

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

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION FORREST CITY, ARKANSAS Respondent and	Case No. DA-CA-00510
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 0922, AFL-CIO Charging Party	

NOTICE OF TRANSMITTAL OF DECISION

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

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

Any such exceptions must be filed on or before **NOVEMBER 14, 2001**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, N.W., Suite 415
Washington, DC 20424-0001

ELI NASH, Chief

Administrative Law Judge

Dated: October 15, 2001
Washington, DC

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

MEMORANDUM
2001

DATE: October 15,

TO: The Federal Labor Relations Authority

FROM: ELI NASH, Chief
ADMINISTRATIVE LAW JUDGE

SUBJECT: U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
FORREST CITY, ARKANSAS

Respondent

and
CA-00510

Case No. DA-

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 0922, AFL-CIO

Charging Party

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

Also enclosed are the transcripts, exhibits and any briefs
filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

OALJ

02-07

WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION FORREST CITY, ARKANSAS Respondent and	Case No. DA-CA-00510
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 0922, AFL-CIO Charging Party	

Eric Daniels, Esquire
For the Respondent

Susanne S. Matlin, Esquire
Ayo A. Glanton, Esquire
For the General Counsel

Before: ELI NASH, Chief
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* (the Statute), and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), 5 C.F.R. § 2411 *et seq.*

The unfair labor practice complaint in this case alleges that the Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas (the Respondent) violated section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1) and (8) by failing to comply with section 7114(a)(2)(B). Specifically, the complaint alleges that a representative of the Respondent denied a bargaining unit employee's request for Union representation during an examination in connection with an investigation where the employee feared discipline and requested Union representation. The Respondent's answer denies that it violated the Statute as alleged in the complaint.

A hearing was held in Memphis, Tennessee, on January 29, 2001. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

____ Findings of Fact

The dispute in this case involves an interview of a bargaining unit employee conducted by the Office of Inspector General (DOJ OIG). The Department of Justice and DOJ OIG are both components of the Department of Justice (DOJ). The Respondent has no organizational authority over the DOJ OIG.

In February or March of 2000, the Respondent received allegations from an inmate at its Forrest City facility that one of its female correctional officers had sexual contact with and provided contraband to inmates. The Respondent referred this matter to the DOJ OIG in Washington, DC, which decided to open a criminal investigation.

During this investigation two DOJ OIG special agents interviewed the correctional officer at the Respondent's facility where she worked. The Respondent provided the agents with a room for the interview and summoned the correctional officer for the agents. The Respondent was not present during the interview and had no input as to how the interview was to be conducted.

At the beginning of the interview the correctional officer asked if she could have a union representative present. The DOJ OIG agents denied that request, asserting that it was a criminal (as opposed to administrative) matter and that it was DOJ OIG policy to exclude union representatives from criminal investigations.

After participating in the interview in which she denied the allegations, the officer agreed to take a polygraph examination. The polygraph examination confirmed her denials, and the agents told her she was cleared. The DOJ OIG agents briefed the Warden after the interview and examination. The correctional officer subsequently received a letter from the DOJ OIG confirming that she had been cleared.

Discussion and Conclusions

The complaint alleges that the Respondent violated section 7116(a) (1) and (8) of the Statute when the DOJ OIG precluded a representative of the American Federation of Government Employees, Local 0922, AFL-CIO from participating in an investigatory examination of a bargaining unit employee. Under section 7114(a) (2) (B) of the Statute, an exclusive representative "shall be given the opportunity to be represented at any examination" of a unit employee by an agency representative in connection with an investigation, if the employee reasonably believes that discipline may result from the examination and requests representation. 5 U.S.C. § 7114(a) (2) (B).

There is no dispute that the interview of the correctional officer constituted an examination in connection with an investigation within the meaning of section 7114(a) (2) (B). Nor is there any dispute that the correctional officer requested union representation and that the DOJ OIG agents denied her request. The Respondent argues that it did not violate section 7114(a) (2) (B) because: (1) the DOJ OIG agents were not acting as representatives of the Respondent; (2) the employee did not reasonably fear discipline; and (3) the employee waived her rights under section 7114(a) (2) (B).

Under Authority precedent, a complaint against an agency component should be dismissed upon a finding that the

component is not responsible for the actions of an OIG investigator during an interview of a unit employee. *Department of Defense, Defense Criminal Investigative Service; Defense Logistics Agency and Defense Contract Administration Services Region, New York*, 28 FLRA 1145, 1149 (1987) (*DCIS*), *aff'd sub nom. DCIS v. FLRA*, 855 F.2d 93 (3d Cir. 1988); *United States Patent and Trademark Office*, 45 FLRA 886, 886 (1992) (*PTO*).

In the *DCIS* case, *DCIS* a OIG component of the Department of Defense (DOD), investigated an employee of the Defense Logistics Agency (DLA), another DOD component. The Authority found that *DCIS* was a representative of DOD and was liable for violating section 7114(a)(2)(B) of the Statute. However, the Authority concluded that *DCIS* was "not acting as an agent or representative of DLA[]" because "DCIS and DLA are organizationally separate from each other." *DCIS*, 28 FLRA at 1149. Therefore, the Authority held that DLA was not responsible for the violation. *Id.*

Similarly, in *PTO*, the Authority dismissed a complaint against the Patent and Trademark Office, finding that it was not responsible for the Department of Commerce's OIG violation of section 7114(a)(2)(B) of the Statute. The Authority adopted the ALJ's finding that the OIG worked independently of the respondent and that the latter exercised no control over the OIG. *PTO*, 45 FLRA at 892-93. See also *U.S. Department of Justice, Washington, DC*, 46 FLRA 1526, 1528 n.4 (1993) (*DOJ*) (affirming dismissal of complaint against INS because it could not control or supervise the OIG's investigation of the INS employee).

Based on Authority precedent, I find that the Respondent is not responsible for the actions of the DOJ OIG agents. In the case at hand, the Respondent occupies the same position as DLA in *DCIS*, *PTO* in *PTO*, and the INS in *DOJ*, and under the same rationale is not responsible for the OIG's activities. Here, the OIG is not a representative of the Respondent, but is the headquarter agency's (DOJ's) representative. As a matter of agency organization, the Respondent could not control or supervise the OIG's investigation of the correctional officer.

A respondent's cooperation with the OIG does not make it responsible for the OIG actions. In *DCIS*, the Authority noted that DLA's "providing a room and having the employees

summoned for the interviews did not constitute a violation" *DCIS*, 28 FLRA at 1150 n.3. Thus, the fact that the Respondent provided the DOJ OIG agents a room in which to conduct their interview and summoned the employee for the interview does not make the Respondent liable. Similarly, the fact that the Respondent initiated the investigation and referred it to the DOJ OIG is irrelevant. In *DCIS*, the DLA also initiated the investigation and referred the matter to DCIS. *Id.* at 1146.

In support of its argument that the OIG is a representative of the Respondent, the General Counsel relies on *NASA v. FLRA*, 527 U.S. 229 (1999), *enf'g*, 50 FLRA 601 (1995), in which the Authority and the Supreme Court found that NASA OIG was a representative of NASA headquarters and that both NASA headquarters and NASA OIG violated the Statute. The General Counsel's reliance is misplaced. First, in *NASA*, there was no finding that the NASA component (Marshall Space Flight Center) was responsible for the NASA OIG's investigation. Second, in holding NASA headquarters responsible for the statutory violations committed by its OIG, the Authority relied on the Inspectors General Act, 5 U.S.C. app. §§ 3(a), which provides that IGs report to and are under the supervision of the head of the agency. 50 FLRA at 621. Thus, the Authority's rationale for holding a headquarters agency liable does not apply to components like Marshall Space Flight Center and the Respondent here who do not have organizational authority over an OIG. *See DOJ*, 56 FLRA 556 (2000) (holding DOJ and OIG but not component Bureau of Prisons liable for violating section 7114(a)(2)(B) of the Statute).

The complaint in this case charges only the Respondent and not the entity who did the investigation (the DOJ OIG) or the organization that oversees the investigating entity (the DOJ). Having concluded that the Respondent was not responsible for the actions of the DOJ OIG agents during the investigation and examination of the employee¹ I recommend that the Authority adopt the following Order:

ORDER

The Complaint in Case No. DA-CA-00510 is hereby, dismissed in its entirety.

¹

In light of this finding, I do not address the Respondent's alternative arguments.

Issued, Washington, DC, October 15, 2001.

ELI NASH, Chief
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by ELI NASH, Chief Administrative Law Judge, in Case No. DA-CA-00510, were sent to the following parties:

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DATED: OCTOBER 15, 2001
WASHINGTON, DC