FEDERAL LABOR RELATIONS AUTHORITY

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF AGRICULTURE, FARM SERVICE AGENCY KANSAS CITY, MISSOURI

Respondent

and

Case No. DE-CA-60399

UNITED STATES DEPARTMENT OF AGRICULTURE, OFFICE OF INSPECTOR GENERAL, KANSAS CITY, MISSOURI

Respondent

and

NATIONAL TREASURY EMPLOYEES UNION

AND

NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 264, DENVER, COLORADO

Charging Party

Mr. James R. Ellison

For Respondent Farm Service Agency

Katherine R. Shanabrook, Esquire

For Respondent Office of Inspector General

Ms. Kathleen MacKenzie

For the Charging Party

Charlotte A. Dye, Esquire

For the General Counsel

Before: WILLIAM B. DEVANEY

Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. [1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns: (a) whether the Office of Inspector General refused to permit a Union representative to actively assist an employee at an examination, in violation of §§ 16(a)(1) and (8) of the Statute; and (b) if the Union representative were denied the right to actively assist an employee, whether Respondent Farm Service Agency violated §§ 16(a)(1) and (8) because it requested the investigation and/or because a component of the Department of Agriculture, OIG, engaged in conduct which interfered with the protected rights of employees of FSA, another component of the Department of Agriculture.

This case was initiated by a charge filed on February 16, 1996 (G.C. Exh. 1(a)), which named as the charged activity or agency, "USAD, CFSA". By Order dated May 9, 1996 (G.C. Exh. 1(c)), the case was transferred, pursuant to § 2429.2 of the Regulations, 5 C.F.R. § 2429.2, to the Dallas Region. On August 1, 1996, a first Amended Charge was filed (G.C. Exh. 1(d)), which changed the named activity or agency to, "USDA, FSA & OIG". The Complaint and Notice of Hearing issued on August 30, 1996 (G.C. Exh. 1(f)) and set the hearing for November 7, 1996, pursuant to which a hearing was duly held on November 7, 1996, in Kansas City, Missouri, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which Counsel for the Office of Inspector General exercised. At

the conclusion of the hearing, December 9, 1996, was fixed as the date for mailing post-hearing briefs, which time subsequently was extended on timely motion of the Charging Party, to which General Counsel did not object but to which Respondents Farm Service Agency and Office of Inspector General did object, for good cause shown, to January 9, 1997. Respondent Farm Service Agency, Respondent Office of Inspector General and General Counsel each timely mailed an excellent brief, received on, or before, January 13, 1997. On January 22, 1997, General Counsel mailed an extensive Motion to Strike Portions of Respondents' Briefs, received on January 27, 1997; and on February 3, 1997, Office of the Inspector General mailed an equally extensive Response to Counsel for the General Counsel's Motion to Revoke Portions of Respondents' Briefs, received on February 7, 1997. For reasons set forth hereinafter, General Counsel's Motion to Strike, is denied; however, certain errors on the part of Counsel for Office of the Inspector General have been noted. All briefs, motions and responses have been carefully considered and on the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

PRELIMINARY MATTER

General Counsel's Motion to Strike

A. General Counsel moved to strike the statement, on page 3 of Respondent Farm Service Agency's Brief (hereinafter, "FSA") and on page 2 of Respondent Office of the Inspector General's (hereinafter, "OIG") Brief, that, "They interviewed . . . other FSA employees for an OIG investigation", for the reason that the "fact" is not included in the record. While not cited by any party, the record does support the statement, e.g., Tr. 125; 142.

B. General Counsel moved to strike the statement on page 3 of Respondent OIG's brief, "that at this point, Bowman requested and was allowed to contact another union official . . . ." The statement sought to be stricken is foursquare supported by the record. What General Counsel presumably intended to challenge was the relation of the proceeding two sentences which indicate that Mr. Bowman signed the "waiver"[(2)] before he requested and was granted a caucus to call. I am aware that General Counsel's witnesses testified that Mr. Bowman did not sign this warning notice (Res Exh. 2) until after the caucus; but OIG'S witnesses testified that he signed the notice at the outset, before the caucus. The record shows that Mr. Bowman's concern, and his request for a caucus, arose when, he asserted, OIG told him and his Union representative that, because she was not an attorney, she could not speak during the examination of Mr. Bowman. i.e., ". . . since I thought I had a right to a union representative and since I wasn't . . . sure about what was going on, I asked if we could have a caucus . . . ." (Tr. 42).

C. General Counsel is entirely correct that the record shows no request to confer on February 15. Therefore, OIG's statement that, ". . . Bowman's request to confer with Miller on February 15th were not restricted" (OIG's Brief, p.5) was, indeed, the statement of a non-fact. I am well aware that it is without meaning and, because the statement is meaningless, it is not necessary to strike the statement.

D. General Counsel moves to strike the statement on page 5 of OIG's Brief that, "Rubey de Guerrero then informed McKenzie [sic] that she was going to put McKenzie [sic] on hold . . . ." General Counsel may be correct that the record does not show that Ms. MacKenzie was told she was going to be put on hold; but the record certainly shows that she was put on hold. For example, Ms. Rubey de Guerrero testified, ". . . I had to put her on hold while she was talking, in an effort to go up to my supervisor . . . so that we could continue the conversation with Ms. MacKenzie together" (Tr. 95); ". . . I told her [Ms. MacKenzie] that I needed to have my supervisor present during this conversation, and that's when I put her on hold . . . ." (Tr. 106); ". . . so she [Ms. Rubey de Guerrero] came up to my office, and we put Ms. MacKenzie on the speaker-phone." (Tr. 139). It might be inferred that Ms. MacKenzie was told she was being put on hold; but in any event, in context, the statement is not misleading, has no bearing on the disposition of this matter and will not be stricken.

E. General Counsel moves to strike the last sentence of the last paragraph of n.4 on page 6 of OIG's Brief, namely, "General Counsel was permitted to cross-examine ASAC Sidener . . . ." General Counsel is correct only as to the incorrect attribution by OIG. It was Ms. MacKenzie, not General Counsel, who cross-examined Mr. Sidener about the statement (Tr. 147-148). OIG was both sloppy and negligent in her writing. Indeed, even in her Response there is no appreciation of her error of attribution.

With respect to the principal thrust of n.4, which was the rejection of Respondent Exhibit 4, Counsel is wrong on several grounds. First, Respondent Exhibit 4, for identi-fication, purported to be a "Memo of Conversation" by Mr. Sidener; but it was offered through Ms. Rubey de Guerrero, not Mr. Sidener, and while it purported to be a record of conversation, it went well beyond his telephone conversation with Ms. MacKenzie. Without the opportunity to examine Mr. Sidener concerning his memorandum, the offer of the exhibit through Ms. Rubey de Guerrero was rejected. Although Mr. Sidener was later called as a witness, Respondent Exhibit 4 for identification was not re-offered as an exhibit. Second, Respondent Exhibit 4 for identification most definitely was not rejected, as OIG, states, ". . . because the Judge had already found Sidener's testimony credible . . . ." This would have been an impossibility inasmuch as Mr. Sidener had not testified. Third, OIG's assertion that it

should have been admitted because it was "consistent with his testimony . . . ." is not entirely correct. Mr. Sidener testified, "I looked at the OIG directive that covered this, and I think I looked up the specific statute. I don't remember particularly a Department of Justice guideline . . . ." (Tr. 147). Nevertheless, because n.4 is, in essence, a request for reconsideration of the rejection of Respondent Exhibit 4, for identification, it will not be stricken.

F. General Counsel moves to strike the reference on page 7 of OIG's Brief of the sentence, "In the interest of judicial economy and to preserve this issue for appeal, OIG incorporates by reference the statutory interpretations and legal arguments made by the Government in their briefs in those cases, and in the pending appeal of . . . 50 F.L.R.A. 601, taking the position that an OIG is not subject to the Weingarten provision of the FSLMRS." I fully agree with OIG that § 2423.16 of the Regulations, 5 C.F.R. § 2423.16, relied upon by General Counsel, does not apply. This statement appears in OIG's argument and is wholly proper.

G. General Counsel moves to strike a portion of OIG's argument, on page 8, because OIG asserts that Ms. Miller, ". . . when asked if she was permitted 'to indicate . . . how Bowman should answer,' she responded, 'No.'". It is true that on page 69 of the transcript, the word is "committed", i.e., "And were you committed to indicate . . . how Mr. Bowman should answer?" In context, it clearly appears that the word "committed" is a typographical error and that it should have been "permitted". See, also, in this regard, page 66 of the transcript. Had OIG moved to correct the transcript to substitute "permitted", I would have granted the motion; but, instead, OIG simply argues that when asked if she was permitted and then quotes the transcript as set forth above. As such, it is proper argument and will not be stricken.

H. General Counsel moves to strike portions of OIG's argument on pages 8, 9 and 16 concerning OIG's representation of Ms. Miller's testimony. This is argument and legitimate contentions which will not be stricken.

I. General Counsel moves to strike the sentence on page 11 of OIG's brief, "The General Counsel argues that Miller's ability to assist Bowman was restricted because Rubey de Guerrero reminded Miller that Miller was not an attorney." This is part of OIG's argument; was what Ms. MacKenzie stated was told her (Tr. 21); was what Mr. Bowman testified was stated (Tr. 41); was what Ms. Miller testified she was told (Tr. 63); and is asserted by General Counsel, e.g., ". . . Counsel for Respondent OIG . . . places undue importance on the fact that Miller was not an attorney, to whom they would have granted more opportunity to participate. It is clear . . . that they believe that, because Miller is

not an attorney, de Guerrero and Schnieders were entitled to require Miller to save any questions . . . until the end of the interview. . . ." (General Counsel's Brief, p. 15). Because it is legitimate argument, it will not be stricken.

J. General Counsel moves to strike OIG's argument on page 12, that, ". . . neither Bowman nor Miller ever complained to the OIG agents about the attorney comment . . . ." Because they made no complaint, there, indeed, is no reference in the transcript; but it is legitimate argument and will not be stricken.

K. General Counsel moves to strike the final paragraph on page 14, continuing through the first two lines of page 15, concerning the argument that, "The credibility of the special agents' testimony . . . was corroborated . . . ." General Counsel is quite correct that the proffered statement, Respondent Exhibit 3 for identification, was rejected. Mr. Sidener instructed the two agents on February 15, 1996, to ". . . document whatever they were engaged in with respect to how actively the representative could participate." (Tr. 143); but they did not. The statement of April 12, 1996 (Res Exh. 3 for identification), was neither a spontaneous nor even a contemporary record of the February 14-15 examination. Rather, it was prepared nearly two months after the fact and fails to corroborate their credibility. Indeed, the notes, which each Ms. Rubey de Guerrero and Ms. Schnieders took, and which could have corroborated their testimony, were not produced. For example, Ms. Rubey de Guerrero testified that from her notes she could tell where Ms. Miller attempted to answer for Mr. Bowman (Tr. 116). Both Mr. Bowman and Ms. Miller denied that Ms. Miller ever attempted to answer for Mr. Bowman or ever interrupted; but the notes were not offered to corroborate Ms. Rubey de Guerrero's testimony. In like manner, Ms. Schnieders testified that, " . . . I was trying to write, take down notes, and I would start to write down something, and then she [Miller] would answer. She was answering, and I didn't know whether to write, you know, Miller said this, and I remember it was very unorganized at that time. . . ." (Tr. 132). Her notes, however unorganized, would have corroborated her testimony and that of her fellow agent, but were not produced.

Nevertheless, the statement is argument and, while it will be accorded only the weight it deserves, it will not be stricken.

1. Respondent OIG is subject to the Statute

The United States Department of Agriculture is an Executive agency within the meaning of § 3(a)(3) of the Statute and its Office of the Inspector General, Kansas City, Missouri, was, for the reasons well

stated by the Authority, in Headquarters National Aeronautics and Space Administration Washington, D.C. and National Aeronautics and Space Adminis-tration, Office of the Inspector General, Washington, D.C. (hereinafter referred to as, "NASA"), 50 FLRA 601, 612-619 (1995), a representative of United States Department of Agriculture, within the meaning of § 14(a)(2)(B) of the Statute, in conducting the investigatory interview herein. I understand Respondent's position but can not agree. I find nothing in United States Nuclear Regulatory Commission v. FLRA, 25 F.3d 229 (4th Cir. 1994)(hereinafter, "NRC"), to the contrary. True, the Fourth Circuit Court of Appeals held that it was not permissible to subject investigatory interviews conducted by the Inspector General to contractual limitation through negotiations between the agency and its union, but the Court fully recognized, and agreed with, the decision of the Third Circuit Court of Appeals, Defense Criminal Investigative Service v. FLRA, 855 F.2d 93 (3d Cir. 1988)(hereinafter, "DCIS"), that DCIS, ". . . which is the equivalent of the Inspector General within the Defense Department, was a representative of the Department of Defense, and therefore, the employees' statutory rights to have union representatives present during an agency invesgation, see 5 U.S.C. § 7114(a)(2), apply . . . ." (25 F.3d at 235). I find the decision of the Court in NRC thoroughly sound. Beyond doubt, were investigations of the Inspector General subject to collective bargaining, the independence of the Inspector General, which the Inspector General Act, 5 U.S.C. App. 3 § 1, et seq. sought to assure, would have been compromised; but that is a far cry from concluding that, the statutory Weingarten right [420 U.S. 251, 260-261 (1975)] of § 14(b)(2)(B) do not apply to investigative interviews of bargaining unit employees conducted by the Inspector General [IG]. The § 14(b)(2)(B) rights are statutory rights wholly independent of collective bargaining.

With all deference, I find the decision of the District of Columbia Circuit Court of Appeals, in United States Department of Justice v. FLRA, 39 F.3d 361 (D.C. Cir. 1994, reh'g den'd 1995), for reasons well stated by the Authority in NASA, supra, unsound and unpersuasive. Offices of the Inspector General plainly are not independent agencies. To the contrary, they are employees of the particular agency, here the Department of Agriculture, and are under the general supervision of the agency head. Representation of an employee by the union pursuant to § 14(a)(2)(B) of the Statute, protects the employee but, as the Authority has noted in NASA, does not impinge in the slightest on the independence of the IG to conduct investigations.[(3)] U.S. Department of Labor, Mine Safety and Health Administration, 35 FLRA 790, 805 (1990).

2. Respondent OIG violated §§ 16(a)(1) and (8)

A. FACTS

Mr. Richard Bowman is a management analyst for the Farm Service Agency (hereinafter, "Farm Service") and is President of NTEU Chapter 264 (Tr. 38). At a negotiating meeting with Farm Service on Friday, February 2, 1996, Mr. Bowman had in his possession, and displayed, Purchase Order documents. By letter dated February 7, 1996, Mr. Jim R. Ray, Acting Director, Farm Service, requested that the Office of Inspector General conduct, ". . . a full investigation" into the matter of Mr. Bowman's possession of Purchase Order documents and the disappearance, on February 5, 1996, of ". . . the entire file involving these documents. . . ." (G.C. Exh. 2). On February 13, 1996, Mr. Bowman was told by his supervisor, Ms. Mary Treese, to call the OIG (Tr. 39), which he did and an appointment was made for the following afternoon, February 14, 1996 (Tr. 39, 40). Mr. Bowman called Ms. Patricia Miller, Chief Steward, and asked her to go with him as his representative (Tr. 39).

The interview began, as scheduled, on the late afternoon of February 14, 1996, at the Office of the Inspector General (Tr. 80), and in particular in the Office of Special Agent James Midenhall who was out of town (Tr. 40, 82). The interview was conducted by Special Agency Stacy Rubey de Guerrero and Special Agent Jill Renee Schnieders (Tr. 80, 118). Mr. Bowman was accompanied by Ms. Miller (Tr. 40, 61). I agree with Respondent OIG that, "The bottom line in this case is credibility." (Respondent OIG's Brief, p. 13). Rarely has testimony of witnesses been more divergent. For example, Mr. Bowman stated that he and Ms. Miller were escorted by Ms. Rubey de Guerrero to a nearby break area for their caucus and from where he called Ms. Kathleen MacKenzie, an NTEU Field Representative, in Denver, Colorado (Tr. 43, 46, 47). Ms. Miller said that Mr. Bowman asked for a caucus; that it was granted; and that during the caucus Mr. Bowman called Ms. MacKenzie and talked to her (Tr. 63-64); but she did not mention having gone to a break area for the caucus and/or for the telephone call. Special Agents Rubey de Guerrero and Schnieders testified that they left Mr. Midenhall's office; that Mr. Bowman and Ms. Miller had their caucus in Mr. Midenhall's office; that they, Bowman and Miller, never left the office (Tr. 85, 86, 104, 113, 115, 119, 120). Ms. Rubey de Guerrero said she did not know whether Mr. Bowman and/or Ms. Miller had made a call from Mr. Midenhall's office (Tr. 113).[(4)] Mr. Bowman and Ms. Miller said that they talked to Ms. MacKenzie during the caucus (Tr. 43, 164) and Ms. MacKenzie said that Mr. Bowman and Ms. Miller called her on the afternoon of February 14 (Tr. 22, 35). Although the testimony of Bowman, Miller and MacKenzie concerning their conversation during the caucus is not contradicted directly, I am not convinced that the conversation took place during the caucus. There is no doubt that Ms. Miller and Mr. Bowman talked to Ms. MacKenzie on the night of February 14; but it doesn't ring true that she talked to them on the afternoon of the 14th during the caucus. They unquestionably called for her during the caucus (see, Ms. Schnieders' testimony, ". . . I believe that Rick had contacted somebody but couldn't get through to him." (Tr. 129)); however, had they talked to her, everything in

Ms. MacKenzie's manner and attitude, which appeared to be militant and assertive when she believed rights of employees were being trampled, showed a disposition to act and I can not escape the conviction that she would have called the IG agents immediately. That she called the IG office after 9:00 p.m. on the 14th (Tr. 31) strongly suggests that she did not talk to Mr. Bowman and Ms. Miller until then. That she was "up in arms" over the refusal of the IG to permit Ms. Miller to actively represent Mr. Bowman plainly appears in her call, as soon as she arrived at her office on February 15 (Tr. 31), and her statements to Ms. Rubey de Guerrero (Tr. 23, 24, 95) and to Rubey de Guerrero's supervisor, Mr. Ronald L. Sidener (Tr. 24-25, 139).

Ms. Rubey de Guerrero and Ms. Schnieders testified that when they withdrew from Mr. Midenhall's office for Mr. Bowman's and Ms. Miller's caucus, they, Rubey de Guerrero and Schnieders, went to the office of their supervisor, Mr. Sidener, to, ". . . update him on the progress of the investigation . . . ." (Tr. 85, 119). Indeed, Ms. Schnieders stated, "Went into his office and Stacy [Rubey de Guerrero] at that time discussed with him what had just taken place, and they looked at the IG manual and the Weingarten rule." (Tr. 119). But Mr. Sidener testified that on the way to the mens room he saw Ms. Rubey de Guerrero and Ms. Schnieders in the corridor chatting and he stopped and spoke to them briefly (Tr. 138). According to Mr. Sidener, on February 15, Ms. MacKenzie gave him a citation of law (Tr. 139); he asked if he could look it up and call her back; that he looked up the law and called Ms. MacKenzie back (Tr. 139); and that, at that time, February 15, he, ". . . looked at the OIG directive that covered this, and I think I looked up the specific statute. I don't remember particularly a Department of Justice guideline, but I looked at whatever we had available so that I could talk to you [MacKenzie] . . . ." (Tr. 147). Again, Mr. Sidener insisted that they, Rubey de Guerrero and Schnieders, were, ". . . standing there chatting" (Tr. 146) when he went by them and spoke to them briefly on the 14th. (Tr. 146).

Mr. Bowman testified that Ms. Miller never told him not to answer any question; never tried to answer for him; and never interrupted (Tr. 51). Ms. Miller testified that she said nothing during the examination on February 14 (Tr. 65); and that she never disrupted the examination of Mr. Bowman (Tr. 66). Ms. Rubey de Guerrero testified, "Ms. Miller continued to interrupt me several times, as far as jumping in and advising Mr. Bowman not to answer the question, and on several occasions, she would attempt to answer the question herself . . . it was becoming disruptive to my interview, and so I told Mr. Bowman that Ms. Miller was here as his union representative and I had no problem with that, but she was not here as his attorney, and I could not allow her to tell him not to answer the questions or to attempt to answer the questions for him . . . ." (Tr. 84). Ms. Schnieders stated, "The interview took place, and Stacy -- Ms. Miller continued to interrupt, and she would ask Mr. Bowman that perhaps he shouldn't answer that question or was answering for him,

and that she was not an attorney -- she was not acting as an attorney; she was a union rep and that they could confer at any time." (Tr. 119); ". . . It just got very chaotic. I remember I was trying to write, take down notes, and I would start to write down something, and then she would answer. She was answering, and I didn't know whether to write, you know, Miller said this, and I remember it was very unorganized at that time" (Tr. 131-132). Ms. Rubey de Guerrero stated that she could tell from her notes where Ms. Miller attempted to answer (Tr. 116); but as noted earlier, neither her notes nor Ms. Schnieders' notes were offered in evidence and I do draw the adverse inference that the notes would not have supported their testimony.

Mr. Bowman testified that he did not sign the "Employee Warning-Administrative/Noncustodial" statement (Res. Exh. 2) until after the caucus (Tr. 41-42, 46, 47); but Ms. Rubey de Guerrero insisted that it was signed at the outset (Tr. 81); and Ms. Miller agreed (Tr. 63). Ms. Schnieders did not say. And so it went. The divergence continued, but these examples illustrate the breadth of their disagreement.

The salient and controlling question is what Ms. Rubey de Guerrero told Ms. Miller concerning her presence at the examination on February 14, and when she made her statement. Mr. Bowman testified that at the outset, before his examination began, Ms. Rubey de Guerrero asked Ms. Miller if she was an attorney and when Ms. Miller said she was not, Ms. Rubey de Guerrero told her, ". . . as a courtesy, they would allow her to stay there, but that she couldn't participate in any way and that we couldn't confer and we couldn't discuss anything . . . and then she stressed that it was just as a courtesy that she was allowing her to stay." (Tr. 41). Mr. Bowman continued, ". . . And so I asked that, since I thought I had a right to a union representative and since I wasn't, you know, sure about what was going on, I asked if we could have a caucus, so that we could decide and call my union field rep. Q Who's that? A It's Kathleen MacKenzie. Q Well, why didn't you -- I mean, you stated that you didn't really know what was going on. You know, why didn't you understand what was going on? What was the -- A I had talked with Kathleen the night before, and it was my understanding when we went there that Pat Miller could be my union representative and she could, you know, help me with the answers and represent me in the whole proceeding." (Tr. 42).

Ms. Miller testified that after Mr. Bowman introduced her as his union representative, Ms. Rubey de Guerrero stated this was an official investigation and Mr. Bowman had to cooperate and asked Mr. Bowman to sign a statement, which he did, and Ms. Rubey de Guerrero then told her, "A They told me that I was only there as a courtesy; since I was not an attorney, I could not talk or confer with him during the interview. Q How did you respond . . . A I didn't say anything. Rick responded. Q And what did Rick do? A Rick asked for a caucus." (Tr. 63).

Ms. Rubey de Guerrero testified that Ms. Miller had interrupted her questioning of Mr. Bowman several times by, ". . . jumping in and advising Mr. Bowman not to answer the question, and on several occasions, she would attempt to answer the question herself."; that, "A Well, at that point, it was becoming disruptive to my interview, and so I told Mr. Bowman that Ms. Miller was here as his union representa-tive and I had no problem with that, but she was not here as his attorney, and I could not allow her to tell him not to answer the questions or to attempt to answer the questions for him -- I needed to hear the questions in his own words; that was extremely important -- and that I had no problem with them consulting, they could consult with each other at any time they wanted -- I would leave the room -- but that I needed to have Mr. Bowman answer the questions himself." (Tr. 84). Ms. Rubey de Guerrero continued, stating, ". . . after I told him I needed to hear his answers, I couldn't have Ms. Miller answering for him, they wanted to consult with each other, and so Agent Schnieders and I left the office that we were in and shut the door behind us." (Tr. 85). Ms. Rubey de Guerrero further stated, ". . . In my mind, if there had been an attorney there, I probably would have allowed a little more leeway as far as the attorney jumping in and advising the client not to answer, and I would have done this believing an attorney-client privilege in that area. And so I would have given that attorney more leeway, assuming that privilege." (Tr. 88).

Ms. Schnieders testified, ". . . The interview took place, and Stacy -- Ms. Miller continued to interrupt, and she would ask Mr. Bowman that perhaps he shouldn't answer that question or was answering for him, and Stacy at that time then asked that she not answer the questions for him, and that she was not an attorney -- she was not acting as an attorney; she was a union rep and that they could confer at any time. Q Did they request -- did Mr. Bowman or Ms. Miller ever request the opportunity to confer? A No. At that time, after Stacy said that, we asked if they wanted to confer, and they said that they did, so we both got up and left the room, and they visited." (Tr. 119).

I credit the testimony of Mr. Bowman and of Ms. Miller, namely, that before the interrogation of Mr. Bowman began, Ms. Rubey de Guerrero told Mr. Bowman and Ms. Miller that Ms. Miller would be allowed to remain but that, as she was not an attorney, she could not participate, i.e., she could not talk or confer with him during the interview. I further credit Mr. Bowman's testimony that Ms. Rubey de Guerrero, when she allowed Mr. Bowman and Ms. Miller to caucus, told them that she was doing this as a courtesy; but this wasn't going to be how the examination was going to be conducted (Tr. 43). I do not credit the testimony of either Ms. Rubey de Guerrero or of Ms. Schnieders in this regard and specifically reject their assertion that Ms. Miller had been disruptive of the investigation and/or that Ms. Rubey de Guerrero's statement was provoked by Ms. Miller's disruptive conduct; and I further specifically reject their assertion that Ms. Rubey de Guerrero ever said they could consult each

other any time they wanted. I do not doubt, and accordingly credit the testimony of Ms. Rubey de Guerrero and Ms. Schnieders to the effect that Mr. Bowman was instructed that he must answer all questions. I have credited the testimony of Mr. Bowman and Ms. Miller in this regard for a number of reasons, including the following: First, each Mr. Bowman and Ms. Miller categorically denied that Ms. Miller ever interrupted or ever attempted to answer for Mr. Bowman; and each stated that Ms. Rubey de Guerrero's statement was made before the interrogation of Mr. Bowman had begun, which is precisely when such "ground rules", as, that the person being examined must answer each question and must answer in his/her own words, would be set forth.

Second, Mr. Bowman and Ms. Miller told Ms. MacKenzie that Ms. Rubey de Guerrero told them that Ms. Miller would be allowed to remain at the investigation but, because she was not an attorney, she could not participate; that is what Ms. MacKenzie testified, without contradiction, she told Ms. Rubey de Guerrero on the 15, ". . . I identified myself and said that I was calling because I was concerned that she was confused about the instruction that they had given to Pat Miller that she could not speak because she was not an attorney. . . ." (Tr. 24); and when Ms. Rubey de Guerrero declined to talk to Ms. MacKenzie without her supervisor, this is what Ms. MacKenzie told Mr. Sidener, Ms. Rubey de Guerrero's supervisor, as she testified, "I identified myself. I said it made no difference whether or not Pat was an attorney; they had the same rights as a union representative, whether or not you were an attorney . . . this interview, I said, was a Weingarten interview and cited him the section of the statute, said why I thought the Weingarten right applied, and then again said that the representative actually does have the right to speak; she has the right to ask questions; she has the right to help clarify questions and answers; she has the right to confer with the witness; and she has the right to suggest, you know, things that they might look at. She, of course, does not have the right to answer for the witness . . . But he did not -- he also was not receptive. He said, We didn't violate anything, because we allowed her to be in the room . . . ." (Tr. 25) Mr. Sidener did not deny what Ms. MacKenzie testified she told him, and, indeed, by inference, confirms it. He testified, I told her [MacKenzie] that I thought we were doing the right thing . . . ." (Tr. 140); ". . . I told her [MacKenzie] that I thought that we were permitting the representative to be there. I may have made a comparison between a lawyer being on a certain level and a representative maybe being a less -- we would have a lower expectation that a union representative would be as active as an attorney . . . ." (Tr. 144); "Well, I would expect a union representative to be less active in the advocacy role than an attorney, and I would give a union representative less credibility than I would an attorney." (Tr. 45).

Third, as noted previously, because Respondent OIG failed to produce the notes of Ms. Rubey de Guerrero and/or of Ms. Schnieders, I have drawn the inference that the notes would not have supported their testimony

that Ms. Miller interrupted the interrogation and/or attempted to answer for Mr. Bowman.

Fourth, Ms. MacKenzie testified that she told Mr. Sidener that the dispute could be resolved if he would write a letter stating that, "In the future you will allow employees who are the subject of investigatory interviews and who are covered by the bargaining unit and who request union representation in Weingarten situations to have union representatives that participate." (Tr. 26)(Emphasis supplied); and that Mr. Sidener responded, " . . . . No, I won't do that . . . ." (Tr. 26). Mr. Sidener neither challenged nor denied Ms. MacKenzie's testimony, which further demonstrates that Respondent OIG refused to permit Ms. Miller, as Mr. Bowman's Union representative, to actively participate in the investigatory interview of Mr. Bowman.

Fifth, Ms. Rubey de Guerrero conceded that she told Mr. Bowman and Ms. Miller that Ms. Miller was a Union repre-sentative and not an attorney and because she was not an attorney could not allow her to tell him not to answer questions or to answer for him (Tr. 84); and stated that if Ms. Miller had been an attorney she would have allowed more leeway because she believed, ". . . an attorney-client privilege in that area." (Tr. 88). Ms. Schnieders also conceded that Ms. Rubey de Guerrero told Ms. Miller she was not acting as an attorney (Tr. 119); and Mr. Sidener admitted that when Ms. MacKenzie complained about representation (Tr. 143), he told he thought that were doing the right thing by permitting the Union representative to be present (Tr. 140, 144), and made it clear that OIG expected a union representa-tive to be less active than an attorney (Tr. 144, 145) and that he gave a union representative less credibility than an attorney (Tr. 145). The admitted denigration of the role of a union representative and the pointed instruction that the Union representative was not an attorney and could not act as an attorney supports the accuracy of Mr. Bowman's and of Ms. Miller's testimony that Ms. Rubey de Guerrero told Ms. Miller that she would permit her to be present but, because she was not an attorney, she could not participate in the interview.

B. CONCLUSIONS

Because the IG told Ms. Miller that, because she was not an attorney, she could not participate in the interview, Respondent OIG denied the Union representative the right, ". . . to take an active role in assisting a unit employee in presenting facts in his or her defense." (NASA, supra, 50 at 607); the Special Agent's instruction that Ms. Miller could not participate, because she was not an attorney, was tantamount to telling her to remain silent at an examination which the Authority has found constituted, ". . . unduly aggressive and intimidating behavior . . . ." (id.), and by denying Ms. Miller, the Union representative, the

right to actively participate in the investigatory interview of Mr. Bowman, pursuant to § 14(a)(2)(B) of the Statute, Respondent OIG violated §§ 16(a)(1) and (8) of the Statute. Id. at 620; United States Department of Justice, Bureau of Prisons, Safford, Arizona, 35 FLRA 431, 438-440 (1990); cf. Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and Phoenix, Arizona and Federal Correctional Institution, El Reno, Oklahoma, 52 FLRA No. 43, 52 FLRA 421 (1996).

As noted above, I have specifically rejected the assertion of Ms. Rubey de Guerrero and of Ms. Schnieders that Ms. Rubey de Guerrero ever told Mr. Bowman and Ms. Miller that they could consult each other any time they wished. Nevertheless, the record shows Mr. Bowman made only one request to caucus, when Ms. Rubey de Guerrero told him Ms. Miller could not participate in any way (Tr. 41) and because he thought he had a right to a union representative which was denied him (Tr. 42), he asked for a caucus and his request was granted. Having been told that Ms. Miller could not participate in the examination and that Mr. Bowman and Ms. Miller, ". . . couldn't discuss anything . . . ." (Tr. 41), the examination, after the caucus, proceeded without comment by Ms. Miller and the questioning of Mr. Bowman was competed on February 14 (Tr. 86). At the hearing, Ms. Miller stated that after the caucus she "communicated" with Mr. Bowman by kicking his foot or leg when he strayed from the question he had been asked (Tr. 66-67); but, inasmuch as neither Ms. Rubey de Guerrero nor Ms. Schnieders was even aware of it, obviously Ms. Miller's action did not interrupt the examination and did not inter with Mr. Bowman answering the questions in his own words.

Mr. Bowman, on the evening of February 14, prepared a statement of his testimony (Tr. 49) and Ms. Rubey de Guerrero and Ms. Schnieders also prepared a statement of Mr. Bowman's testimony (Tr. 91-92); on the 15th, the statements were exchanged; portions of each statement were incorporated into a final draft which was faxed to Ms. MacKenzie (Tr. 23), thereafter, Mr. Bowman signed the statement was given a copy, and the interview was concluded (Tr. 50, 51).

The Third Circuit Court of Appeals, in Defense Criminal Investigative Service (DCIS), Department of Defense (DOD) v. FLRA, 855 F.2d 93 (3d Cir. 1988), first noted that,

> ". . .Section 7114(a)(2)(B) was adopted by Congress in 1978 shortly after the decision in Weingarten [NLRB v. Weingarten, Inc., 420 U.S. 251 (1975)] and purports on its face to confer Weingarten rights on all federal

> employees in a bargaining unit . . . ." (855 F.2d at 100),

and then set forth Mr. Justice Brennan's statement of the intended role of a Weingarten representative in an investigative interview:

> '"The employer has no duty to bargain with the union representative at an investigatory interview. The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation . . . .' 420 U.S. at 260 . . . ." (855 F.2d at 100).

The Authority has made it clear that, while the union representative must be permitted to actively participate in an examination under § 14(a)(2)(B), U.S. Customs Service, Region VII, Los Angeles, California, 5 FLRA 297, 306 (1981); U.S. Department of Justice, Immigration, and Naturalization Service, Border Patrol, El Paso, Texas, 42 FLRA 834, 840 (1991), the " . . . representational function of a Weingarten representative is limited. Among other things, the employer may insist on hearing the employee's own account of the matter under investigation and the union's presence need not transform the examination into an adversary proceeding . . . ." (NASA, supra, at 618); " . . . an employer has a legitimate interest and prerogative in achieving the objectives of the examination . . . ." Federal Aviation Administration, New England Region, Burlington, Massachusetts, 35 FLRA 645, 652 (1990); ". . . management may place reasonable limitations on the union's participation during a § 14(a)(2)(B) investigation in order to prevent an adversarial confrontation with that representative and to achieve the objective of the examination . . .", Federal Prison System, Federal Correctional Institution, Petersburg, Virginia, 25 FLRA 210, 233 (1987); and may even reject a designated representative when necessary to protect the integrity of the investigation, id. at 228. Of course, ". . . when an employee makes a valid request for union representation in an investigative interview, the employer must: (1) grant the request, (2) discontinue the interview, or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview . . . .", Department of Defense, Defense Criminal

Investiga-tive Service, Defense Logistics Agency and Defense Contract Administration Services Region, New York, 28 FLRA 1145, 1149 (1987), enf'd sub nom. Defense Criminal Investigative Service (DCIS), Department of Defense (DOD) v. FLRA, 855 F.2d 93 (3d Cir. 1988).

The 14(a)(2)(B) right applies to criminal investigations as well as to non-criminal investigations, Department of the Treasury, Internal Revenue Service, Jacksonville District and Department of the Treasury Internal Revenue Service, Southeast Regional Office of Inspection, 23 FLRA 876, 878-879 (1986), but where, are here, the investigation is a non-criminal investigation, government employees, if, as Mr. Bowman was (Res Exh. 2), adequately informed: (a) that his replies, and their fruits can not be used against him in a criminal case; and (b) that he is subject to discipline, including discharge, for not answering, Kalkines v. United States, 473 F.2d 1391, 1393 (Ct. Cl. 1973); Navy Public Works Center, Pearl Harbor, Hawaii v. FLRA, 678 F.2d 97 (9th Cir. 1982); Weston v. Department of Housing and Urban Development, 14 MSPR 321, 324 (1983); Goutee v. Veterans Administration, 36 MSPR 526 (1988); National Treasury Employees Union, 9 FLRA 983, 986 (1982), may not with impunity refuse to answer. Moreover, disclosures to a union representative in the course of representing the employee in a disciplinary proceeding are protected, U.S. Department of the Treasury, Customs Service, Washington, D.C., 38 FLRA 1300 (1991).[5]

Respondent OIG displayed scant knowledge, and even less understanding, of the role of a Weingarten representative in an investigative interview. With a clearer appreciation that the representational function is limited, the Union represen-tative will cease to appear as an ogre to be avoided. Whether the Weingarten representative is, or is not, an attorney, the duties, the rights and the limitations are the same.

3. Respondent Farm Service Agency did not violate § 16(a)(1) or (8).

Respondent Farm Service was not present at the investigative examination of Mr. Bowman (Tr. 54, 55). There is no organizational relationship between Farm Service and the OIG (Res Exh.; Tr. 75-76); Farm Service has no authority to direct investigations conducted by OIG (Tr. 154) and has no supervisory authority over OIG (Tr. 154). OIG is not an agent of Farm Service.

Farm Service did request the investigation of Mr. Bowman's unauthorized possession of confidential Purchase Order documents and the disappearance of the file involving those documents (G.C. Exh. 2); but once the request had been made, Farm Service had no control whatever as to whether there would be an investigation and if there were, its conduct (Tr. 137, 154, 155). A Farm Service supervisor, Ms. Mary Treece, gave

Mr. Bowman a "slip" to contact OIG (Tr. 39, 55), which he did, and he made an appointment for the following day (February 14)(Tr. 39) and Mr. Everett Asbury, Mr. Bowman's Division Chief, another Farm Service supervisor, ". . . told me [Bowman] to go over also" (Tr. 55). Farm Service approved official time for Ms. Miller to represent Mr. Bowman (Tr. 68).

Farm Service had no involvement whatever with the investigative examination of Mr. Bowman, was not present at the examination, had no control or authority over the conduct of the investigation, and had no control, supervision or authority over OIG. Indeed, Farm Service had taken affirmative action to provide Mr. Bowman representation by approving official time for Ms. Miller, Mr. Bowman's chosen Union representative, to be present at his examination. Because Farm Service did not conduct the investigation, did not deny the Union representative the right to actively participate in the examination, and had no control over the OIG special agents who did deny the Union representation the right to actively participate in the examination, Farm Service did not violate either § 16(a)(1) or § 16(a)(8) of the Statute as alleged and, accordingly, the allegations of the complaint against Farm Service are hereby dismissed. Department of the Treasury, Bureau of the Mint, U.S. Mint, Denver, Colorado, Case No. 7-CA-876, 9 Adm. Law Judge Dec. Rep. April 30, 1982; Department of Defense, Defense Criminal Investigative Service; Defense Logistics Agency and Defense Contract Administration Services Region, New York, 28 FLRA 1145, 1148-1149, 1152, 1163 (1987), enf'd 855 F.2d 93 (3d Cir. 1988).

I am aware that the Authority in NASA, supra, extended liability for the violation of 14(a)(2)(B) to Headquarters, NASA, as well as OIG, stating, in part, as following:

> "We also find, contrary to the Judge, that NASA, HQ violated section 7114(a)(2)(B) of the Statute and thus committed unfair labor practices in violation of section 7116(a)(1) and (8) . . . .
>
> . . .
>
> "We conclude that holding NASA, HQ responsible for the manner in which its OIG conducts investigative interviews pursuant to section 7114(a)(2)(B) fully effectuates the purposes of the Statute.

In reaching this conclusion, we recognize that the Authority has, in similar circumstances, previously declined to hold an agency headquarters responsible for the actions of its IG. U.S. Department of Justice, Washington, D.C. and U.S. Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota and Office of Professional Responsibility, Washington, D.C. and National Border Control Council, American Federation of Government Employees, 46 FLRA 1526, 1571 (1993) rev'd sub nom. But cf. U.S. Department of Labor, Mine Safety and Health Administration, 35 FLRA 790 (1990) (holding the Mine Safety and Health Administration liable for the illegal actions of the Department's IG in a case where the Inspector General was not charged).(6)

"However, the Authority also has noted in prior decisions that it is appropriate for agency headquarters with administrative responsibility for the Office of Inspector General to advise IGs 'of the pertinent rights and obligations established by Congress in enacting the Federal Service Labor-Management Relations Statute. More particularly, . . . investigators should be advised that they may not engage in conduct which interferes with the rights of employees under the Statute.' DOD, DCIS, 28 FLRA at 1151. It is with this objective in mind--ensuring that the Office of Inspector General is advised by its statutory superior of the obligation to comply with the Statute--that we find the purposes underlying the Statute will be effectuated by holding NASA, HQ liable for the actions of its Inspector General. As set forth in this decision, despite a degree of

independence, the IG is nevertheless under the direct supervision of the head of the agency. Accordingly, we will no longer follow Authority precedent declining to hold an agency headquarters responsible for the statutory violations of its Inspector General." (50 FLRA at 621-622).

To be sure, the Authority noted in NASA,

" . . . the IG Act grants an IG a degree of freedom and independence from the parent agency that employs him or her. However, this statutory recognition of autonomy is not absolute, and becomes nonexistent when the IG's purpose in 'conducting interviews . . . is to solicit information concerning possible misconduct of [agency] employees in connection with their work,' and 'the information secured may be disseminated to supervisors in affected subdivisions of the [agency] to be utilized by those supervisors for [agency] purposes.' DCIS, 855 F.2d at 100." (50 FLRA at 615)

Nevertheless, to fail to comply with § 14(a)(2)(B), the entity to be charged must have some relationship to the denial of an opportunity to be represented at an examination of an employee by a representative of the agency. Here, Farm Service had no relationship whatever to the denial of Mr. Bowman's 14(a)(2)(B) right to be represented. Farm Service most assuredly was not "agency headquarters" and most assuredly was wholly without "administrative responsibility for the Office of Inspector General." Because Farm Service did nothing, actively or passively, to deny Mr. Bowman his unfettered 14(a)(2)(B) right to active representation, it did not fail to comply with 14(a)(2)(B) and it did not violate § 16(a)(1) and (8) of the Statute.

Having found that the Office of Inspector General violated §16(a)(1) and (8) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.29 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.29, and § 18 of the Statute 5 C.F.R. § 7118, it is hereby ordered that the United States Department of Agriculture, Office of Inspector General, Kansas City, Missouri, shall:

1. Cease and desist from:

(a) Failing and refusing to comply with the requirements of §14(a)(2)(B) of the Statute, 5 U.S.C. § 7114(a)(2)(B), when conducting investigatory examinations of Farm Service Agency employees pursuant to that section of the Statute, which means, specifically, that Union representatives, when requested in accordance with § 14(a)(2)(B), shall: (a) be permitted to be present at any examination, whether criminal or non-criminal; and (b) be granted the right to actively participate.

(b) In any like or related manner, interfering with, restraining, or coercing Farm Service Agency employees in the exercise of their rights assured by the Statute.

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

(a) The Regional Inspector General, Kansas City, Missouri, shall order the Regional Office of Inspector General to comply with the requirements of § 14(a)(2)(B) of the Statute, 5 U.S.C. § 7114(a)(2)(B), when conducting any investigatory examination of Farm Service Agency employees, whether criminal or non-criminal; and the Regional Inspector General shall further, specifically, order every employee who conducts such investigatory examinations that the Union representative, when requested in accordance with § 14(a)(2)(B): (a) shall be permitted to be present at the examination; and (b) shall be granted the right to actively participate in the examination.

(b) Post at its facilities in Kansas City, Missouri, and at all facilities in the Region where employees of the Farm Service Agency are employed, 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 Regional Inspector General, Office of Inspector General, United States Department of Agriculture, Kansas City, Missouri, and shall be posted and maintained for 60 consecu-tive days thereafter, in conspicuous places, including all bulletin boards and other places where notice to employees are customarily posted. Reasonable step shall be

taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Sufficient numbers of signed Notices, set forth in sub-paragraph (b), above, shall be delivered to the Director, or Acting Director, as the case may be, of the Farm Service Agency, Kansas City, Missouri, to insure that such Notices are posted at all facilities of the Farm Service Agency in the Region, and are maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees of the Farm Service Agency are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced or covered by any other material.

(d) Pursuant to § 2423.30 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.30, notify the Regional Director of the Dallas Region, Federal Labor Relations Authority, 525 Griffin Street, Suite 926, LB 107, Dallas, Texas 75202-1906, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM B. DEVANEY

Administrative Law Judge

Dated: June 13, 1997

Washington, DC

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Department of Agriculture, Office of Inspector General, Kansas City, Missouri, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES AND ALL EMPLOYEES OF THE FARM SERVICE AGENCY THAT:

WE WILL NOT fail or refuse to comply with the requirements of § 14(a)(2)(B) of the Labor-Management Relations Statute, 5 U.S.C. § 7114(a)(2)(B), when conducting investigatory examinations of employees pursuant to that section of the Statute.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees of the Farm Service Agency in the exercise of their rights assured by the Statute.

WE WILL ORDER all employees who conduct investigative examinations of Farm Service Agency employees to comply with the requirements of § 14(a)(2)(B) of the Statute, 5 U.S.C. § 7114(a)(2)(B).

WE WILL ORDER all employees who conduct investigative examination of Farm Service Agency employees to: (a) Permit Union representatives when requested in accordance with § 14(a)(2)(B), to be present at all examinations; and (b) Permit the active participation of the Union representatives at the examination.

United States Department of Agriculture,

Office of Inspector General

Date: _____ By: _____

Regional Inspector General

Office of Inspector General

Kansas City, Missouri

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Dallas Region, whose address is: 525 Griffin Street, Suite 926, LB 107, Dallas, Texas 75202-1906, and whose telephone

number is: (214) 767-4996.

1. For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7114(a)(2)(B) will be referred to, simply, as "§ 14(a)(2)(B)".

2. Respondent OIG's use of the term "waiver" is a misnomer and is wholly incorrect. Mr. Bowman waived nothing. He was given a form of "Kalkines" warning (Kalkines v. The United States, 473 F.2d 1391, 1393 (Ct. Cl. 1973), whereby he was warned that: (a) his replies, and their fruits, could not be used against him in a criminal case; and (b) he was subject to discharge for not answering.

3. In this regard, the 1996 amendment to § 8(G)(f)(3) of the Inspector General Act, which relates to the United States Postal Service, is both interesting and enlightening. The amendment in question is as follows:

"(3) Nothing in this Act shall restrict, eliminate, or otherwise adversely affect any of the rights, privileges, or benefits of either employees of the United States Postal Service, or labor organizations representing employees of the United States Postal Service, under chapter 12 of title 39, United States Code, the National Labor Relations Act, any handbook or manual affecting employee labor relations with the United States Postal Service, or any collective bargaining agreement." 5 U.S.C. App. 3, § 8(G)(f)(3); 110 Stat. 3009, Sept. 30, 1996)

The Postal Service is not subject to the Statute (see, 5 U.S.C. §§ 104, 105, 7103(a)(3); 39 U.S.C.A. §§ 1202, 1203, 1208, 1209), therefore, the above amendment to the IG Act was necessary to insure, inter alia, that the NLRB's Weingarten right be protected in IG investigation in the Postal Service. Inasmuch as Congress had incorporated the Weingarten right in the Statute (§ 14(a)(2)(B)), it was not necessary that the amendment of the IG Act extend to agencies subject to the Statute. Nevertheless, this amendment further lays to rest the wholly specious rational that the presence of a union representative at an IG investigation compromises the independence of the IG.

4. If a long distant call had been made it would seem reasonable to believe that Respondent Farm Service would have been aware of the call when billed; but no telephone record was offered.

5. This was recognized with approval by the United States Court of Appeals for the District of Columbia Circuit, in United States Department of Justice; Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota, Office of Inspector General, Washington, D.C.; and Office of Professional Responsibility, Washington, D.C. v. FLRA, 39 F.3d 361 (D.C. Cir. 1994), as follows:

" . . . Quoting the ALJ, the Authority in Customs Service viewed the issue as 'whether the designated union representative of an employee in an actual or potential disciplinary action can be examined by management concerning statements made by the employee to his, or her, representative.' 38 F.L.R.A. at 1302. There is, the Authority answered, a 'privilege' protecting 'the content or substance of statements made by an employee to [his] Union representative in the course of representing the employee in a disciplinary proceeding.' 38 F.L.R.A. at 1308. (footnote omitted) Because section 7114(a) 'assures the right and duty of a union to represent employees in disciplinary proceed-ings,' an employee must 'be free to make full and frank disclosure to his or her represen-tative in order that the employee have adequate advice and a proper defense.' Id.

We do not question this reasoning insofar as it applies to management. . . . " (39 F.3d at 369).

However, the Court went on, as follows:

"But the Office of Inspector General is not within that category. . . The privilege the Authority recognizes, derived from the section 7114(a) right of an employee to union representation in an investigation, may be good as against management. But it is not good as against the world. . . ." (id., at 369).

With all deference, for reasons set forth by the Authority in NASA, supra (50 FLRA 601, 612-619 (1995)), the Inspector General is subject to § 14(a)(2)(B) of the Statute. Moreover, I suggest that the employee's due process rights require that, contrary to Court, the privilege must be good as against the world.

6. This was an unusual case in that it was a criminal investigation conducted by the FBI. The OIG agent sat in on the examination, but Mine Safety had no authority or control of OIG. Nevertheless, the Administrative Law Judge found that Mine Safety failed to comply with 14(a)(2)(B) and, therefore, violated §§ 16(a)(1) and (8). The Authority adopted, without opinion, the finding, conclusions and recommended Order (35 FLRA at 791). In view of the Authority's statement in NASA, I believe the Mine Safety and Health case was an

aberration, was overly broad and should not be followed.