, among other things, restrain . . . inmates." 68 FLRA at 55-56. But in *USP Atwater* the claim was rejected, because the officers were not called upon to deal with incidents of inmate misconduct while walking to their posts. *Id*. at 859-60. Similarly, the time an officer spends checking in with a supervisor is generally not considered a compensable preparatory activity, but it can be if the employee performs additional tasks such as checking mail or receiving assignments. *Compare USP Atwater, id*. at 859, *and U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Terre Haute, Ind.*., 58 FLRA 327, 330 (2003). Therefore, the fact-finder in a portal dispute needs to know much more

[1] 29 U.S.C. §§ 201 et seq.
[2] 29 U.S.C. §§ 251-262.
[3] In *U.S. Dep't of Justice, Fed. Bureau of Prisons, FCI Danbury, Conn*., 55 FLRA 201, 202 (1999), the Authority referred to this litigation, which prompted the BOP in 1995 to implement rules establishing uniform nationwide policies concerning when shifts would be considered to have started and ended. In *U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary Marion, Ill*., 61 FLRA 765, 766 (2006), the Authority referred to other local and nationwide grievances, seeking compensation for pre- and post-shift activity, filed by the AFGE and various local unions in the AFGE's Council of Prison Locals as early as 1995. More recently, "portal" grievances involving FCC Coleman and other BOP facilities have continued to raise questions for arbitrators and the Authority, in a variety of factual settings, as to when an employee first and last performs work that entitles him or her to compensation. For instance, in *U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary Coleman II, Fla*., 68 FLRA 52 (2014) (*USP Coleman II*), the Authority approved in part and set aside in part an arbitrator's findings concerning when correctional officers first engaged in "principal activities" and how much time they engaged in "preparatory and concluding activities." During the hearing before me, several witnesses referred to this latter grievance, and a portion of the transcript of that arbitration was made an exhibit. GC Ex. 3. Even cursory research reveals numerous other published decisions by arbitrators and the Authority involving portal disputes between the BOP and AFGE local unions.

than the mere fact that a correctional officer walks from the Control Center to the gate or to her post: the success or failure of a compensation claim will depend on the claimant's ability to produce convincing evidence as to each of the various tasks that an employee performs in the period immediately before and after arriving at the Control Center, obtaining his or her equipment, passing through the sally port, and reporting to his or her post, as well as the precise amount of time spent in each activity. Moreover, the financial stakes in these cases are high: successful grievances will result in back pay to large portions of the workforce, and attorneys' fees alone can amount to more than a million dollars in a single case. Tr. 47.

The attorney handling the portal grievances filed by Locals 506 and 614 in this case, Heidi Burakiewicz, has been representing AFGE prison locals in such litigation for approximately fifteen years. Tr. 35-56. She utilizes a variety of methods for investigating and sorting out which wage-and-hour claims have merit and which don't. She speaks with employees and with members of the Union's executive board; submits requests to the Agency for documents relating to the positions in dispute; and visits the prison in order to see the physical layout of the facility. Tr. 47-48. In the course of her FLSA litigation with the BOP, Burakiewicz has frequently taken tours of prison facilities – sometimes at the initiative of the Agency, and sometimes at the request of an arbitrator. Tr. 53-54. On one of these tours, several years ago, the parties stood in the front lobby and at the Control Center for an extended period of time, allowing Burakiewicz to observe what actually happens during the shift change process. Tr. 56. From this experience, Burakiewicz realized the value of extended observation of the activities of the employees in the front lobby as they begin and end their workday, in presenting evidence to a fact-finder in FLSA litigation. Tr. 56-58. Seeing the shift change process herself enables her (and, hopefully, the arbitrator) to visualize and understand the various activities that are occurring, and it helps her when she questions witnesses about the subject. Tr. 58. She draws diagrams, similar to GC Exhibit 2, to show the layout of each institution and the locations where different activities are occurring, for the use of witnesses and the fact-finder. Tr. 58-59. At an FLSA hearing, she generally starts by having an employee testify about the layout of an institution and the steps that occur in starting and ending a workday; then she requests that the arbitrator take a tour of the facility, after which she calls additional witnesses to testify about the other elements of the case. *Id.*

When Burakiewicz or one of her associates stands in the prison lobby to observe shift changes, she has a local union official with her, to help her identify the employees as they come and go, into and out of the institution. Tr. 90, 93. She tries to arrive at the lobby about a half hour before each shift change, and she stays there until the last employee on the shift has departed. Tr. 94. She obtains and uses the daily roster, which lists the employees scheduled to work that day, and with the assistance of the union official, she marks down the time that each employee reports and leaves, focusing on when the employee performs the first (or last) "compensable task" of the day. Tr. 90. Burakiewicz explained that based on the FLSA case law, there are certain tasks that may be significant in identifying when the employee's workday begins and ends, such as donning and doffing equipment indispensable to the employee's job, whether they obtain or turn in equipment at the Control Center, and how long they have to wait at the Control Center to do so. Tr. 90-91. She also looks to see whether supervisors are present in the lobby during shift changes, as an indication of whether the Agency is aware of practices that occur there. Tr. 91-92. She further explained that accuracy and consistency are very important in keeping these records. For instance, they cannot write down the time one employee enters the front lobby and the time another employee finishes at the screening site or goes through the sally port; if they did so, the information would not match, and the results would be meaningless. Tr. 96.

Burakiewicz further testified that the recordkeeping performed by her and her associates cannot be delegated to union officials. Such employees are not trained to know the significant legal issues, and in her experience they are not consistent or meticulous enough in recording the necessary information to produce data that is useful in litigation. Tr. 107. They also get distracted, as they are more likely to get involved in conversations with employees coming to and going from work. Employees will sometimes approach Burakiewicz in the lobby, but she strictly avoids engaging in any substantive conversation; if someone starts to talk to her about a grievance or some other matter, she instructs the person to meet her at the union office later in the day. Tr. 99-103. She is far too busy keeping track of the times employees perform their first and last compensable tasks to get involved in conversations, and she doesn't want employees to suffer any repercussions from talking publicly to a union attorney. Tr. 99, 102-03. She insisted that she "absolutely" does not solicit employee business for her law firm or for the union while observing shift changes. Tr. 100-01.

Burakiewicz uses the information recorded while observing shift changes in both the early and late stages of grievance investigations and at hearings. It helps her to identify what specific jobs have legitimate FLSA claims; to narrow down the union's grievance in advance of arbitration; to evaluate the accuracy of descriptions from individual employees and whether any

of them are exaggerating; to measure the amount of damages recoverable; and to cross-examine management witnesses. Tr. 98, 107-12. In some cases, the Agency has offered to provide video footage of the lobby area as a substitute for her personal observations, but she has found such video footage invariably to be of poor quality and of negligible evidentiary value. Tr. 113-18. Perhaps most importantly for Burakiewicz, she utilizes her observation of the shift changes to "understand the rhythm and what's going on" at each specific institution, as she often discovers "unique little quirks" and "unanticipated or unexpected" actions relating to when employees perform their first and last compensable tasks. Tr. 97, 107; *see also* Tr. 160-63.

This brings us to the current grievances filed by Locals 506 and 614, which were the basis for the incidents now in dispute. Local 614 filed its grievance (Jt. Ex. 1) against USP McCreary in December of 2014, and Local 506 filed its grievance (Jt. Ex. 2) against FCC Coleman in October of 2014. Tr. 45. Both were drafted with Burakiewicz's assistance, and the allegations in paragraphs 5 and 6 of the grievances were identical: that the Agencies were violating the Fair Labor Standards Act, 29 U.S.C. § 207(c); OPM regulations, 5 C.F.R. Part 551; and Article 3, Section b of the Master Agreement by requiring employees to perform tasks such as donning equipment, picking up equipment, supervising and correcting inmate behavior, reviewing files, and filling out documents prior to the start, and after the conclusion, of their shifts, without compensation. Both grievances were still pending at the time of this hearing, in July 2017, and Burakiewicz has been working with officials of the Unions to gather evidence in order to prepare the cases for arbitration. Tr. 270. The parties in the McCreary grievance have agreed to mediation, but mediation has not yet occurred, as the Union was still attempting to gather specific information about work performed in different jobs, in order to identify which positions would be disputed. Tr. 112-13. In the Coleman grievance, the attorney representing the Agency had been pressing Burakiewicz to identify which positions the Union contested, and on what grounds, so that the arbitration hearing could be streamlined. Tr. 123-26. In an effort to do so, Burakiewicz planned to travel to FCC Coleman to gather more facts. Tr. 126-27.

On March 8, 2016, Burakiewicz came to FCC Coleman with two other attorneys from her law firm to meet with employees and officials of Local 506 regarding the portal grievance and to observe the actions of employees in the front lobby of each facility as they came into work and departed. Tr. 127. She had previously obtained permission from Coleman officials to meet with employees at the Union office, which is located in a separate building. Tr. 472; Jt. Ex. 8. But she didn't believe it was necessary for her to ask permission to stand in the lobby, as she had done this without a problem on previous occasions at Coleman and many other BOP institutions. Tr. 104-05, 121-23, 128. She and a Union steward went to the lobby of the medium-security facility, and after showing identification and authorization and getting screened at the front desk,[4] the two of them moved to the open area to the right of the front desk (that is, the side that does not have the screening equipment), where they stood and observed employees coming in and out. Tr. 89-90. Burakiewicz carried a printout of the daily roster, so that she knew who was scheduled to work and where; as employees would enter the lobby and walk to the Control Center at the start of their shift, or leave the Control Center at the end of their shift, the steward would tell her the name of the employee, and she would mark that employee down on the roster and note the time the employee came in or out. Tr. 92-93. At some point, a lieutenant came up to them and told Burakiewicz she had to leave the building, which they did. Tr. 128.

The same process was repeated the next day, March 9, when Burakiewicz went to Penitentiary 1 with Union President Joe Rojas and another official of the Union and was told to leave by Human Resources Manager Kevin Rison and Assistant Manager David Honsted. Tr. 128-29. Rison told her that only the Agency's portal attorney could give her permission to stay in the lobby, so Burakiewicz went outside to contact that attorney, Jennifer Grundy Hollett. Tr. 133. Since Ms. Hollett was away on travel, communicating with her was difficult, and the two attorneys spent much of March 9 debating Burakiewicz's request, without any resolution. Jt. Exs. 6, 7 & 8. Burakiewicz then asked for permission to observe the shift changes the following day, March 10; Hollett discussed the matter with Agency officials and finally advised Burakiewicz that they would not be allowed to do so. Jt. Ex. 8. Hollett offered to provide video recordings of the front lobbies instead, and she suggested that if Burakiewicz wished to observe shift changes in the future, she should submit a written request in advance. *Id.*

Accordingly, Burakiewicz and Local 506 Vice-President Gerrod Dixon sent a series of emails to Hollett and the wardens at FCC Coleman between March 22 and 25, requesting permission for Union attorneys to observe shift changes in the lobbies at each facility from March 29 to April 1, in relation to the pending portal grievance. Tr. 142, 145; Jt. Exs. 9-19. Burakiewicz tried to reassure Hollett that she had no

[4] Whenever she visits a BOP facility, Burakiewicz is required to show identification, a memo from the warden authorizing her to enter, and usually an NCIC clearance form showing that she has had a recent criminal background check in a national criminal database. Tr. 49, 62.

intention of speaking with employees in the lobby during shift changes. Jt. Ex. 9. Nonetheless, Warden Lockett denied the request, and Hollett sent a separate email explaining the decision. Jt. Exs. 17, 19. Hollett cited "a security concern . . . to have non-staff congregating in the lobby and security screening areas, and observing the screening process and staff obtaining/returning equipment at the control center, particularly during shift exchange times." Jt. Ex. 19. She noted that "the Agency has concerns about any attorneys attempting to interview/sign up staff while on the job or heading into/out of the facility." *Id*. The Agency repeated its offer to provide video from the front lobby security cameras and asserted that this would meet the Union's "stated needs of seeing the process and gauging time, while meeting our security and operational concerns." *Id*. Since then, Burakiewicz and Hollett have discussed the issue further, during attempts to set dates for the arbitration hearing. Burakiewicz has explained that she cannot finalize her plans for the hearings until she has had the opportunity to stand in the lobby during shift changes, and Hollett has stated that the Agency "will never agree to it; that is never going to happen." Tr. 148.

In a parallel series of events, Local 614 made arrangements for two attorneys from Burakiewicz's firm, Robert DePriest[5] and Stephanie Bryant, to visit USP McCreary from March 14 to 17, 2016, in relation to the ongoing portal litigation. Union President Don Peace sent an email to the warden, asking for permission for the attorneys to bring their laptop computers into the Union office, which (unlike the one at FCC Coleman) is located inside the institution; the warden approved the request. Jt. Ex. 3; Tr. 306-09. Attached to the email were NCIC forms for the attorneys. Jt. Ex. 3; Tr. 307. The Union didn't ask for permission to stand in the front lobby and observe shift changes, because it didn't think permission was necessary. Tr. 312-13. DePriest and Union Executive Vice-President Larry Brown came to the lobby of the Penitentiary at around 3:30 p.m. on March 15, in advance of the 4:00 p.m. shift change. Tr. 310-11. They stood in the open area at the front of the lobby, near the lockers and vending machine, so that they were not in the way of people going through the screening site. Tr. 312. From this vantage point, Brown and DePriest could observe employees entering and leaving; Brown identified the employees, and DePriest wrote down the times that they entered and left. Tr. 312, 314. At some point, USP McCreary's Human Resource Manager, Todd Lambert, walked up to them and told them to leave, because they were not authorized to be in the lobby watching the shift change. Tr. 314-15. According to Lambert, he walked into the lobby from the corridor containing the warden's office shortly before 4:00 p.m. and saw Brown with a man he didn't recognize. Tr. 366. Assuming this person to be one of the Union's attorneys,[6] Lambert contacted one of the Agency's lawyers, and then the warden himself, to see whether anyone had authorized them to stand in the lobby. Upon learning that the Union lawyers had not been given permission to gather there, Lambert was instructed by the warden to escort the lawyers out of the building. Tr. 366-68, 407-08. Lambert didn't ask any of the Union representatives why they wanted to observe the shift changes in the lobby, and he was not advised that the presence of the Union representatives in the lobby caused any disruption. Tr. 392-93.

Within a few days of this incident, Union officers Peace and Brown met with Warden Ormond, who explained that they had not expressly requested to observe the shift changes in the front lobby; if they had requested this in advance of the visit, he would have approved it. Tr. 319-20. Therefore, the Union sent a new memo to the warden on April 28, requesting permission for DePriest to meet with employees at the prison's training center and at the Union's office from May 9 through 12, and to observe shift changes in the front lobby. Jt. Ex. 4. On May 2, Lambert responded on behalf of the warden, stating that DePriest could meet with employees only at the training center, but he could not enter the main prison facility or observe shift changes in the lobby. Jt. Ex. 5. Brown again asked the warden why he had denied their request, when they had done precisely what he advised; according to Brown, the warden told him this was done on the advice of the Agency's lawyer, and that this practice was being applied Bureau-wide. Tr. 321-22. According to Warden Ormond, he denied the attorneys' initial attempt to observe the shift changes in the lobby because "they were not an employee of the Agency or the institution and it was a security concern to monitor the habits and the procedures that the employee may be conducting the screening . . . ." Tr. 408. Similarly, when the Union's request was made in writing, he felt it would be "inappropriate" for non-employees "just standing around in the lobby[,]" as they might interfere with staff doing their work, and they might identify "patterns and shortcomings and weaknesses" in security procedures. Tr. 427, 428. While the warden was never advised that the attorneys had caused any specific disruption when they were in the lobby, he testified, "[M]y contention is them being here was disruptive." Tr. 439-40.

[5] Although the Union initially identified him as "Donald DePriest" (Tr. 306; Jt. Ex. 3), Burakiewicz identified him as Robert (Tr. 119), and I trust that Burakiewicz knows her associate better than officials at McCreary. Moreover, in a subsequent email, the Union identified him as Robert. Jt. Ex. 4.

[6] Both Lambert and the warden knew that the Union's attorneys were at the prison to interview employees regarding the portal litigation. Tr. 357, 454-55.

At the hearing, witnesses offered conflicting accounts of the policies and practices relating to the use of the front lobbies at FCC Coleman and USP McCreary. For instance, BOP Program Statement 5510.15 (Searching, Detaining, or Arresting Visitors to Bureau Grounds and Facilities) authorizes a warden or a designee to deny entry to a non-inmate visitor in certain circumstances. Resp. Ex. 1 at 18; Tr. 346. Lambert testified that all visitors must request authorization to visit any institution, and the warden has discretion to grant or deny such requests. Tr. 350-51. BOP Program Statement 3740.02 (Staff Entrance and Search Procedures) states: "No inmates or inmate visitors will be allowed to remain in the area, or allowed to view screening procedures, when electronic searches of staff are being conducted." Resp. Ex. 3 at 11; Tr. 349. When asked whether he was concerned that the Union attorneys might bring contraband into the prison, Warden Ormond said, "The policy is the same for everyone, so it's not about one particular attorney, or one particular visitor . . . . I didn't meet these union counsel. I don't know them personally or have never met them, so it's not about the individual person." Tr. 409. Management officials at both McCreary and Coleman testified that in their experience, prior to this case, the Union had never asked permission to stand and observe shift exchanges in the front lobby, and the Agency had never given the Union permission for its attorneys to do so. Tr. 371-72; 425; 480.

Union witnesses, however, testified that Burakiewicz and her fellow attorneys, accompanied by Union officials, had frequently stood and observed entire shift changes at numerous BOP institutions over a several-year period, and until March of 2016 had never been told that such a practice was prohibited. Tr. 104-05, 131. While the grievance in the *USP Coleman II* case was pending, Burakiewicz and Rojas stood in the front lobby of that facility and observed numerous shift changes; not only did they observe the shift changes without objection, but Warden Drew approached them and Rojas introduced Burakiewicz to the warden. Tr. 120-22, 226-29. A similar incident occurred in a different case, with the human resource manager at the BOP facility in Chicago. Tr. 104-05.

Witnesses also disagreed as to the extent that non-employee visitors were allowed to linger in the front lobby. Lambert testified that since visiting hours for inmates start at 8:00 a.m., in the middle of a shift change, visitors are required to stay outside the building until all employees have gone through the entry screening process. Tr. 381-82. But Burakiewicz, Rojas, and Brown all testified that visitors frequently arrive as early as 7:30 and wait in the lobby (where they can observe the staff reporting in and out) until they go through screening after 8:00. Tr. 149, 191, 193-94, 222, 290-91. Contractors, such as vending machine operators, also come into the prison lobby, where they wait until a prison employee comes out to escort them inside the secured area. Tr. 149, 223, 298-301. Depending on how long it takes for an employee to meet the contractor, the contractor may have to wait in the lobby for up to 45 minutes. Tr. 299-301.

A particularly contentious dispute focused on the visits of an organization called the Correctional Peace Officers Foundation (CPOF), an independent nonprofit group that assists correctional officers and their families in times of need. Periodically, at the Union's invitation, representatives of CPOF have visited USP McCreary and FCC Coleman to talk to employees and solicit membership in CPOF. Tr. 223, 295. Rojas said that when CPOF came to Coleman in about 2014, its representatives set up a table in the front lobby of all four facilities, behind the screening desk, and handed out leaflets and information about the organization to employees as they came and left. Over a four-day period, they stayed at each facility for one full day. Tr. 223-25. Brown said that CPOF last came to McCreary in about 2015, and they were arranging for another visit in 2017. Tr. 295-97. But management witnesses insisted that the Agency had never given approval for CPOF to use the lobbies for solicitation; rather, the organization had simply been allowed to speak to employees at Union functions. Tr. 372-73, 466, 475. An exchange of emails between Local 506 and Coleman management reflects that the Union's request for CPOF to set up an informational table in the front lobbies in March of 2011 was denied, but that the organization was allowed to speak at Union functions. Resp. Exs. 7 & 8. Union officials were not able to produce any documentation of their requests for CPOF to visit either institution in 2014 or 2015, but Local 614 did submit an email it sent to employees in August of 2011, advising them that a CPOF representative would have an information table set up in the front lobby at USP McCreary during shift changes, and that the representative would be soliciting membership. Tr. 523; Union Ex. 2. And while the document itself does not appear to have been sent to anyone in McCreary management, Brown believed that an email such as this would not have been sent to the entire bargaining unit without the warden's approval. Tr. 526-27.

POSITIONS OF THE PARTIES

General Counsel

The GC alleges that the Respondents violated § 7116(a)(1), (5), and (8) of the Statute by refusing to grant the Unions' requests for access to the front lobbies of the prisons to observe shift changes for reasonable periods of time. More specifically, the GC argues that

denying the Unions access to the lobbies violated § 7114(b)(4) of the Statute and that the Agency thereby failed to negotiate in good faith. GC Br. at 1, 18, 22.

The General Counsel acknowledges that this case is unique, "in that the information requested is not what is commonly sought in an information request submitted under the Statute." *Id*. at 19. Rather than requesting that the Respondents provide documents relating to a grievance, the Unions here are requesting access to a specific area within the prison facilities, so that they can gather raw data themselves from observing the activities of employees coming and going in the front lobby. *Id*. Despite this difference, the GC argues that the statutory elements of a § 7114(b)(4) data request are met here: the Unions established that the data was normally maintained by the Respondents and reasonably available (*id*. at 17-18, 22); they further established a particularized need for the data to be obtained by observing shift changes, thereby demonstrating that the data was necessary for them to investigate and pursue the portal grievances (*id*. at 18-19, 22); and they articulated their need for the data to prison management, which understood how the Unions intended to use it (*id*. at 21-22).

The GC notes that while the Authority has not had occasion to rule specifically on this type of information request, an FLRA administrative law judge did in *Def. Logistics Agency, Def. Dist. Region East, Def. Depot Susquehanna, New Cumberland, Pa*., Case No. BN-CA-70149 (April 17, 1998) (ALJD Rep. No. 134) (*New Cumberland*). In that case, the judge applied traditional 7114(b)(4) analysis to find that the agency unlawfully denied a union's request for access to a building in order to conduct specialized tests for the presence of asbestos. In support of his finding that the union's request for plant access was a request for "data" under the Statute, the judge relied in part on a line of decisions by the National Labor Relations Board (NLRB) derived from *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), *enf'd* 778 F.2d 49 (1st Cir. 1985) (*Holyoke*). The General Counsel urges that I, and ultimately the Authority, adopt the *New Cumberland/Holyoke* approach and similarly find that the Respondents violated their duty to bargain with the Unions by denying them access to the front lobbies of the prisons in order to observe shift changes.

The GC alleges that when Local 614 requested that its attorneys should be allowed access to the lobby at USP McCreary, and when Burakiewicz requested that she and her colleagues should be allowed access to the lobbies at the FCC Coleman facilities, the Respondents were aware of the reasons for the requests: that they were gathering information to investigate and pursue the portal grievances that were pending. GC Br. at 21. The wardens and HR officials at both institutions discussed the requests with the attorneys who were representing them in the portal grievances, before denying the requests. Indeed at Coleman, HR Manager Rison instructed Burakiewicz to contact Hollett to resolve the dispute, and Burakiewicz told Hollett she needed to observe the activity in the lobbies in order to identify the positions in dispute in the grievance. *Id*. at 21-22. The Respondents therefore understood that the Union attorneys were seeking to obtain information that they needed to properly represent the Unions in the grievances. In this manner, the GC asserts that the Unions articulated their particularized need for the information, which could only be obtained by observing shift changes in the front lobbies. *Id*. at 22.

In cases such as this, the NLRB has adopted, and the GC urges me and the Authority to adopt, a balancing test, in which the competing rights of employees to be responsibly represented by their union and the right of an employer to control its property are accommodated "'with as little destruction of one as is consistent with the maintenance of the other.'" *Holyoke*, 273 NLRB at 1370 (quoting *Babcock & Wilcox Co*., 351 U.S. 105, 112 (1956)). Some of the factors considered by the Board in this analysis are outlined in its decision in *Hercules, Inc*., 281 NLRB 961, 970 (1986), *enf'd* 833 F.2d 426 (2nd Cir. 1987). Thus, the General Counsel argues that the Unions had no satisfactory alternative means of obtaining the information it sought, and that the wardens' responsibility to ensure the safety and security of federal prisons did not justify the denial of access of union attorneys from the prison lobbies. GC Br. at 23-28. With regard to the first argument, the GC insists that attorney Hollett's offer to provide video footage of the front lobbies was not an adequate substitute for Burakiewicz personally observing the lobbies during shift changes. Burakiewicz testified as to how previous videos submitted to her by the Respondents were blurry and taken at bad angles; as a result, it was difficult to identify employees or to put the scene into context. Tr. 113-18. She also stated that such offers by the Respondents have been unreliable, since the videos have generally been furnished right before a hearing, if at all. Tr. 115-16. The GC insists that the information obtained by the Union attorneys by personal observation requires them to observe the entire area of the lobby and Control Center and to personally measure the times that employees perform their first and last compensable tasks of the day. GC Br. at 24-25. Perhaps more importantly, the GC argues that the Respondents cannot be permitted to dictate the techniques the Union attorneys use to investigate and litigate their grievances. As noted by the court in *Hercules*, "Requiring total reliance on Company data would in effect place the Union at the mercy of the Company." 833 F.2d at 429 (citation omitted); *see also Dep't of VA, Ralph H. Johnson Med. Ctr.,*

Charleston, S.C., 57 FLRA 495, 498 (2001) (agencies and unions have the right to designate their respective representatives when fulfilling their statutory responsibilities).

In contrast to the Unions' need for the information that can only be obtained by directly observing shift changes, the GC asserts that the Respondents have failed to demonstrate property or other interests that outweigh the representational needs of the Unions. For instance, the GC argues that it is irrational to apply BOP Program Statements restricting visitor access to lobbies and shift changes to attorneys representing the Unions. In *Hercules*, 281 NLRB at 970, the Board identified several factors that might be relevant to an employer's need to restrict access to its premises, and the GC insists that none of these factors justify the Respondents' decision here. As already noted, the GC asserts that there is no adequate alternative means for the Unions to obtain the information. GC Br. at 24-25. Interviewing employees will not produce the hard, tangible evidence that can be obtained through direct observation and preparing charts while standing in the lobby. The GC acknowledges that agencies have legitimate security concerns in a prison, but it insists that the presence of a Union attorney in the front lobby of the prison would not compromise security in the slightest. *Id*. at 25-28. The GC cites numerous examples of both Union attorneys and non-union visitors being present in the lobbies of many institutions, including FCC Coleman, without any problem, as evidence of the pretextual nature of the Respondents' claim. *Id*. at 26-27. Similarly, the suggestion that an attorney's presence in the lobby is disruptive is, in the GC's view, contradicted by the evidence. The atmosphere in the lobbies during shift changes is boisterous as employees are mingling and conversing, and the Union attorneys do not solicit grievances or even engage in discussions with officers while they are observing the shift change. *Id*. at 28. Therefore, the GC argues that the representational rights of the Unions here outweigh the property rights and security interests of the Respondents.

Respondents

The Respondents argue that the *Holyoke* balancing test is not an appropriate standard for evaluating a federal union's request for access to an agency's premises. Resp. Br. at 3-7. They further argue that even if *Holyoke* were to be adopted by the Authority, the Unions did not satisfy that standard, based on the unique safety and security concerns of a federal prison. *Id*. at 16-21. Finally, they argue that the Unions did not demonstrate a particularized need for the data or information that might be obtained by observing shift changes in the prison lobbies. *Id*. at 8-16.

In *Holyoke*, the NLRB ruled that a request for access to an employer's facilities, in order to perform a test or gather information, is not the same as a direct request for the information itself. 273 NLRB at 1369-70. Under NLRB case law, an employer is required to furnish information to a union if the information is "relevant" to the union's representational duties. *Id*. But the Board explained that when a union seeks access to company premises in order to obtain information, an employer's right to control its property is compromised, and those property rights must be balanced against the representational rights of the union and the employees. *Id*. at 1370. Respondents assert that the legal basis for requiring employers to furnish information is different in the private sector than in the federal sector; accordingly, the NLRB rule is not suitable for the FLRA. Resp. Br. at 4 n.3. They further argue that it is improper to equate the Unions' request to observe shift changes in the prison lobbies to the performance of tests by independent experts. In the *Holyoke* case and its progeny, the unions were seeking evidence of an unlawful act, while in our case, the Unions "are seeking to have their attorney personally witness that act." Resp. Br. at 5. Thus the General Counsel wants me to both adopt *Holyoke* and simultaneously expand it in a way that would distort the legislative balance crafted by § 7114(a)(2) of the Statute. That is, in addition to the right of union participation at formal discussions and *Weingarten* interviews, unions would now have carte blanche to roam an agency's premises to physically observe, and develop litigation strategy about, anything it believes violates the law or the contract. Resp. Br. at 5-7. Respondents note that the GC cites no authority for this proposition, and indeed it cannot be justified. *Id*. at 7.

As noted above, *Holyoke* and its progeny require a balancing of the employer's property rights and the employees' rights to effective union representation. Respondents argue that in this case, the balance weighs squarely in their favor, because the Unions' asserted need to observe shift changes is a pretext for the Unions' attorney to solicit employees to participate in other grievances and lawsuits against the prisons, and because the prisons' safety and security needs are far more substantial. Resp. Br. at 13-17. The observational data from watching shift changes could be obtained just as effectively by prison employees, and perhaps more effectively on the prisons' own security videos; the Unions' insistence that only their attorneys could effectively obtain this information reflects their underlying desire to utilize their presence in the lobbies to recruit witnesses and increase Union membership. *Id*. at 13-14. On the other hand, the Authority and courts have frequently recognized that federal law enforcement agencies have unique security and safety needs, which would be adversely affected by allowing the Union attorneys to observe shift changes. *See, e.g.*, *Bell v.*

Wolfish, 441 U.S. 520, 547 (1979); *U.S. Penitentiary Leavenworth, Kan.*, 55 FLRA 704, 714 (1999) (*Leavenworth*). Here, the evidence established that the wardens legitimately view all visitors, including union attorneys, as potential security risks, even if they have passed an NCIC background check. Resp. Br. at 17-18. Additional risks are posed, because inmates are brought through the lobbies on a daily basis for transport to medical visits; emergencies periodically occur in which the presence of visitors in the lobby would be dangerous; and the presence of an attorney standing in the lobby could interfere with the ingress and egress of employees during the shift changes. *Id*. at 18-20.

Evaluating the Unions' request to observe shift changes under traditional 7114(b)(4) criteria, the Respondents assert that the Unions did not demonstrate a particularized need for the attorneys personally to stay in the prison lobbies. When the attorneys first came to McCreary and Coleman in March, they did not initially make any request to stand in the lobbies, and they only did so verbally when they were rebuffed by prison officials. *Id*. at 9. Burakiewicz then engaged in a series of email exchanges with Respondents' counsel regarding her visit to FCC Coleman, and while Burakiewicz cited the relationship of the information to an ongoing portal case, she did not articulate with any particularity what precisely she sought to learn from observing shift changes or how that information would be used. *Id*. at 9-10. When Local 614 made a written request in May, it simply asked for permission for the attorney "to observe the shift changes in the front lobby[,]" without any explanation of why this was necessary. *Id*. (citing Jt. Ex. 4). At the hearing, Burakiewicz tried to make up for these earlier failures by providing extensive testimony explaining the methodology of charting the information gleaned during the lobby observations and how the Unions would utilize that information in carrying out its representational duties, but Respondents argue that the Unions were required to articulate these points when they made the requests, not months later. *Id*. at 10-11. At no point, however, did the Unions or the GC demonstrate why it was necessary (as opposed to relevant or useful) for the attorneys to observe shift changes in the prison lobbies. The Respondents already offer the Unions a wide variety of methods for obtaining information to prepare its portal grievances: access to union offices to meet with employees, official time for those employees, tours of the facilities, and security video footage of the front lobbies. In these ways, employees and the Unions' attorney can confer, investigate, and prepare their cases. *Id*. at 12. These methods will be of greater probative value to counsel at an arbitration hearing than a few charts of employee activity in the lobbies over a few days' time. *Id*. at 13. Thus, the GC did not meet its burden of proving that the Respondents violated its duty to furnish information under § 7114(b)(4).

ANALYSIS AND CONCLUSIONS

The manner in which the General Counsel has pursued its complaint makes this case more difficult than it ought to be. As I see it, this is a straightforward case of an agency denying a union access to its facilities, thereby preventing the union from adequately performing its representational duties to employees regarding a pending grievance, in violation of § 7116(a)(1) and (5) of the Statute. The General Counsel alleged this in paragraphs 14, 16, 18, and 20 of the Consolidated Complaint and then briefly at the hearing (Tr. 26), but it then focused its attention on the allegation that by denying lobby access to Union representatives, the Agency violated § 7114(b)(4) of the Statute. In arguing that the Union's request was "unique" under the Statute (GC Br. at 19), the GC seems to be overlooking the very direct ways in which the request was not unique at all, and in which the Agency's actions violated established norms of good faith bargaining under the Statute.[7]

[7] Although I am looking at the alleged ULP from a different perspective than the General Counsel, I am evaluating the exact same conduct that the GC has alleged to be unlawful. When the Unions filed their ULP charges, they alleged that "[t]he Agency's refusal to allow the Union and its attorneys to observe the time that staff arrive and depart the institution" violated § 7116(a)(1), (5), and (8) of the Statute. GC Exs. 1(a)-1(d). Similarly, the GC alleged in its Complaint that the refusal to grant the Unions access to the front lobbies violated the Agency's duty to negotiate in good faith. GC Ex. 1(e). Citing private sector precedent, the Authority has held that a party accused of violating the Statute has "'the right to be notified of the specific charges raised against him and an opportunity to defend himself against [the charges].'" *U.S. Dep't of Labor, Wash., D.C.*, 51 FLRA 462, 467 (1995) (*DOL*) (quoting *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 134 (2nd Cir. 1990)). A respondent cannot be found guilty of a violation that was neither charged nor litigated. *DOL*, 51 FLRA at 467. Thus, in the *DOL* case, a union sought unsanitized records from the agency; the judge found that the union was not entitled to unsanitized records, but that the agency should have provided sanitized information. *Id*. at 467-68. The Authority held that the issue of sanitized records was not alleged in the complaint or during the hearing, and thus it was not fully or fairly litigated. *Id*. But in cases such as *AFMC, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 54 FLRA 1529, 1531 n.2 (1998), and *Dep't of VA, VA Med. Ctr., Wash., D.C.*, 51 FLRA 896, 900 (1996), the Authority upheld violations, as they had been fully and fairly litigated. Similarly here, the parties have at all points in this case, from the filing of the charges to the hearing, understood that the issue in this case is whether the Unions are entitled under the Statute to have access to the front lobbies of the prisons in order to observe shift changes and to investigate pending grievances. This issue has been fully and fairly litigated.

There is a distinct (albeit not extensive) body of Authority cases recognizing that an agency violates the duty to negotiate in good faith under § 7116(a)(1) and (5) if it interferes with the ability of union officials (whether they be employees or non-employee representatives) to carry out their representational functions. Subsections (a) and (b) of § 7114 enumerate some aspects of the duty to negotiate in good faith, and § 7116(a)(5) makes it an unfair labor practice to refuse to negotiate in good faith; § 7114(b)(4) specifically requires agencies to furnish information to unions in certain circumstances. As the D.C. Circuit Court of Appeals has noted, "[t]he duty to request and supply information is part and parcel of the fundamental duty to bargain." *Am. Fed'n of Gov't Employees, AFL-CIO, Local 1345 v. FLRA*, 793 F.2d 1360, 1363 (D.C. Cir. 1986); s*ee also Dep't of HHS, Soc. Sec. Admin., Balt., Md*., 37 FLRA 1277, 1284 (1990). But § 7114 does not attempt to list all of the ways in which an agency or a union can fail to negotiate in good faith, and the facts of this case illuminate one of those ways: denying union-designated attorneys access to an area of the prisons in order to investigate and prosecute grievances. *See, e.g., Soc. Sec. Admin., Dallas Region, Dallas, Tex*., 51 FLRA 1219, 1227 (1996).

Starting in its earliest cases, the Authority has ruled that non-employee union representatives have a right of reasonable access to an agency's property and facilities, even at agencies with heightened security concerns. Thus, in *Philadelphia Naval Shipyard*, 4 FLRA 255 (1980) (*Naval Shipyard*), the Authority held that the agency violated § 7116(a)(1) and (5) by expelling a union official from the naval base and subsequently prohibiting him from entering secured areas of the base, when the official was trying to meet with employees and supervisors regarding grievance and bargaining issues. While the dispute in that case focused primarily on the union official's alleged misuse of his security pass, the judge began his analysis by stating, "It is elementary . . . that . . . a union official must be granted freedom to process grievances or otherwise represent employees . . . Moreover, unless otherwise warranted, a union representative may not be denied access to the premises." *Id*. at 266. The judge then proceeded to evaluate the official's conduct and concluded that it did not justify barring him from the base. *Id*. at 267-68.

In a later case, when management refused to recognize a union-designated observer to a committee, the Authority held that this violated § 7116(a)(1) and (5). *Dep't of HHS, Food & Drug Admin., Region II, N.Y Reg'l Lab.*, 16 FLRA 182 (1984) (*HHS*). Citing *Naval Shipyard*, the judge stated that agency officials have "no right to determine who would act as the union's representative, and its attempt to do so was an intrusion into the internal affairs of the bargaining agent and improper interference." 16 FLRA at 191. The *HHS* decision, in turn, was cited in a decision finding that an agency violated § 7116(a)(1) and (5) when it refused to recognize an attorney designated by the union to represent it in a grievance. *Food & Drug Admin., Newark Dist. Office, W. Orange, N.J.*, 47 FLRA 535, 566 (1993). And in *Bureau of Indian Affairs, Isleta Elementary Sch., Pueblo of Isleta, N.M.*, 54 FLRA 1428 (1998) (*Isleta*), the Authority held that the agency violated § 7116(a)(1) when it denied a non-employee union representative access to school premises in order to meet with employees and handle pending grievances. Rejecting the agency's argument that non-employee representatives are only entitled to enter agency premises if such access is permitted under the parties' collective bargaining agreement, the Authority stated, "the Statute provides such access for a union's designated representative, including one who is a non-employee." *Id*. at 1438. It continued, "This right [under § 7102] encompasses a union's right to designate its representatives, including a non-employee who will have access to an agency's premises to conduct representational activities." *Id*. (footnote omitted). As in *Naval Shipyard*, the Authority in *Isleta* found that the union official did not engage in flagrant misconduct that would justify his exclusion; therefore, barring him from entering the school was unlawful. *See also U.S. Air Force Logistics Command, Tinker AFB, Okla. City, Okla*., 32 FLRA 252 (1988).

The bargaining rights of a union under § 7116(a)(5) are closely linked to the right of employees under § 7102 to form, join, or assist a labor organization, especially once the union has attained the status of exclusive representative of those employees and is engaged in a bargaining relationship with an agency. But even when a union has no bargaining relationship with the agency, the Authority has long held that employees must be allowed to distribute literature and solicit members during nonworking times. *Okla. City Air Logistics Ctr., Tinker AFB, Okla.*, 6 FLRA 159, 162 (1981). The Authority has analogized the rights of federal employees under § 7102 to those of private sector employees under § 7 of the National Labor Relations Act, as amended, 29 U.S.C. § 157,[8] and has adopted the guiding principle articulated by the Supreme Court, in an unfair labor practice case brought under the NLRA: "Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is

[8] While § 7102 of the Statute, unlike § 7 of the NLRA, does not refer to a right to engage in "concerted activities," the Fifth Circuit Court of Appeals explained that this is simply a recognition that federal employees may not engage in strikes. *U.S. Dep't of Justice, INS, Border Patrol, El Paso, Tex. v. FLRA*, 955 F.2d 998, 1001-03 (5th Cir. 1992).

consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105, 112 (1956) (cited by the Authority, in the context of union organizing campaigns, in *Soc. Sec. Admin*., 52 FLRA 1159, 1183-84 (1997) (*SSA I*), *remanded sub nom. NTEU v. FLRA*, 139 F.3d 214 (D.C. Cir. 1998), *decision & order on remand*, 55 FLRA 964 (1999) (*SSA II*), and in *U.S. Dep't of the Air Force, Randolph AFB, San Antonio, Tex*., 58 FLRA 14, 18-19 (2002)). In *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976), the Supreme Court applied its *Babcock & Wilcox* decision, explaining that in seeking "a proper accommodation" of the competing rights of employers and employees, the balance "in any situation may largely depend upon the content and the context of the § 7 rights being asserted."

Regardless of whether the union in question is seeking to organize or has already attainted the status of a certified exclusive representative, case law under the Statute has in reality applied a form of the *Babcock & Wilcox* balancing test, even when the decisions do not cite it. Thus in *Naval Shipyard*, the judge stated that while "a union representative may not be denied access to the premises[,]" he immediately added that "this right is not absolute. A serious abridgment of plant rules or regulations may curtail this right with an attendant loss of protection." 4 FLRA at 266. In *Isleta*, the Authority also held that while an agency's interference with a union's § 7102 right of access to agency premises violates § 7116(a)(1), an agency nonetheless "has the right to deny access to its premises to a non-employee Union representative who is engaged in otherwise protected activity for remarks or actions that constitute flagrant misconduct." 54 FLRA at 1440-41.

In *Leavenworth*, cited by the Respondent, the Authority reaffirmed earlier decisions that while a union has the right to designate its representatives for carrying out its representational duties, an agency may refuse such a designation when there are "special circumstances" justifying it, although such "special circumstances" will be construed narrowly. 55 FLRA at 713-14. The Authority stated that federal correctional facilities have "special security concerns which may not be present at other work locations . . . [since] internal security concerns are of 'paramount importance[]'"at such facilities. *Id*. at 714. The union president in *Leavenworth* had committed misconduct which posed the risk of inmate disturbances and justified his exclusion from agency premises. Therefore, the Authority held that the judge had "erred by allowing the Union's representational rights to trump the Respondent's legitimate security concerns . . . ." *Id*. Similarly, in the current case, the Respondent cites the same paramount internal security concerns as justifying its refusal to allow the Union's attorneys to observe shift changes. While none of the three cases cited here refer to *Babcock & Wilcox*, they all recognize that a union's statutory right of access to an agency's premises must be balanced and accommodated with the agency's right to regulate internal security and to conduct its operations efficiently and safely.

None of these cases, however, or any other Authority decision, refers to a union official's right of access to agency premises as a function of the agency's duty to furnish information (or data), and I think the General Counsel has done a disservice to the Union by presenting the issue in those terms. Section 7114(b)(4) of the Statute requires an agency to "furnish" to an exclusive representative "data" which is (among other things) "normally maintained by the agency," "reasonably available," and "necessary." An entire body of case law has developed around the application of the requirements of § 7114(b)(4). *See, e.g.*, *U.S. DOJ, Fed. Bureau of Prisons, FCI Ray Brook, Ray Brook, N.Y.*, 68 FLRA 492 (2015); *Internal Revenue Serv., Wash., D.C.*, 50 FLRA 661 (1995) (*IRS*), and cases cited therein. Yet, even though unions have been pursuing access to agency premises since the earliest days of the Statute, the Authority has not chosen to evaluate a union's request for such access under the analytical framework of 7114(b)(4). The lack of such precedent from the Authority is not because the Union's request in this case is anything novel, but rather because parties have been resolving these disputes adequately under the general framework of §§ 7114 and 7116(a)(1) and (5), rather than under the specialized rules of § 7114(b)(4). Moreover, the rules that have been developed for resolving information requests under 7114(b)(4) are ill-suited for requests such as those present in this case. Instead, this seems like a case of a square peg being forced into a round hole: you may be able to hammer it in with enough brute force, but it leaves you with a messy hole and a disfigured peg.

As the GC notes, the judge in *New Cumberland* utilized § 7114(b)(4) to evaluate a union's request for access to an agency warehouse to test the area for the presence of asbestos, and he concluded that the request met the 7114(b)(4) criteria. The judge applied Authority precedent, and the dictionary meaning of the word, to conclude that "data" in the Statute should be understood in its broadest sense to encompass the "material and information" that would be obtained by taking chunks from the warehouse walls and fibers from the air. He further concluded that the statutory requirement to "furnish" the data included providing the union with access to it, and that this data was normally maintained by the agency, reasonably available, and necessary for the union to properly represent its members (i.e., to determine whether employees were working in a safe environment). *New Cumberland*, *supra*, *ms*. op. at 7-8. He also referred favorably to the *Holyoke* line of NLRB

decisions (cited as well by the GC) which treat a request for access to employer premises as a request for information. This analysis, however, strikes me as straining the limits of § 7114(b)(4) beyond the breaking point, and quite unnecessary, in light of the much more logical framework of the right to represent employees under § 7102, and the duty to bargain in good faith under §§ 7114 and 7116(a)(1) and (5).

First, as the judge in *New Cumberland* acknowledged, the statutory basis for requiring employers to furnish information is quite different in the private sector from the federal government. *Id*. at 8 n.20. The National Labor Relations Act does not contain a specific requirement to provide information, but the NLRB has historically inferred one from the general duty to bargain in good faith. *See J.I. Case Co. v. NLRB*, 253 F.2d 149 (7th Cir. 1958), *enf'g* 118 NLRB 520 (1957). By contrast, when the Statute was enacted, Congress chose to explicitly require agencies to furnish information to unions, but it also added several specific limitations on that requirement, most notably the requirement that the information be "necessary." In *NLRB v. FLRA*, 952 F.2d 523, 531 (D.C. Cir. 1992), the court noted that while the NLRB requires merely that the requested information be "relevant" to the union's representational duties in private sector cases, the Statute requires that the information be "necessary." In *Dep't of Justice v. FLRA*, 991 F.2d 285, 290 (5th Cir. 1993), the court noted this distinction in refusing to adopt the private sector standard for federal employee information requests. Since the federal and private sector standards are different, I am loathe to import NLRB decisions such as *Holyoke* into our own case law.

The private sector model for information requests is also ill-suited to federal cases because of the manner in which the NLRB's analysis has evolved to encompass union requests for access. In cases such as *Winona Indus., Inc*., 257 NLRB 695 (1981), the Board equated requests for access with requests for information, and accordingly applied a pure relevance standard. But in *Holyoke*, the Board acknowledged that a request for plant access is not identical to a request for documents or similar information,[9] in that it infringes on the employer's private property rights. 273 NLRB at 1369-70. Therefore, it modified its analytical framework (which did not have to contend with the detailed criteria of § 7114(b)(4), but simply with the general NLRA requirement to bargain in good faith) to require a balancing of the employer's property rights against the employees' right to proper representation, in accordance with *Babcock & Wilcox*. *Id*. at 1370. So, the GC now is asking the Authority to apply an NLRB standard – initially designed for information requests and then modified for access requests – to the Statute's different (and more detailed) methodology for evaluating information requests. This seems to be the kind of reverse-engineering that motivated early aviators to design airplanes to look like birds.

Putting aside the NLRB's analytical twists and turns regarding requests for plant access, § 7114(b)(4) is simply ill-suited to fit requests for access. A superficial reading of the multiple components of 7114(b)(4) strongly suggests that Congress envisioned it as a framework for requesting documents or similar types of information that are possessed by an agency and must be given to a union, and an in-depth review of the case law bears this out. It is not entirely implausible to define "data" so broadly as to include "information that union attorneys will obtain by standing in prison lobbies and watching employees come and go," and it is not entirely implausible to define "furnish" so broadly as to include "allow access to an area," but this is only possible when looking at each word in isolation. When the entirety of § 7114(b)(4) is considered, including the requirements that the data be "normally maintained by the agency in the regular course of business;" that it be "reasonably available," "not prohibited by law," and not constitute guidance relating to collective bargaining, it is apparent that the Statute is referring to documents and similar types of information that are to be transferred from the agency's possession to the union's. This conclusion is reinforced by the extensive case law surrounding the requirement that a requesting union articulate a "particularized need" for the information. *See IRS*, 50 FLRA at 669-73, and subsequent decisions applying that standard, such as *U.S. Dep't of the Air Force, AFMC, Kirtland AFB, Albuquerque, N.M*., 60 FLRA 791 (2005), *enf'd sub nom. AFGE Local 2263 v. FLRA*, 454 F.3d 1151 (10th Cir. 2006). This conclusion is further reinforced by the parties' actions in this case.

In advance of the Union attorneys' trips to USP McCreary in March and May of 2016, Local 614 President Peace sent brief memos to the warden, requesting permission for the attorneys to come to the institution and to bring their laptop computers inside the institution to the Union office. Jt. Exs. 3 & 4. The Union's March request did not indicate that the attorneys would be going to the front lobby to observe shift changes, nor did it give a reason why the attorneys would

[9] The Board also cited *Fafnir Bearing Co. v. NLRB*, 362 F.2d 716 (2nd Cir. 1966), where the court noted the following about a union's request to conduct its own time studies on plant premises: "While it is true that the material the Union sought, because of its subjective nature, was not in the Company's filing cabinets, it was nevertheless within the Company's exclusive control . . . [W]e believe the Board . . . could properly determine that the Union's need to conduct these tests outweighed the Company's interests in closing its doors to outsiders." *Id*. at 721 (citations omitted).

be coming to the institution at all, but it was nonetheless approved summarily by the warden. Tr. 305-06; Jt. Ex. 3. After the attorneys were rebuffed in their attempt to observe the shift changes at McCreary in March, Peace did offer slightly greater detail: he said the attorney needed to use their laptops "to meet with employees at the training center and inside the institution at the Union office[,]" and he also requested permission for the attorney to observe shift changes in the lobby. Jt. Ex. 4. The warden responded to the April 28 request by permitting the Union attorney to meet with employees and use his laptop in the training center, but not to enter the penitentiary itself or to observe shift changes. Jt. Ex. 5. At no point in these communications did the Union attempt to articulate a "particularized need" for its requests: not for meeting with employees in the Union office or at the training center, not for bringing their laptops, and not for observing shift changes in the prison lobby. Moreover, McCreary management officials did not ask for an explanation of the Union's particularized need, and the entire series of communications is free of the extensive, litigation-like detail and lawyerly jargon that is typically exchanged in requests for information under 7114(b)(4). It is clear from these events and exchanges of memos that neither the Union nor the Agency viewed the Union's requests (neither the requests for the attorneys to meet with employees in the Union office nor the request to observe shift changes) as requests for information under 7114(b)(4); instead, they viewed the communications as routine requests for Union attorneys to obtain access to the prison, which occur (in one form or another) on a regular basis, in order to process grievances and represent employees. It was not until management realized that the Union wanted to observe shift changes that the Agency identified the request as posing internal security problems, and even then it was not treated as a 7114(b)(4) information request.

This is also true regarding Ms. Burakiewicz's visit to Coleman in March of 2016. Although we have no documents showing the pre-visit communications between the Union and Coleman officials, Burakiewicz arranged with Ms. Hollett, the Agency attorney handling the portal grievances, to visit Coleman. Tr. 126-27. When prison officials would not let Burakiewicz and her associates stand in the front lobbies to observe shift changes, Burakiewicz exchanged telephone messages and emails with Hollett, attempting to obtain permission to do so. Jt. Exs. 6-8. Burakiewicz referred to the pending portal grievance at Coleman, to her previous visits to various prisons (at which she was allowed to observe shift changes), and to her hope to avoid "filing a ULP or getting the arbitrator involved[]" in the dispute. Jt. Ex. 7. Thus it was apparent to the Agency that the Union wanted its attorneys to observe shift changes in the lobby as a part of the portal litigation, although the exact nature of the information that Burakiewicz sought to obtain in the lobby was not articulated, nor was the relationship of that information to the Union's representational duties. Hollett did seem to understand fully what the Union was seeking to obtain, however, as she offered to provide the Union with video footage from security cameras in the front lobbies, "which can be reviewed for litigation purposes." Jt. Ex. 8. Burakiewicz submitted another written request for access to the lobbies in advance of a second visit to Coleman in late March (Jt. Exs. 9-11, 16-17), and Hollett again advised her that she would not be permitted access anywhere at FCC Coleman, except for the Union office (Jt. Ex. 19). Again, as with the communications relating to visiting McCreary, both the Union and the Agency treated the Union's efforts not as requests for information under § 7114(b)(4), but as routine requests for access to the facility in order to accommodate the Union's need to investigate a grievance. And when the parties could not resolve their dispute, both Local 614 and Local 506 filed ULP charges, alleging that "[t]he Agency's refusal to allow the Union and its attorneys to observe the time that staff arrive and depart the institution is an unauthorized interference with the Union's ability to engage in concerted activity in violation of Section 8(a)(1)." GC Exs.1(a)-1(d).

All of these factors demonstrate that the appropriate way to approach this dispute is not under 7114(b)(4), but under 7116(a)(1) and (5). And when the case is evaluated in this manner, I believe the evidence shows that Agency officials at both McCreary and Coleman violated their duty to bargain in good faith with the Union when they interfered with the Union's efforts to investigate pending grievances, by denying the attorneys access to the prison lobbies in order to obtain information about when employees start and finish their work shifts.

The key Authority decisions in this analysis are *Naval Shipyard*, *Isleta*, and *Leavenworth*. The first two cases affirmed the same basic principle, that "a union official must be granted freedom to process grievances or otherwise represent employees . . . [U]nless otherwise warranted, a union representative may not be denied access to the premises." *Naval Shipyard*, 4 FLRA at 266. It was implicit in *Naval Shipyard* that the "union representative" included non-employees, since the person who had been unlawfully excluded there was a non-employee; but the Authority made this explicit in *Isleta.* Rejecting the agency's argument that non-employee representatives did not have the same right as employees to access agency premises, the Authority in *Isleta* responded that the right of employees under § 7102 to form, join, or assist a union "encompasses a union's right to designate its representatives, including a non-employee who will have access to an agency's

premises to conduct representational activities." 54 FLRA at 1438 (footnote omitted).

In addition to effectuating a union representative's statutory right of access to agency premises, these two decisions also made it clear that this right is not absolute. As the judge stated in *Naval Shipyard*, 4 FLRA at 266, a representative may be lawfully denied access if it is "otherwise warranted," such as if he committed flagrant misconduct. And in *Leavenworth*, the Authority expanded on the types of situations in which a union official (even an employee) could be barred from agency premises. Although *Leavenworth* could be viewed narrowly as simply illustrating another type of flagrant misconduct justifying the denial of access, its meaning is broader than that. The Authority emphasized the "paramount importance" of a prison's internal security concerns, and it analogized a denial of access to an agency's refusal to allow specific individuals to represent employees at "Weingarten" interviews. 55 FLRA at 713-14. In holding that the judge "erred by allowing the Union's representational rights to trump the Respondent's legitimate security concerns under the special circumstances presented here," the Authority also sent the message that the security interests of a prison must be given substantial weight in balancing them with a union's representational rights.[10]

In other words, even after rejecting § 7114(b)(4) as the framework for evaluating plant access requests, and looking instead to the underlying rights and obligations of parties in a collective bargaining relationship, we have come full circle to an approach that seeks to balance and accommodate the parties' rights and interests, along the lines of *Babcock & Wilcox* and *FCI Englewood*. As the Supreme Court explained in *Hudgens*: in pursuing the "basic objective . . . [of] accommodation . . . with as little destruction of one as is consistent with the maintenance of the other[,] . . . [t]he locus of that accommodation . . . may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." 424 U.S. at 522. With this objective in mind, I will examine the Unions' interests in observing shift changes in the front lobbies and the Respondents' interests in protecting their internal security and property and attempt to strike that balance, in the circumstances of this case.

As I noted earlier, Ms. Hollett and the Respondents were made aware (through phone conversations and emails) in March of 2016 that Burakiewicz and her fellow attorneys would be coming to USP McCreary and FCC Coleman in order to interview employees and pursue the portal grievances. When the Respondents balked at allowing the attorneys to stand in the lobbies, Burakiewicz laid out in detail to Hollett the importance of personally observing the shift exchanges to the Union's ability to narrow the issues in the grievances and to better prepare for arbitration. Burakiewicz reminded Hollett that the Agency had been asking the Union to narrow down the number of positions in dispute in the grievance, and that Burakiewicz needed to observe shift changes in order to gather the facts necessary to accomplish that task. Tr. 133. In the email in which the Agency officially refused to allow the Union attorneys to stand in the lobbies, Hollett related that "there are security and safety concerns with your presence in the front lobby during security screening and while staff are obtaining or turning in equipment." Jt. Ex. 8. She also indicated that "the Agency has concerns about any attorneys attempting to interview/sign up staff while on the job or heading into/out of the facility[,]" but that the Union attorneys could obtain the information they needed by meeting with employees at the Union office and by viewing security camera video of the front lobbies. *Id*. When Burakiewicz renewed her request in advance of a planned second visit to Coleman at the end of March, she responded to Hollett's concern about attorneys interviewing or "signing up" employees in the lobby by promising that "we do not intend to speak with anyone except the Union officials who are with us." Jt. Ex. 10.

This summary of the evidence demonstrates that Hollett, who had been handling the portal grievance for Coleman for some time, fully understood the importance of Burakiewicz's observations in the lobby to the Union's pursuit of its grievances (against both Coleman and McCreary). Burakiewicz testified in much greater detail at the hearing about these observations, and how she utilized them in both the prehearing investigation and litigation stages of the grievances and as evidence at the arbitration hearing itself. But Hollett was already personally familiar with the Union's previous arbitrations and Burakiewicz's use of her charts and notes concerning the flow of employees on their way into and out of the Control Center, in order to identify each employee's first and last compensable task. Similarly, by the time the president of Local 614 wrote to the McCreary warden in late April of 2016, to obtain permission for Attorney DePriest to observe shift changes in the McCreary lobby in May (Jt. Ex. 4), the Respondents were fully aware of

[10] The principle of accommodating the legitimate rights of a union and an agency in Weingarten examinations was explained in more detail in *Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 54 FLRA 1502, 1511-13 (1998) (*FCI Englewood*), upon which the Authority relied in *Leavenworth.* There, the Authority repeatedly referred to decisions requiring it to "strik[e] a balance" between the competing rights and interests, and to a "framework of accommodation" for resolving these conflicts. *Id*. at 1512-13.

the events involving Burakiewicz at Coleman and understood why the Union wished to observe the shift changes.

Reviewing these facts, I conclude that the Union has an extremely strong interest in viewing the ingress/egress process from the vantage point of the front lobbies of the Coleman and McCreary facilities. While the Respondents assert in their brief that much of these facts would have been of little or no probative value in an arbitration hearing, they did not rebut Burakiewicz's testimony at our hearing that the charts she makes in prison lobbies have been extremely useful to her in prior cases, both in the Unions' prehearing investigations and at the arbitration hearing. Furthermore, it is not the Agency's role to micromanage the Union's trial preparations for an arbitration or to second-guess the importance of every witness or investigative procedure. If, for example, Burakiewicz had advised the warden at Coleman that she needed to interview five specific employees at the Union office in order to investigate its grievances, it would have been wholly improper for the warden to tell her that Employees B and C are unnecessary to proving the Union's case. These are decisions that are rightly left to the Union to make, so long as they do not infringe on the Agency's internal security needs or involve other special circumstances.

In fact, the record reflects that Coleman management generally did respect the Union's requests for time and space to interview witnesses relating to grievances, and it did not (normally) micromanage the Union's grievance processing. It essentially gave the Union attorneys carte blanche to interview any employees they wanted, as long as they did so in the Union office. But with respect to the attorneys' request to observe shift changes, management objected not only to the attorneys' presence in the lobby, but also to the Union's need for the observational data they wished to prepare. And as I have stated, this sort of micromanagement of the Union's grievance preparations was not appropriate, as the criteria of § 7114(b)(4) for information requests are not applicable here. It was sufficient that the Union demonstrated to Hollett and the warden that it sought attorney access to the lobbies to gather information directly related to its pending portal grievances. Furthermore, the Union attorneys were not seeking access to the lobbies to "solicit" or "sign up" employees (whatever that may mean), nor was it seeking to speak to them in any way, about any matter. Rather, they were seeking access solely to observe the shift changes and to identify the first and last compensable tasks being performed by employees as they entered and left the Control Center. The Union has a significant representational interest in investigating grievances, gathering information to litigate those grievances, and narrowing the disputed issues in those grievances.

I also find that the Union could not obtain the information it sought through other available methods.[11] First of all, the importance of first-hand observation by trained individuals cannot be emphasized strongly enough. Although Burakiewicz questions employees thoroughly regarding the procedures they follow in starting and ending their workday, she explained at the hearing that first-hand observation at the scene around the Control Center by her attorneys – who are experienced in portal litigation and in preparing charts from observing shift changes – is essential to supplement those employee interviews. The observations are important to corroborate employee accounts, to identify employees whose memories are not accurate and would thus make unreliable witnesses, and to measure the amount of time spent in preliminary or postliminary activities. Tr. 107-10, 160-61, 200-01. Union officials cannot be expected to perform this task. Tr. 107. Second, the security video offered by the Agency is an inadequate substitute for first-hand observation by her attorneys. The Agency has frequently failed to produce such videos in the past, and when videos have been furnished, they are of poor quality and fail to provide a full view of the activities Burakiewicz needs to observe. Tr. 113-16. Judge Posner's observations (in a case in which a union was unlawfully denied access to a work site) on the inadequacy of a two-dimensional representation such as a video to translate a three-dimensional scene are equally applicable to our case. *Caterpillar, Inc. v. NLRB*, 803 F.3d 360, 364-65 (7th Cir. 2015). And as the NLRB held in *Nestle Purina Petcare Co.*, 347 NLRB 891 (2006), "responsible representation of employees can be achieved only by the Union's having access to the Respondent's premises." In that case, access meant allowing an industrial expert hired by the union to conduct a time-and-motion study of the work performed by unit employees, in order to document the employees' claim that their workload warranted higher pay. 347 NLRB at 891, 892. *See also Nat'l Broad. Co*., 276 NLRB 118 (1985), where the Board held, in a contract dispute over whether non-unit personnel were performing the work of unit members, that direct observation of the disputed activities by the union was the only acceptable method of obtaining the necessary information.

Finally, in weighing the Unions' statutory claim to access here, it is important to recognize that they are seeking access in this case in order to carry out their representational duties as the exclusive representative of BOP employees, not to organize unrepresented

[11] Although I have cited NLRB access decisions here, I must emphasize that I am not endorsing the Board's *Holyoke* test or an analytical framework that requires unions to prove that they cannot obtain the sought-after information by other means. I discuss such alternative methods here simply as part of my analysis of the Unions' statutory interest in observing employee activity in the lobby during shift changes.

employees or solicit membership. The Supreme Court cases regarding union access to employer facilities involved organizing campaigns, picketing, or solicitation. *See Babcock & Wilcox*, 351 U.S. at 106, 113; *Hudgens*, 424 U.S. at 509, 521-22. Similarly, when the Authority applied the principles of *Babcock & Wilcox* in *SSA I* and *II*, it did so in the context of attempts to distribute literature by a union seeking to supplant the bargaining unit's exclusive representative. 52 FLRA at 1161. As the *Hudgens* court noted, the "locus" of the proper accommodation of each party's rights will vary, "depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." 424 U.S. at 522. I believe that a certified union has an even stronger representational interest in investigating and pursuing grievances under a collective bargaining agreement than an uncertified union seeking to attain the status of exclusive representative. When a union becomes the exclusive representative, and embarks on a long-term bargaining relationship with an agency, its status carries with it significant statutory responsibilities to represent employees fairly and fully and to bargain with the agency in good faith. An agency similarly carries a responsibility for conducting itself in grievance disputes in good faith, including allowing union representatives access to its property to investigate those grievances. In many respects, the Respondents in this case do allow Union attorneys access to portions of their premises for grievance processing. The dispute here is not whether the attorneys were entitled to come onto the premises at all, nor is it whether the Unions' observations of the shift change process were important to the pending grievances; rather, the crux of the dispute is whether the Respondents' internal security needs justified their decision to keep the attorneys out of the lobbies.

That brings us to the Respondents' interests in restricting prison access. As I have already noted, a federal prison's interests in security and safety are of "paramount importance." Undoubtedly, there are many more security concerns relating to a non-employee walking around a prison than there are in a traditional office setting. But this does not mean that a prison can wave the phrase "internal security" like a magic wand and avoid closer analysis. Even as the Authority found in *Leavenworth* that "special circumstances" existed which justified the limitations on a union officer's access to the prison, it cautioned that such special circumstances would be "construed narrowly to preserve the union's normal prerogatives." 55 FLRA at 714. In *FCI Englewood*, the case on which the Authority relied in *Leavenworth*, the prison's special security needs did not justify the restrictions placed on union representatives for Weingarten interviews. 54 FLRA at 1513-15. In our case, there is no doubt that the Agency must protect the secured areas of the prison (which begin when a person goes through the Control Center) from a variety of dangers: enabling prisoners to escape or cause disturbances, importing contraband, or interfering with prisoners exiting the facility. Tr. 408-18. The Agency is also entitled to make sure that Union officials or attorneys do not disrupt the work of employees. While these dangers are real, the Respondents failed to show that an attorney standing in the lobby for an hour during a shift change posed any such danger. Accordingly, Respondents did not demonstrate a reasonable connection between their asserted security concerns and the need to keep Union attorneys out of the front lobbies.

It is wholly unreasonable to treat the Unions' attorneys – who have already been required to undergo repeated NCIC security checks, whose addresses are known to the Respondents, and who can be subjected to severe penalties if they are found to introduce contraband or improperly assist prisoners – in the same way as inmates' visitors or even inmates' attorneys. The Unions are engaged in an ongoing relationship with the Agency, and their need to visit the prisons repeatedly to represent employees constitutes a strong incentive for the attorneys to abide by prison safety and security rules. Warden Ormond testified that his concern was not about any individual Union attorney, but "[w]e have one policy for all, anyone that's entering the institution as far as screening." Tr. 409. But treating every visitor the same is not reasonable, and in this case it does not reflect a sincere attempt to accommodate the Unions' legitimate interests. Every organization makes distinctions between groups – some who pose higher risk and some who pose little or no risk – and a "one policy for all" policy is simply disconnected from reality. Warden Osmond posited that by standing in the lobby, the attorneys could become familiar with prison security procedures and somehow defeat those procedures. Tr. 424, 428. This is an astounding and unfounded accusation to make against attorneys who represent the very correctional officers who would be harmed by such an action. The attorneys here are already required to have a valid NCIC check in advance of a visit, and they are screened when they first enter the lobby. Additionally, a Union officer is present with the attorney at all times. In sum, the Respondents have not shown that any actual security risk is posed by the attorneys' mere presence in the lobbies for approximately an hour at a time, in these circumstances.

My evaluation of the Respondents' property interest is also influenced by the evidence concerning the locations where the Union was seeking access. The attorneys were not seeking to stand in the Control Center, a much smaller, much more secure, area than the lobby, nor were they seeking to stand inside the secured area of the prison facilities. They sought permission to stand in the lobbies, which are relatively open and large enough for an attorney and a Union official to stand without interfering with the flow of employees. They sought to

stand to the side of the lobby desk opposite the screening equipment, so that they would be out of the way of traffic. Tr. 202-03. The lobby during a shift change is a noisy place, full of employees engaging in casual conversation as they come to, and go from, work. Tr. 218-19. The presence of two Union representatives standing to the side is extremely unlikely to disturb any employees who are working. The Union representatives were not interested in conversing with employees, as that would have distracted them from making their observations and charts. When Hollett told Burakiewicz that the Agency was concerned about "attorneys attempting to interview/sign up staff while on the job or heading into/out of the facility" (Jt. Ex. 8), Burakiewicz promised her that she had no intention of doing so (Jt. Ex. 9). At the hearing, the Respondents did not offer any evidence that Union attorneys had ever engaged in solicitation or improper activity while handling grievances at the prisons; accordingly, I cannot give any weight to their claim that attorneys standing in the lobby posed any danger of disrupting the work of employees. Moreover, that claim is contradicted by testimony that the attorneys were expressly trying to avoid conversations with employees entering or leaving the prisons. Tr. 99-100, 198-200.

The record further demonstrates that a variety of non-employee visitors sit or congregate in the lobbies for more-than-insignificant periods of time. Tr. 148-49, 189-94, 219-23, 285-86, 290-92, 298-300. Most such visitors come to the prisons to visit inmates, between 8:00 a.m. and 3:00 p.m., but they begin arriving between 7:30 and 7:45 a.m., during which time they are processed at the front desk in the lobby and wait in an area with chairs next to the front lobby desk until visiting hours begin. Tr. 222, 285-86, 290-91. Therefore, inmate visitors are in the front lobby during the 8:00 a.m. shift change and the 2:00 p.m. shift change, often resulting in visitors standing in line with incoming employees at the screening area. Tr. 222, 290-91. Contractors and vendors also enter the prisons at the front lobby, and they routinely have to wait there until an employee can escort them to the various areas inside the prison where vending machines and other equipment need to be serviced. Tr. 298-301. One employee witness testified that it is his job to escort the vending machine serviceman, who usually arrives at McCreary between 3:20 and 3:30 p.m. Tr. 298. The employee usually arrives at the institution at 3:30, so he greets the vendor and has him continue to wait in the lobby while he goes through the Control Center, picks up his equipment, and returns to the lobby. Tr. 298-300. As a result, the vendor will sometimes wait in the front lobby for nearly an hour. Tr. 300.[12]

This evidence shows that while the Agency may have a policy prohibiting visitors from observing the employee screening process (Tr. 349; Resp. Ex. 3), visitors are routinely in the area around the front lobby during shift changes. Additionally, Coleman management often arranges for groups of visitors to take tours of its institutions, including the front lobbies at FCC. Burakiewicz herself has participated in more extensive, arbitration-focused tours – at both FCC Coleman and many other federal prisons – that have spent significant periods of time at the front lobby desk and the Control Center. And finally, although the Respondents insist (and I credit them) that they have never officially consented to Burakiewicz or her attorneys observing shift changes in the lobby of any of their institutions (Tr. 371, 425), it is also clear that Burakiewicz has done so on numerous occasions. I do not consider Burakiewicz's previous, successful efforts to observe shift changes at other institutions to constitute any sort of past practice, or that the Respondents waived their security objections to her actions by failing to stop her in the past. However, I do credit her testimony that in observing shift changes on numerous occasions at a variety of Agency facilities, her actions did not cause any disturbances or interfere with employee ingress and egress. The evidence of vendors and inmate visitors spending time in the front lobbies during shift changes on a much more routine basis further corroborates my conclusion that there is not a reasonable link between the Agency's denial of access to the Union attorneys and the security of the Agency's operations. Thus, notwithstanding the heightened security concerns of federal prisons, the Agency's property interest in prohibiting these attorneys from observing shift changes does not constitute the "special circumstances" cited in *Leavenworth*, and it is outweighed by the importance of those observations to the Unions' performance of their representational duties in the two pending grievances.

In discussing the evidence regarding the use of the lobbies by visitors and vendors, I am not stating (and the Unions have not alleged) that the Respondents maintained a discriminatory access policy, as that term is defined in *SSA I*, 52 FLRA at 1187, and *SSA II*, 55 FLRA

[12] On the other hand, I have not given any weight to the testimony regarding the occasional visits of the Correctional Peace Officer Foundation to the prisons. While this organization has, on at least one or two occasions, been allowed to set up tables to talk to employees and hand out literature, there were stark conflicts in testimony regarding the details of where the representatives sat, how often this occurred, and whether prison management gave the group permission to use the prison lobbies. Therefore, the record regarding these incidents does not shed light on any issue material to my decision.

at 965-66.[13] The Unions are not claiming that they are treated less favorably than inmate visitors; on the contrary, they are claiming that they are improperly lumped into the same category as inmate visitors, and that such treatment is not justified by the prison's security needs. Inmate visitors and vendors do not seek specifically to remain in the lobby in order to observe shift changes, as the Union does here. The Unions are not asking for the same treatment as visitors, because they are already the exclusive representative of the employees; thus they have statutory rights and obligations over and above those of routine visitors. I cite the evidence regarding visitors as an indicator of the relative weakness of the Respondents' security objections to the Unions' request, not to demonstrate a discriminatory policy under *SSA I* and *II*. In other words, if, in the fifteen-to-thirty minutes that visitors sit or stand in the lobby waiting to go into the prison, or in the thirty or forty-five minutes that vendors sometimes wait in the lobby, they are not jeopardizing the prison's security, *a fortiori* the Union attorneys pose little or no legitimate security risks.

In sum, I have sought to balance the Unions' statutory right to investigate and litigate grievances with the Respondents' duty to protect their internal security, and I conclude that the Unions' rights must prevail here. They cannot adequately document and their prove their contractual allegations, or separate out the weak allegations from the strong allegations of its grievance, without having their trained attorneys observe shift changes. For their part, the Respondents have not established that any legitimate security concern is imperiled by the presence of an attorney in the lobby for a relatively brief period of time. In making this latter finding, I take very seriously the paramount concerns of a prison for safety and security, but I conclude that the Respondents have not made a reasonable connection between their asserted concerns and the presence of attorneys in the lobby.

Accordingly, I conclude that the Respondents interfered with the Unions' effort to investigate and litigate the two pending grievances, thereby violating their duty to bargain in good faith with regard to those pending grievances. This, in turn, violated § 7116(a)(5) and (1) of the Statute.

Based on the foregoing, I recommend that the Authority issue the following order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that:

A. The Department of Justice, Federal Bureau of Prisons, United States Penitentiary McCreary, Pine Knot, Kentucky (Respondent), shall:

1. Cease and desist from:

(a) Refusing to allow non-employee representatives of the American Federation of Government Employees, AFL-CIO, Local 614 (the Union) to stand in the lobby of its institution at reasonable times in order to gather information from observing shift changes in connection with pending grievances.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of the rights assured them by the Statute.

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

(a) Refusing to allow non-employee representatives of the American Federation of Government Employees, AFL-CIO, Local 614 (the Union) to stand in the lobby of its institution at reasonable times in order to gather information from observing shift changes in connection with pending grievances.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, 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 Warden, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin

[13] For this reason, the Authority's recent decision in *U.S. Dep't of Def., Missile Def. Agency, Redstone Arsenal, Ala.*, 70 FLRA 611 (2018), is not applicable here. In *Redstone*, as in *SSA I* and *II*, the union did not represent the employees it was seeking to solicit. It was asserting its right under § 7102 of the Statute to form, join, or assist a labor organization, while in our case the Unions are asserting their rights under §§ 7114 and 7116(a)(5) to bargain collectively on behalf of the employees they represent. While the mandate of *Babcock & Wilcox* – to accommodate each party's interests with as little destruction of one as is consistent with the maintenance of the other – is equally applicable to cases of discriminatory solicitation policies as it is to cases of interfering with an incumbent union's ability to process a grievance, the nature of the rights and interests being asserted in our case are different from those in cases such as *Redstone* and *SSA I* and *II*. Therefore, as the Supreme Court noted in *Hudgens* when it applied *Babcock & Wilcox*, the locus of the accommodation will depend on the rights asserted by the parties in each case. 424 U.S. at 522.

boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) In addition to physical posting of paper notices, the Notice shall be distributed electronically to all bargaining unit employees on the same day as the physical posting, through email, posting on an intranet or internet site, or other electronic means, if the Respondent customarily communicate with employees by such means.

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

B. The Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex Coleman, Coleman, Florida (Respondent), shall:

1. Cease and desist from:

(a) Refusing to allow non-employee representatives of the American Federation of Government Employees, AFL-CIO, Local 506 (the Union) to stand in the lobbies of its institutions at reasonable times in order to gather information from observing shift changes in connection with pending grievances.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of the rights assured them by the Statute.

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

(a) Permit non-employee representatives of the Union to stand in the lobbies of its institutions at reasonable times in order to gather information from observing shift changes in connection with pending grievances.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, 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 Complex Warden, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) In addition to physical posting of paper notices, the Notice shall be distributed electronically to all bargaining unit employees on the same day as the physical posting, through email, posting on an intranet or internet site, or other electronic means, if the Respondent customarily communicate with employees by such means.

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

Issued, Washington, D.C., August 16, 2018

RICHARD A. PEARSON
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 Department of Justice, Federal Bureau of Prisons, United States Penitentiary McCreary, Pine Knot, Kentucky, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT refuse to allow non-employee representatives of American Federation of Government Employees, AFL-CIO, Local 614 (the Union) to stand in the lobby of our institution at reasonable times in order to gather information from observing shift changes in connection with pending grievances.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of the rights assured them by the Statute.

WE WILL permit non-employee representatives of the Union to stand in the lobby of our institution at reasonable times in order to gather information from observing shift changes in connection with pending grievances.

_____
(Agency/Activity)

Dated:_____ By:_____
(Signature) (Title)

This Notice must remain posted for sixty (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 its provisions, they may communicate directly with the Regional Director, Atlanta Region, Federal Labor Relations Authority, whose address is: 225 Peachtree St. N.E., Suite 1950, Atlanta, GA 30303, and whose telephone number is: (404) 331-5300.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex Coleman, Coleman Florida, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT refuse to allow non-employee representatives of American Federation of Government Employees, AFL-CIO, Local 506 (the Union) to stand in the lobbies of our institutions at reasonable times in order to gather information from observing shift changes in connection with pending grievances.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of the rights assured them by the Statute.

WE WILL permit non-employee representatives of the Union to stand in the lobbies of our institutions at reasonable times in order to gather information from observing shift changes in connection with pending grievances.

_____
(Agency/Activity)

Dated:_____By:_____
(Signature) (Title)

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

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