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

NATIONAL LABOR RELATIONS BOARD REGION 12, TAMPA, FLORIDA NATIONAL LABOR RELATIONS BOARD OFFICE OF THE GENERAL COUNSEL WASHINGTON, DC NATIONAL LABOR RELATIONS BOARD OFFICE OF INSPECTOR GENERAL WASHINGTON, DC Respondents	Case No. AT-CA-80026
and NATIONAL LABOR RELATIONS BOARD UNION 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 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 **MARCH 15, 1999**, and addressed to:

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

JESSE ETELSON

Administrative Law Judge

Dated: February 10, 1999
Washington, DC

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

MEMORANDUM DATE: February 10, 1999

TO: THE FEDERAL LABOR RELATIONS AUTHORITY

FROM: JESSE ETELSON
ADMINISTRATIVE LAW JUDGE

SUBJECT: NATIONAL LABOR RELATIONS BOARD, REGION 12
TAMPA, FLORIDA
NATIONAL LABOR RELATIONS BOARD OFFICE OF THE GENERAL COUNSEL, WASHINGTON, DC
NATIONAL LABOR RELATIONS BOARD
OFFICE OF INSPECTOR GENERAL, WASHINGTON, DC

Respondents

and Case No. AT-CA-80026

NATIONAL LABOR RELATIONS BOARD UNION

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 transmittal form sent to the parties, and the service sheet. Also enclosed are the transcript, exhibits and briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ

99-15

WASHINGTON, D.C.

NATIONAL LABOR RELATIONS BOARD REGION 12, TAMPA, FLORIDA NATIONAL LABOR RELATIONS BOARD OFFICE OF THE GENERAL COUNSEL WASHINGTON, DC NATIONAL LABOR RELATIONS BOARD OFFICE OF INSPECTOR GENERAL WASHINGTON, DC Respondents	Case No. AT-CA-80026
and NATIONAL LABOR RELATIONS BOARD UNION Charging Party	

Sherrod G. Patterson, Esquire
For the General Counsel, Federal Labor Relations Authority

Jennifer S. Kovachich, Esquire
For the Respondents, National Labor Relations Board Region 12 and National Labor Relations Board Office of the General Counsel

Peter Winkler, Esquire
For the Respondent, National Labor Relations Board Office of the Inspector General

Michael P. MacHarg, Esquire
For the Charging Party, National Labor Relations Board Union

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Statement of the Case

This is another in a series of cases in which an agency's Office of Inspector General (OIG) and one or more operating subdivisions within the agency have been charged

with violating the Federal Service Labor-Management Relations Statute (the Statute), when a representative of the OIG allegedly: (1) examined an employee who reasonably believed that the examination might result in disciplinary action against him; and (2) denied the employee's request to have a union representative present. In the earlier cases before the Authority, each agency whose OIG was involved appears to have been an "establishment" as defined in section 11 of the Inspector General Act of 1978, 5 U.S.C. app. §§ 1-12 (IG Act or the Act). However, the National Labor Relations Board (NLRB), the parent agency of the OIG involved in this case, is not a section 11 "establishment" but a section 8G "designated Federal entity." Section 8G of the IG Act, as amended, subjects this OIG to some but not all of the provisions of the Act to which the OIG's of "establishments" are subject.

The amended complaint, as further amended at the hearing, alleges that each of the named Respondents failed to comply with section 7114(a)(2)(B) of the Statute, and thereby committed an unfair labor practice in violation of sections 7116(a)(1) and (8) of the Statute, when John Zielinski, Counsel to the Inspector General[1] denied an employee's request for union representation at an examination that the employee attended after the Acting Regional Director for Respondent Region 12 informed the employee that an OIG representative wanted to meet with him.[2] The complaint alleges that it was reasonable for the employee to believe that the examination could result in disciplinary action. The complaint also alleges that each of the Respondents committed an independent violation of section 7116(a)(1) of the Statute when Zielinski told Dallas Manuel II, the president of Local 12 of the Charging Party (the Union) words to the effect that if Manuel did not immediately leave the room in which the examination was being held he would be subject to discipline, including discharge. Also among the critical allegations of the complaint are that the NLRB is an agency under section 7103

[1] / Mr. Zielinski's "Counsel" position is not to be confused with that of counsel representing OIG in this proceeding.

[2] / At the Charging Party's request, I shall not identify the employee in this decision but shall refer to him as "T." In order to insulate T's identity to the extent that is practicable, I shall include in this decision only such details about the events surrounding the examination as are necessary for the reader's understanding of the circumstances. I use masculine pronouns when referring to T, but do so as a convenience rather than an indication of gender.

(a)(3) of the Statute, that each of the Respondents is an "activity" of the NLRB under § 2421.4 of the Authority's Rules and Regulations (5 C.F.R. § 2421.4), and that during the period covered by the complaint Zielinski was acting on behalf of each of the Respondents.

Each Respondent admitted, in its answer, that the NLRB is an agency and that Respondents Office of the General Counsel (OGC) and Region 12 are "activities" of the NLRB. Each Respondent denied that Respondent OIG is an "activity" of the NLRB and denied that Zielinski acted on behalf of Respondents OGC or Region 12. Each Respondent admitted that Region 12's Acting Regional Director, a supervisor or management official, informed the employee on behalf of Region 12 and OGC that a representative of the OIG wanted to meet with him on July 10, 1997, and that Zielinski met with the employee on that date.

Each Respondent asserted that it was without sufficient knowledge to admit or deny the allegation that it was reasonable for the employee to believe that the examination could result in disciplinary action. (In its brief, however, Respondent OIG asserted that no "examination" within the meaning of section 7114(a)(2)(B) occurred.) Respondent OIG denied that Zielinski rejected the employee's request for union representation. (In its brief, OIG asserts that the employee made no valid request for union representation.) Respondents OGC and Region 12 asserted that they were without sufficient knowledge to admit or deny the allegation that Zielinski denied the employee's request. These two Respondents denied, however, that *they* rejected such a request.

Respondent OIG denied that Zielinski made the statement the complaint alleges that he made to Local 12 President Manuel. Respondent OIG asserted, however, that Zielinski told Manuel, among other things, that Manuel had no standing to remain in the room and that he should leave. Respondents Region 12 and OGC asserted that they were without sufficient knowledge to admit or deny the allegation about Zielinski's statement to Manuel, but denied that *they* made such a statement to Manuel. Finally, each Respondent denied that it failed to comply with section 7114(a)(2)(B) of the Statute and that it committed any of the alleged unfair labor practices.

A hearing on the complaint was held in Tampa, Florida, on October 7, 1998. Counsel for the General Counsel, for all Respondents, and for the Union filed post-hearing

briefs.[3] Counsel for Region 12 and OGC filed a motion to correct the transcript's error in identifying Richard Siegel as being employed by OIG, and to correct an error in her brief. Mr. Siegel is the Associate General Counsel, Division of Operations Management, Office of General Counsel, and the transcript is so corrected. I also accept the correction to page 4 n.2 of the brief.

Witness Sequestration Issue

At the request of Counsel for the General Counsel as the hearing opened, I indicated that I intended to sequester the witnesses. Counsel for OIG objected to sequestration if such an order included Mr. Zielinski, on whom counsel intended to rely as his "*factual* advisor." Mr. Zielinski was also, prospectively, OIG's sole witness as to the immediate events that precipitated the unfair labor practice charge and complaint. Zielinski was, in fact, the sole witness called by any of the Respondents for all purposes, as he also provided their testimony concerning the status of OIG, its relationship to the other Respondents and to other agencies, and concerning the background and the results of the OIG investigation that had brought him to the examination of employee T.

I asked Counsel for OIG whether he saw any prejudice to Respondents if Zielinski were excluded during the testimony of the General Counsel's witnesses about statements made by or to Zielinski. Counsel stated, in response, that he would like Zielinski to hear exactly what those witnesses would testify to with respect to those conversations, and to be able to tell Counsel whether they were telling the truth. Counsel for the General Counsel suggested that one way to meet OIG Counsel's concern was to present Zielinski's testimony first and then to proceed with the General Counsel's case, at which point it would be appropriate for Zielinski to be present.

I stated that I would not permit Zielinski to be present during testimony about his own conduct but that the General Counsel's suggestion provided an option, or that we could permit Zielinski to be present during the testimony of other witnesses as to background matters and as to the relationships between the Respondents. The parties then

[3] For convenience and to attempt to avoid confusion, I refer to Counsel for the General Counsel, Federal Labor Relations Authority, as "Counsel for the General Counsel" or simply as "the General Counsel" and refer to Counsel for the Office of the General Counsel, National Labor Relations Board, as "Counsel for Region 12 and OGC."

conducted private discussions off the record. When the hearing resumed, Counsel for OIG stated that, while he still thought he was entitled to have Zielinski as his "*technical* advisor," given the choice between proceeding first and the witnesses being sequestered he would choose the latter.[4] I then sequestered the witnesses. Counsel for OIG did not seek further to have Zielinski present during testimony about events in which he was not involved directly or personally.

Counsel for OIG has renewed his objection to Zielinski's sequestration, arguing in his brief that Zielinski should have been considered a "representative" of OIG (a party that is not a natural person) under Rule 615 of the Federal Rules of Evidence (FRE), and therefore expressly exempt from Rule 615's prescription for exclusion of witnesses. Failure to exempt Zielinski, Counsel argues, harmed OIG in that, in the absence of Zielinski as Counsel's "factual advisor," and lacking the opportunity to depose the General Counsel's witnesses in advance, Counsel was critically compromised in his ability to cross-examine those witnesses. Although the Authority is not bound by the Federal Rules or any other rules of evidence, Counsel asserts, in view of the apparently uniform practice reflected in the FRE, their underlying policies, and their constitutional dimensions, the Judge committed reversible error and no violation by OIG may be found without first according it a rehearing.

I take OIG's principal purpose in briefing this issue to me to be an assurance that it will be able to pursue its objection before the Authority, if necessary. Technically, however, the arguments are addressed to me, and although responding to them places me in an unwanted adversarial posture with respect to Counsel, I welcome the opportunity to review this issue.

Although the Authority is not bound by the FRE, including Rule 615, I agree with Counsel that the policies

---

[4] Counsel for the General Counsel asserted, as an additional argument for sequestration, that T might feel intimidated by Zielinski's presence during his testimony.

underlying these Rules should be given serious consideration.[5] As one court has stated:

> Because of its important role in reaching the truth, Rule 615 carries a presumption favoring sequestration. Accordingly, we construe the rule's exemptions "narrowly in favor of the party requesting sequestration." For the same reason, the party seeking to avoid sequestration of a witness bears the burden of proving that a Rule 615 exemption applies.

Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 628 (4th Cir. 1996) (*Opus 3*) (citations omitted).

At the hearing in the instant case, Counsel objected to the sequestration of Zielinski on the ground that he was needed as a "factual advisor," later referred to as a "technical advisor." To all appearances, this objection was based on considerations underlying exemption (3), of Rule 615--that Zielinski's presence was "essential to the presentation of [OIG's] cause." In determining whether a witness is exempt from sequestration under Rule 615(3), a court must decide whether the witness's presence is "essential" rather than simply desirable. *U.S. v. Jackson*, 60 F.3d 128, 135 (2d Cir. 1995), *cert. denied* 116 S.Ct. 487 (1995), 116 S.Ct. 951 (1996), 116 S.Ct. 1057 (1996). Moreover, courts have been reluctant to exempt witnesses who are assertedly essential as experts or assistants to counsel but who are expected to provide testimony on disputed issues of fact, especially where the information such "essential" persons possessed could have been communicated to counsel prior to trial. *See, for example, Opus 3*, 91 F.3d at 629; *U.S. v. Klaphake*, 64 F.3d 435, 437 (8th Cir. 1995). In appropriate circumstances, a technical advisor may be permitted at counsel's table, provided that such advisor would not be a witness. *See Master Palletizer Systems, Inc.*

---

[5] Rule 615 provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the [party's] cause.

v. T.S. Ragsdale Co., 937 F.2d 616, 1991 WL 125162 (10th Cir. 1991) (unpublished opinion).[6]

At the briefing stage, OIG's Counsel argues that Zielinski's presence was required as OIG's designated representative. Such argument implicates considerations underlying exemption (2), rather than exemption (3) of Rule 615. Exemption (2) considerations were not the basis asserted at the hearing for permitting Zielinski's presence, as I interpreted Counsel's contentions then. Failure to make a Rule 615(2)-type contention at the hearing might be considered sufficient reason for rejecting it now. *See Opus 3*, 91 F.3d at 629 n.2. Assuming, however, that I should have understood the original objection to sequestration as a claim that Zielinski was a "representative," I do not believe that the "representative" argument warrants a different result.

OIG was not prevented from having a representative present. It was only prevented from having as its representative its principal witness, and he was excluded only if his testimony was to follow the testimony of the General Counsel's witnesses.

Counsel for OIG seeks to invest Zielinski with the same status for exemption (2) purposes as an investigative agent who was responsible for the preparation of the government's affirmative case. *See In re United* States, 584 F.2d 666, 667 (5th Cir. 1978). The analogy is not persuasive. Such an investigative agent might be comparable to an investigator in an Authority proceeding (or an NLRB proceeding) other than the attorney appearing as Counsel for the General Counsel. Zielinski, on the other hand, is the individual whose conduct is the subject of the hearing. He is not the agent responsible for preparing the case, any more than a supervisor whose conduct is alleged to have violated the Statute would be so considered, notwithstanding that both are important sources of information for preparing a defense. Such a supervisor-witness would not ordinarily enjoy the status of the respondent agency's "representative" for the purpose of exempting her from sequestration. Moreover, OIG was offered the opportunity to avoid

---

6 In *Veterans Administration and Veterans Administration Medical Center, Lyons, New Jersey*, 24 FLRA 255 (1986), the Authority upheld the judge's ruling that the respondent's assistant personnel manager could serve as its technical advisor and testify without being sequestered. However, it does not appear that in that case the witness testified about any specific incident about which there were conflicting accounts. *See id.* at 265, 268-69 n.6.

Zielinski's exclusion by having him testify first. That offer was rejected, presumably in order to retain the tactical advantage of having the General Counsel's witnesses testify first. Forcing that choice seems to me now, as it did then, to have been a proper exercise of my discretion. *Id.*

Findings of Fact[7]

A. Undisputed Jurisdictional Facts and Functional Relationships of the Parties[8]

The NLRB is an agency and the Union is a labor organization as defined in section 7103 of the Statute. The NLRB has a General Counsel who is appointed by the President and who exercises general supervision over all attorneys, officers, and other employees in the NLRB's regional offices through OGC and its Division of Operations Management. Thus, as admitted, Respondents OGC and Region 12 are "activities" as defined in § 2421.4 of the Authority's Rules and Regulations.[9]

Employees of the NLRB regional offices, headed by regional directors, investigate unfair labor practice charges on behalf of the General Counsel. The Union is the exclusive representative of a nationwide consolidated unit of NLRB employees including employees located in Region 12.

OIG is headed by the NLRB's Inspector General, who is appointed by the "head" of the NLRB "in accordance with the applicable laws and regulations governing appointments within the [NLRB]," pursuant to Section 8G(c) of the IG Act. The NLRB's "head" for this purpose is its "Chairperson." Sections 8G(a)(3) and 8G(h)(1) of the Act; 62 Fed. Reg. 23,505-07 (1997). The Inspector General is authorized to select, appoint, and employ a staff (section 8G(g)(2)),

[7] The following findings are based on the entire record, the briefs, my observation of the witnesses, and my evaluation of the evidence. Statements of fact that are essentially undisputed are usually recited without attribution. Disputed evidence is set forth as presented, the disputes to be resolved later.

[8] Some of these "facts" are undisputed legal conclusions taken from the pleadings; some statements are based on matters of which I have taken official notice, including statutory provisions.

[9] "*Activity* means any facility, organizational entity, or geographical subdivision or combination thereof, of any agency."

subject to budgetary control, discussed below. The Inspector General reports to and is under the general supervision of the Chairperson and no other officer or employee of the NLRB. Section 8G(d). The Chairperson may remove or transfer the Inspector General, but must inform both Houses of Congress of the reasons for such action. Section 8G(e). The Chairperson may not prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation. Section 8G(d).

The Chairperson is responsible for transferring to OIG such offices, units, or other components, with their functions, powers, and duties, that he determines to be properly related to the functions of OIG and would, if so transferred, further the purposes of section 8G. However, no program operating responsibilities are to be so transferred. Section 8G(b).

The NLRB provides OIG with office space and equipment and its budget, and houses it at NLRB headquarters, where the Chairperson and the OGC are also located. OIG makes an annual budget request which, along with the budget requests of other components of the NLRB, is reviewed internally as part of the agency's budget process before it is submitted to Congress. (Tr. 202-04, 241-42.)

Among the statutory duties and responsibilities of the OIG that appear to be relevant to this case are the following, excerpted from section 4 of the IG Act:[10]

> (a)(5) to keep the head of such establishment and the Congress fully informed . . . concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such establishment, to recommend corrective action concerning such problems, abuses, and deficiencies, and to report on the progress made in implementing such corrective action.
>
> (d) In carrying out the duties and responsibilities established under this Act, each

[10] Sections 4 and 6 of the IG Act contain certain references to the "establishment" within which the OIG is established. As noted above, the NLRB is not an "establishment." However, section 8G(g)(1) makes these sections applicable to the OIG's of "designated Federal entit[ies]" and provides that such term should be substituted for "establishment" for purposes of these other sections.

> Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law.

Pursuant to sections 8G and 6 of the IG Act, the NLRB, on request of its Inspector General, is required to furnish the Inspector General or to an authorized designee such information or assistance as may be necessary for carrying out the Inspector General's statutory duties, insofar as is practicable and not in contravention of any existing statutory restriction or agency regulation.

As characterized by Mr. Zielinski, OIG serves as "the eyes and ears of the Congress within the Federal Executive Branch." This OIG has investigated NLRB Members, its Chairman, and its General Counsel. (Tr. 160-61.)[11] The NLRB's General Counsel cannot direct OIG either to conduct or not to conduct a particular investigation (Tr. 165-66). If an allegation of criminal conduct comes to its attention, OIG has the authority to investigate it. If the allegation concerns "a routine administrative thing, a GS-5 that's showing up late for work every day, we'll refer that to the General Counsel and ask the General Counsel to report back to us on it." (Tr. 172-73.)

When it completes an investigation, OIG includes its findings in a semi-annual report to Congress, refers any criminal matters to the Department of Justice, and reports its findings with respect to any NLRB employee to the appropriate NLRB operating subdivision. A matter that begins as a criminal investigation may, if the Department of Justice declines to prosecute, be referred to NLRB management for administrative disposition, including possible discipline. (Tr. 206-10.) OIG makes no recommendation regarding discipline (Tr. 213, 233-34), nor does it have the authority to direct the NLRB, its General Counsel, or Region 12 to discipline, discharge, or take any personnel action with respect to an employee. (Tr. 166-67). However, the General Counsel has taken disciplinary action against employees based on an OIG report (Tr. 234).

By regulation, the NLRB requires its employees to "cooperate fully" with OIG investigations within the Inspector General's authority and jurisdiction. Such cooperation includes providing statements under oath

[11] The term "Chairman," as used in the record, undoubtedly refers to the same position that was referred to previously as "Chairperson" in identifying the agency "head."

relating to such investigations. An employee's refusal to answer questions or to provide a statement under oath to an investigator "may result in disciplinary action against an employee," provided that nothing in the regulation "shall be construed to deny, abridge, or otherwise restrict the rights, privileges, or other entitlements or protections afforded to Agency employees." (GC Exh. 2; 29 C.F.R. § 100.201 (1998))12.

B. Events Leading to the Alleged "Examination" of Employee T

T had been assigned to investigate an unfair labor practice case arising in Region 12, where he was employed. He worked on the case for about six months, beginning in March or April 1996. Because of criticism by one of the parties to that case, to the effect that T was biased, he requested to be removed from the case in or around October 1996. T heard nothing more about the case until May or June of 1997, when an article in a management-side trade journal was brought to his attention. This article contained criticisms and accusations against him by the respondent in that case and its counsel. The article also referred to a possible Inspector General investigation.

OIG became aware of the article. OIG also received a number of complaints about, and requests to investigate, T's conduct in connection with that unfair labor practice case. These complaints, requests, or other contacts came from the respondent company in the case, from its counsel, and from three separate committees or subcommittees of Congress. The complaints portrayed T as an anti-management union zealot. They contained a range of allegations, the most serious of which was an allegation of criminal misconduct. (Tr. 169-71, 235.)

OIG opened an investigation and sent an agent to the field to conduct preliminary interviews. When the agent reported back, the Inspector General reviewed the material he had furnished. The Inspector General decided that he wanted further investigation, including an interview with T. He assigned Zielinski to the matter. Zielinski called Region 12 and spoke with Acting Regional Director Karen LaMartin.

Zielinski advised LaMartin that he would be in the area and reminded her of the Region's obligation, under the IG Act, to cooperate. He requested a specific time and place for an interview, an office with a computer, printer, and

12
This regulation was apparently renumbered in 1994.

telephone, and that she make T available to him. LaMartin called Zielinski back and informed him that T was out of town on business. Although Zielinski at first did not want to have LaMartin announce his forthcoming arrival, he eventually asked LaMartin to advise T that a representative of the Inspector General would be in the regional office at a specific time to meet with him. LaMartin was to advise T that, pursuant to LaMartin's duty to cooperate and T's obligation under the NLRB's regulation to meet with the Inspector General, T was to be available to the Inspector General's agent. Zielinski asked La Martin, however, not to discuss anything else with T. (Tr. 175-77, 222.)

On July 9, 1997, LaMartin told T that OIG was coming down to interview him the following afternoon. After speaking to LaMartin, T went immediately to speak with Dallas Manuel II, an attorney in Region 12 who was the president of Local 12 of the Union and also one of the Union's district vice presidents. T discussed the situation with Manuel and requested that Manuel attend the interview as his union representative. Manuel agreed to do so. (Tr. 48, 55-57, 82-83, 105-09.)

Manuel informed LaMartin of his conversation with T. LaMartin told Manuel that the request for union representation had to be made in the presence of the Inspector General's agent. In response to Manuel's inquiries about the nature of the OIG investigation, LaMartin told him that it involved alleged misconduct by T in the course of an investigation. LaMartin also stated something to the effect that, in her opinion, the Local Union "did not have the ability to represent [T] in this matter." Manuel told LaMartin that she was incorrect and that the Union intended to represent T. Manuel also requested that LaMartin communicate to OIG in advance of the interview that a request for union representation had been made. Manuel reported the substance of this conversation to T (Tr. 57-59, 73, 91).

The next morning, July 10, Manuel spoke with LaMartin about arrangements for the interview. Manuel requested official time for the interview and that it be held at a neutral location. (Tr. 59-60). After further discussions, Manuel was informed that the Inspector General's representative would meet T at the Region 12 office. Manuel and LaMartin then agreed that the representative would meet T and conduct the interview in the hearing room within Region 12's office suite, or in the judge's chambers inside the hearing room area. LaMartin indicated, however, that T should meet with the Inspector General's representative

alone if that was the IG representative's desire. (Tr. 63-64, 74.)

Meanwhile, T had obtained private legal counsel for his interview, but his private counsel was not available that day. Either T or Manuel apparently so informed LaMartin on July 10, as LaMartin reported this to Zielinski when he arrived at the Region 12 office. (Tr. 109-10, 178, 184.)[13] LaMartin also told Zielinski that a union representative was going to be accompanying T to the meeting. Zielinski testified that he told LaMartin that, T being represented by counsel, he (Zielinski) was not going to ask T questions. (Tr. 179-80, 220-21). There is no evidence that LaMartin relayed this information to anyone.

Zielinski told LaMartin, further, that the union representative had "no standing just to come into the room." He also told LaMartin that he (Zielinski) had no supervisory authority over either the union representative or T, but he asked LaMartin to direct the union representative, "as your subordinate, . . . not to come in and interfere in an Inspector General investigation."[14] LaMartin responded that OGC in Washington had decided that Zielinski "should go in and handle the situation as best [he] could, at least in the first instance." (Tr. 180-81.)

T met with his private attorney for lunch, to discuss the course he should take at the scheduled interview. The attorney advised him to attend the meeting. T told him about the union representative. The attorney said it was a good idea to have somebody there with him. The attorney also advised T not to answer any questions, outside of the attorney's presence, about the substance of the unfair labor practice case investigation. At this time T believed that the investigation was about the unfair labor practice case he had investigated in 1996, but he was not sure. He intended not to answer any substantive questions about his conduct in that case but did not know whether the OIG agent was going to ask any. (Tr. 110, 133-34.)

---

[13] T's private attorney had told T that he would be available to attend an interview with OIG on the following day if T could get it postponed (Tr. 110). The record does not indicate when this was first communicated to a representative of any of the Respondents.

[14] Zielinski also testified that he said nothing to LaMartin about the action to be taken if T requested union representation, except that she should refer T to the OIG representative if he had any questions (Tr. 222).

When Zielinski learned that the interview was to be held in the hearing room, he concluded that LaMartin had not provided him with an office, a phone, a computer, or a printer, which (as he testified) he needed if he was going to conduct an examination. However, he did not complain because he further concluded that there was not going to be an examination that day. He had so concluded because T was represented by counsel and because "there was a Union rep there and I was not going to conduct an examination with a Union rep present." Asked why not, Zielinski responded: "Our policy is not to. And under the law, as we understand it, down now in the 11th Circuit, there's not an entitlement." (Tr. 183-84.)

C. The "Examination"

T and Manuel went to the hearing room in advance of the scheduled 1:30 p.m. interview. (Tr. 55, 64). Some time later, Zielinski arrived, accompanied by LaMartin, who introduced him to T and then left (Tr. 65, 78, 93, 112).[15] Zielinski asked Manuel to introduce himself. Manuel identified himself either as the Local 12 president or as the district vice president of the Union (Tr. 48, 65, 184). According to Manuel and T, T also stated that Manuel was there as T's, or as "the" union representative (Tr. 65-66, 113, 125). Zielinski denied that T told him "that he requested the presence of Mr. Manuel as his union representative."

Zielinski told Manuel that he had no standing to be at the meeting (Zielinski's version, Tr. 184-85) or that T did not have any "*Weingarten*" rights, that the Union did not have the ability to represent T in this meeting, and that Manuel was to leave (Manuel's version, Tr. 66).[16] Zielinski further told Manuel that the NLRB regulation on OIG "Audits and investigations" (GC Exh. 2) required Manuel, as an employee, to cooperate with this investigation, and that, by his presence, Manuel was interfering with and obstructing

[15] This finding is based on the credited testimony of Manuel and T. Zielinski's testimony leaves the impression that he entered the hearing room alone, after LaMartin showed him where it was (Tr. 184), but neither of Counsel for the Respondents requests such a finding, and Zielinski did not appear to have paid much attention to this detail. Manuel was credible in describing his impression that LaMartin "ignored me, and it was as if I were invisible" (Tr. 93).

[16] I regard these versions of Zielinski's statement to Manuel as amounting to the same thing and not requiring a credibility resolution.

the investigation. (Tr. 66-67, 185). According to Manuel, Zielinski also stated that he would investigate Manuel for obstructing the investigation and that this "would result in discipline, including discharge" (Tr. 68, 70).

Zielinski told Manuel that, because Manuel was an attorney for an agency of the United States, his representation of T in this investigation could be a conflict of interest that was potentially in violation of 18 U.S.C. § 205 and "potentially actionable" by the Bar of the State in which he was admitted to practice (Tr. 185, 217-18). Manuel testified that Zielinski went further, telling Manuel that he would report him to the Florida Bar Association for ethics violations (Tr. 68). Zielinski denied this (Tr. 217-18).[17]

Manuel asked Zielinski if Zielinski wanted to hear what Manuel had to say about all of this. Zielinski said, "No, please leave." (Tr. 187.) At that point, according to Zielinski, T stated that he withdrew his request for union representation (Tr. 187). According to Manuel, T simply asked Manuel to leave (Tr. 72, 83). T, who testified that he had been very nervous and that he did not have a clear recollection of everything that was said, thought it was possible that he had said something to the effect that he was withdrawing his request, but did not remember what if anything he said (Tr. 127). In any event, Manuel left.

Either before or after Manuel left, T told Zielinski that he had retained outside counsel, who would not be available until the next day. T gave Zielinski his lawyer's business card and Zielinski gave T his card so that the lawyer could call him. Zielinski told T he would accommodate the request to postpone the interview. (Tr. 136-39, 188-89.) He gave T a copy of the NLRB "Audits and investigations" regulation (GC Exh. 2) and a blank copy of what he referred to as the "Garrity warning," the heading of which reads: "Non-Custodial Warnings and Assurances to Persons Employed by Federal Government and Requested to Give Answers Usable in Criminal Proceedings" (R OIG Exh. 1).

[17] Although the complaint does not allege any violation with respect to a threat that Manuel's professional status at the bar might be jeopardized, Counsel for the General Counsel included such an allegation in his opening statement (Tr. 32) and every witness testified on this subject without objection. I find that it was fully litigated and may properly be considered as an adjunct to paragraph 12 of the complaint, which alleges that Zielinski told Manuel that he "would be subject to discipline, including discharge."

The "Garrity warning" advises the employee so requested that the employee's cooperation is sought "in an administrative inquiry regarding misconduct or improper performance of official duties" and that "the matter under investigation could also constitute a violation of law which could result in [a] criminal prosecution[.]" It informs the employee of the right to remain silent if any answers might incriminate him, that anything the employee says or does can be used against him in an administrative proceeding, a criminal prosecution, or both, and that the employee may wish to talk to a lawyer for advice before answering any questions and have a lawyer present during any questioning.

The document, as printed, states further that, if the employee decides to answer questions now, without a lawyer present, he has the right to stop answering questions at any time. It informs the employee that he cannot be discharged solely for remaining silent if he refuses to answer questions on the grounds of self-incrimination, but that his silence "can be considered in an administrative proceeding for its evidentiary value that is warranted by the facts surrounding your case."

An acknowledgment paragraph states that the employee has read and understands the warnings and assurances and is willing to make a statement and answer questions without a lawyer "at this time," and that no promises or threats have been made to him and no pressure or coercion has been used against him.

According to T, Zielinski asked him to sign the form or not, offering T the choice: that if he signed it they would go on and, if not, that the interview was over (Tr. 117, 134-35, 151). Zielinski's testimony was slightly different. He testified that he advised T not to make any statement and that he should provide the NLRB regulation and the "Garrity" form to his attorney (Tr. 189). T acknowledged that Zielinski may have asked him to take the "Garrity" form and show it to his attorney, and then to decide whether or not to sign it (Tr. 135). The interview ended, without any substantive questions from Zielinski, less than five minutes after Manuel left (Tr. 134, 189). Asked why he waited until Manuel left before giving T the "Garrity" form, Zielinski answered that he "was not going to deal with [T] on any issue involving the investigation while Mr. Manuel was present" (Tr. 226-27).

D. The Aftermath

T, accompanied by his lawyer, submitted to a 4-5 hour examination by Zielinski the following day. Zielinski returned to Washington and presented the affidavits taken in the course of his investigation to the Inspector General. Ultimately, the investigation of T's conduct was closed. OIG found no "violation" by T (Tr. 228). OIG provided its report to the NLRB's General Counsel. The report "raised substantial questions about the hiring practice under which [T] had been hired in the matter" and "some questions about [T's] demeanor during the investigation." The OIG report recommended "that [T] be allowed to avail himself of sensitivity training." The report did not mention discipline. (Tr. 227-28.) The record is silent with respect to any action taken by the NLRB General Counsel or Region 12 following receipt of the OIG report.

E. Additional Credibility Resolutions

I am not persuaded that, on July 10, T told Zielinski specifically that he requested Manuel's presence as T's union representative. There can be little doubt that all three present understood why Manuel was at the meeting. Zielinski had been forewarned that a union representative would accompany T when he came to be interviewed, and he was prepared to abort the interview if the representative was present. He would have been particularly alert for such a specific "request" by T. T was, by his own admission, not a reliable witness about many details of the meeting, and did not appear to be altogether confident on this point. Moreover, he stated twice that he might have identified Manuel as "the" union representative.

Manuel was both confident and believable in testifying that T identified him as *his* union representative. However, I believe that he was mistaken. Manuel having already identi-fied himself at Zielinski's request, it seems reasonable for T, consistent with Zielinski's testimony, to have believed that no further "request" was necessary. Clearly, Manuel had represented himself to be *a* union representative. T may or may not have referred to him as "*t he*" union representative. While, as explained below, there is no legally significant difference, in these circumstances, between T's expressly making a request or not, between his referring to Manuel as "the" union representative or as "my" union representative, or even between the latter and T's silence with respect to Manuel's status, I find that the preponderance of the credible evidence lies with Zielinski to the extent that his testimony constitutes a denial that T said that he "requested" Manuel (or words to that effect) as "his" union representative.

The conversation, in any event, switched immediately to Zielinski's opposition to Manuel's presence, either as a union representative or otherwise. By stating that Manuel was obligated, as an employee, to cooperate, and that, by his presence, he was interfering with and obstructing the investigation, Zielinski at least implied that Manuel's continued presence could subject him to discipline. Zielinski was not asked whether he warned Manuel about discipline, as Manuel testified that he did. I credit Manuel that Zielinski said something about possible discipline, in view of his testimonial demeanor and Zielinski's silence on the matter. However, although Manuel's recollection of Zielinski's words was to the effect that Manuel could be investigated, which "would result in discipline and discharge," I find, as being more plausible, that Zielinski said something to the effect that Manuel could be disciplined if he remained. Any substantially more emphatic prediction would have exhibited a recklessness that I am not prepared to attribute to Zielinski.

Zielinski did deny that he spoke of reporting Manuel to the Bar of the State in which Manuel was admitted to practice. I credit his denial. As Zielinski volunteered, he told Manuel that there was a potential conflict-of-interest violation of 18 U.S.C. § 205 (a criminal statute) and that it was "potentially actionable" by his State Bar. While Manuel may honestly have interpreted Zielinski's words as going further, I attribute this interpretation to the atmosphere created by all the circumstances including, from Manuel's perspective, Zielinski's previous remarks and the entire nature of the investigation, which was almost bound to elicit fear and hostility on the part of someone who, like Manuel, presumably performed the same kinds of case investigations that T did and might well be placed in T's predicament in the future. Manuel was, then, prepared to take anything Zielinski said in the worst possible light. Zielinski, on the other hand, had reason to be more conscious of what he actually said, and would have perjured himself by a false denial. I am not persuaded that he did so.

Concerning the words spoken by T that immediately preceded Manuel's departure, I credit Zielinski again. Before T spoke, Zielinski perorated his objection to Manuel's presence with the words, or to the effect of, "Please leave." While there is not a great deal of difference in substance between Manuel's version of what occurred next--that T asked him to leave--and Zielinski's version--that T expressly withdrew his request for union representation (a version that T himself found plausible)--

Zielinski's version is an admission against interest. It militates against any remaining doubt that there was a clear understanding, at the time Zielinski demanded Manuel's departure, that Manuel was present at T's request and as his union representative. While Zielinski, when testifying, may have thought that an express withdrawal of T's "request" would insulate retroactively his insistence that Manuel leave, there is no reason for him to have believed that T's simply asking Manuel to leave would be any less effective for that purpose. I find that Zielinski testified to what he honestly believed T said and that, T having acknowledged that he might have said it, Zielinski's recollection is substantially accurate.

Although Manuel testified that T never asked him "no longer to be his union representative" (Tr. 83), he did not purport to repeat the words T used in asking him to leave. The effect of a request that Manuel leave is hardly distinguishable from a statement that T elected to proceed, at that point and for purposes of the interview, without a union representative. Such a statement does not amount to dismissing Manuel as his union representative for all purposes and does not, therefore, contradict Manuel's testimony. As discussed below, the legal significance of T's statement must be considered in the context of the circumstances that elicited it.

Finally, with respect to the only factual dispute concerning Zielinski's conversation with T after Manuel left, I find that Zielinski's testimony provides the most reliable guide to what occurred. The dispute is insubstantial, in my view, and again does not reflect on anyone's honesty. It goes to whether Zielinski advised T not to make a statement but rather to take the "Garrity" form to his attorney, or whether, without offering any advice, Zielinski gave T the option of signing the form or refusing and ending the interview. As T acknowledged in his testimony that Zielinski might have asked him to take the form to his attorney and then make a decision as to whether to sign it, and as this is consistent with Zielinski's testimony, I find that what T acknowledged as a possibility is true. I further find that, since it was clear that the interview would not continue if T did not sign the form immediately, Zielinski's suggestion that T take the form to his attorney amounted to advice not to sign it immediately and not to make a statement at that time.

Discussion and Conclusions

A. Zielinski Was Acting as a "Representative of the Agency"

In order to find that any of the Respondents failed to comply with section 7114(a)(2)(B) of the Statute, Zielinski must be found to have been a "representative of the agency" (the NLRB or one of its organizational components, such as OGC) within the meaning of that term as it is used in section 7114(a)(2)(B), when he conducted the investigation of T's conduct. As all of the Respondents concede, the Authority has held that an agent of an agency's OIG was a "representative of the agency" for section 7114(a)(2)(B) purposes when he examined an employee under circumstances that otherwise caused such an examination to fall within section 7114(a)(2)(B). *Headquarters, National Aeronautics and Space Administration, Washington, D.C. and National Aeronautics and Space Administration, Office of the Inspector General, Washington, D.C.*, 50 FLRA 601 (1995), *enforced sub nom. FLRA v. National Aeronautics and Space Administration, Washington, D.C. and National Aeronautics and Space Administration, Office of the Inspector General, Washington, D.C.*, 120 F.3d 1208 (11th Cir. 1997), *cert. granted*, 119 S.Ct. 401 (1998) (*NASA*). Further, as in *NASA*, the results of an investigation by the NLRB's Inspector General may be used by other components of the agency to support administrative or disciplinary action taken against bargaining unit employees.[18]

The instant case is factually distinguishable from *NASA* in that here the examination was part of an investigation into conduct that allegedly included criminal conduct. However, the Authority has not recognized such a distinction as being dispositive, finding rather that an investigator for an agency OIG's criminal investigative component was a representative of the agency when conducting an examination into an employee's alleged criminal conduct. *Department of Defense, Defense Criminal Investigative Service; Defense Logistics Agency and Defense Contract Administration Services Region, New York*, 28 FLRA 1145 (1987) (*DCIS*), *enforced sub nom. Defense Criminal Investigative Service, Department of Defense v. FLRA*, 855 F.2d 93 (3d Cir. 1988).

---

[18] NLRB employees are subject to Government-wide standards of ethical conduct that include the duty to "act impartially and not give preferential treatment to any private organization or individual" and to "endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part." 5 C.F.R. § 2635.101(b)(7) and (8). NLRB employees who violate these standards or who otherwise engage in criminal conduct may receive disciplinary action "in addition to any penalty prescribed by law." 5 C.F.R. §§ 735.102, 735.203, and 2635.106; 29 C.F.R. § 100.101.

But see FLRA v. U.S. Department of Justice, et al., 137 F.3d 683 (2d Cir. 1997).

As noted at the outset of this decision, however, this is a case of first impression as to one aspect of the "representative of the agency" issue. That is, the relationship between a "designated Federal entity" under section 8G of the IG Act and such an agency's Inspector General is somewhat different from the relationship between a section 11 "establishment" and such an agency's Inspector General. The difference is one that could cause the Authority or the courts to find that an agent of the NLRB's OIG is a "representative of the agency" even if the Supreme Court overturns the Authority's holding in *NASA* and finds no "representative" status there.19

Unlike the Inspector General in *NASA* and the Inspectors General of other agencies defined by section 11 of the IG Act as "establishments," the Inspector General of the NLRB is appointed by its Chairman, who may also remove him or her. Although such removal must be explained to Congress, there are no formal limitations on the reasons for such action. The Inspector General, therefore, must rely solely on political considerations rather than on legal standards with respect to the security of his or her position.

Nor is this the only limitation, whether it is characterized as actual or potential, on the Inspector General's independence. OIG must depend on the agency's approval, at least in the first instance, for its annual budget request. Zielinski recognized the agency's involvement in the OIG budget as a problem, the solution to which was being sought through legislation (Tr. 241). This

19 Application of the Authority's existing precedent to the facts of this case does not, of course, require me to anticipate the standard the Authority will apply following the Supreme Court's disposition of *NASA*. However, it is not unusual for the Authority to remand cases to its administrative law judges, for their analysis of questions that are primarily questions of law, or of the application of Authority policy. I believe that one of the most important considerations in deciding unfair labor practice cases is to provide the parties with a final decision with the least possible delay. For that reason, I present this analysis of the arguable distinction between this case and *NASA* in order to minimize to the extent possible the necessity for such a remand, with its attendant delays, in the event that the Authority interprets the Supreme Court's decision as leaving open the question of this OIG agent's representative status.

degree of agency control over the OIG budget (although the Inspector General may be able to seek relief through the political process, either by way of such legislation or by appealing directly to Congress to appropriate more funds for its operation than the agency has requested) presents more than a theoretical possibility of compromising the Inspector General's independence to some extent. Together, these two factors--(1) the Inspector General's service being at what might be perceived as the pleasure of the agency head and (2) the agency's role in establishing the OIG's budget--present a picture in which the Inspector General appears to have at least somewhat less independence than do the Inspectors General of *NASA* and other "establishments."[20] Thus, although the Authority has not yet had occasion to consider whether an agent of the OIG of a "designated Federal entity" is a "representative of the agency," I recommend that, in the event that the agent in *NASA* is held not to be a "representative of the agency," the Authority make an independent determination as to whether such a holding is a controlling precedent for deciding whether the agent of the NLRB's OIG was acting as such a representative.

B. There Was a Section 7114(a)(2)(b) "Examination," Which the Employee Reasonably Believed Might Result in Discipline

Although Zielinski asked T no substantive questions *after* the events that are alleged as the unfair labor practices here, the question of whether an "examination" occurred for section 7114(a)(2)(B) purposes must be addressed in the context of the earlier events leading to and including the expulsion of Manuel. Stated more broadly, an exclusive representative's right to be represented at an examination that otherwise qualifies under section 7114(a)(2)(B) may be (and usually is) established before the investigator actually begins asking substantive questions.

Thus, when an employee has made a valid request for union representation, the employing agency "is permitted one

---

[20] I do not mean to suggest that the budget control necessarily distinguishes this case from *NASA*. Neither in *NASA* nor in any of the other earlier cases was budget control presented as a reason for or against a finding of "representative" status, and none of the decisions contains findings of fact with which to compare the degree of budget control in the instant case. I present budget control here as a factor that--its weight not having been previously considered--might, in combination with the localized power to hire and fire the Inspector General, make for a different result here.

of three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview without representation or having no interview at all." *U.S. Department of Justice, Immigration and Naturalization Service Border Patrol, El Paso, Texas*, 42 FLRA 834, 839 (1991) (*INS*). I do not construe the Authority's use of the words "discontinue" and "continuing" as implying that these limited options are presented to the agency only after the interview proper has begun. In *INS*, for example, the Authority applied its three-option analysis to a situation where the request for union representation and the events that led to the dispute over whether there was compliance with section 7114(a)(2)(B) all occurred before any substantive questions had been asked. Moreover, the Authority referred with approval to a court's paraphrasing of the Authority's doctrine that was tailored to fit the facts in *INS*: "[A]n employer faced with a request for union representation may offer the employee the option of participating in the interview without representation or *having no interview at all*." *Id.* at 838 (emphasis added). For purposes of the instant case, that statement offers a more straightforward guide to the appropriate analysis.[21]

Notwithstanding Zielinski's testimony that he did not *intend* to ask T any substantive questions, and T's intention not to answer any, T found himself, at the time Zielinski insisted on Manuel's leaving, in precisely the kind of situation that section 7114(a)(2)(B) describes. He was about to be examined by a representative of the agency under circumstances in which, no matter what was to occur next, the assistance of a union representative would probably be useful. Without such assistance, T was required to go solo into a potential confrontation, or negotiation, over how and when the examination would proceed. He predictably would have important decisions to make, during such a meeting, concerning the exercise of any options he might be offered. Moreover, notwithstanding the Respondents' arguments to the contrary, T reasonably believed that the examination could result in disciplinary action against him.

The right with which we are concerned here applies "whenever the circumstances surrounding an investigation make it reasonable for the employee to fear that his answers might lead to discipline. The *possibility,* rather than the

---

[21] *Cf. NLRB v. Weingarten, Inc.*, 420 U.S. 251, 258-59 (1975), *quoting Mobil Oil Corp.*, 196 NLRB 1052 (1972) ("The employer may, if it wishes, advise the employee that it will not proceed with the interview unless the employee *is willing to enter the interview* unaccompanied by his representative.")(emphasis added.)

inevitability of future discipline determines the employee's right to union representation." *Department of Veterans Affairs, Veterans Affairs Medical Center, Hampton, Virginia*, 51 FLRA 1741, 1748-49 (1996), *quoting American Federation of Government Employees, Local 2544 v. FLRA*, 779 F.2d 719, 723 (D.C. Cir. 1985). Here, T had no way of knowing, at any time before Zielinski insisted that Manuel leave, whether Zielinski was going to ask him the kinds of questions that T intended not to answer, but he could reasonably believe that the OIG agent might ask him such questions. Nor could T have been expected to know the consequences of his intended refusal to answer, not yet having had the opportunity to absorb the contents of the "Garrity" form.[22] Moreover, he could not know what kinds of inducements the OIG agent might employ to persuade him to answer questions, or how, when so confronted while isolated in this vulnerable position, he might respond to such inducements despite his previous intention to avoid answering. These circumstances produce at least enough reasonable basis for fear of discipline to cross the threshold for section 7114(a)(2)(B) purposes. They also place the situation that existed when Zielinski met T and Manuel, and then excluded the latter, within the boundaries of a section 7114(a)(2)(B) "examination."

C. The Employee Made a Valid Request for, and Did Not Waive, Union Representation for Purposes of This Case

An employee must make a valid request for union representation, but it need not be made in a specific form. Instead, it must be sufficient to put the respondent on notice of the employee's desire for representation. *Norfolk Naval Shipyard, Portsmouth, Virginia*, 35 FLRA 1069, 1074 (1990) (*Norfolk*). As stated earlier, there can be little argument about T having given Zielinski adequate indication of his desire that the union official accompanying him should attend the meeting as a union representative. Section 7114(a)(2)(B) gives *the exclusive representative* the opportunity to be represented at a qualifying examination, if the employee requests it. Whether the employee chooses to call the union's representative "his" representative or not is immaterial. Moreover, circumstances like those

---

22 To the extent that T had been made aware of the contents of the NLRB's own "Audits and Investigations" regulation, the timing of which none of the witnesses could pin down, he would reasonably have had grounds for a strong affirmative belief, not merely a fear derived from uncertainty, that his failure to answer questions would place him in danger of discipline.

presented here make any affirmative statement by the employee superfluous.

Whether or not Manuel's informing LaMartin that he would be accompanying T to the meeting, and discussing with her their differences as to whether his presence as a union representative was appropriate, was itself sufficient to provide notice to "the respondent," T and Manuel had substantial reason to believe, by the time the meeting occurred, that the OIG agent had been informed of their intention in this regard. Moreover, they were correct in that belief.

Once at the meeting, Manuel, in T's presence, identified himself as a union official and left no doubt that he was there for section 7114(a)(2)(B) purposes. If Zielinski still had any doubt that Manuel was there at T's request, common sense tells us that he was obliged to ask T to confirm or dispel such doubt. Instead, the evidence most favorable to the Respondents places Manuel at the meeting as an announced union representative with T's tacit consent. This, given the pre-meeting discussions, satisfied the *Norfolk* standard. Then, Zielinski confirmed his understanding of Manuel's purpose by arguing with him about his standing, as a union official, to be at the meeting. In none of his statements to Manuel did Zielinski suggest that Manuel's presence was inappropriate because of any doubt that T had requested it. Finally, Zielinski's understanding that T had requested union representation is confirmed further by his credited testimony that T said he was withdrawing such request. Zielinski never suggested that T's "withdrawal" was a *non sequitur*.

T's withdrawal of his request at that point, however, has no bearing on whether the Respondents violated the Statute. Zielinski had already effectively excluded the union representative from the meeting. Manuel could have remained longer and argued, but it could not have been clearer that Zielinski would not conduct the interview in his presence. Nor did Zielinski give T any indication, before the "withdrawal" statement, that in Manuel's absence T would be relieved of his obligation to proceed with the interview. Thus, Zielinski had not offered T, at that critical point, the options required by *INS*. Nothing that T said or did at that point could undo the failure to comply with section 7114(a)(2)(B) if, as explained below, such conduct had already occurred.

The fact that T had not been offered the required options also makes it difficult to support the contention that there was a valid waiver at all, one that, had it

occurred earlier, might have served as a defense to the section 7114(a)(2)(B) allegations. In *Norfolk*, 35 FLRA at 1077, the Authority stated that an employee waives the right to union representation if, after being given the options discussed above, he elects to continue without representation. Although a waiver might also be effected in some other manner or circumstances, the Authority will carefully scrutinize any such claim to ensure that the alleged waiver is not the result of coercion or intimidation. *Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas*, 36 FLRA 41, 52 (1990), *remanded on other grounds* sub nom. *Department of Justice, Immigration and Naturalization Service,* 939 F.2d 1170 (5th Cir. 1991). More specifically, the Authority affirmed a judge's conclusion that an employee did not waive the right to union representation when he invited the investigating agents to proceed with the interview only after having requested and been refused such representation. *U.S. Department of Labor, Mine Safety and Health Administration*, 35 FLRA 790, 804-05 (1990).

In the instant case, T's statement that he was withdrawing his request for representation was manifestly a reaction to the apparent futility of Manuel's insistence that he be permitted to remain. Continuing the argument would, from T's viewpoint, only increase the level of stress the situation had produced. He decided, then, that he would prefer to assume the risks attendant on proceeding without representation, since the only other option that appeared open to him was to refuse to participate at all, in defiance of LaMartin's instructions--instructions that had not, at least at that point, been countermanded by Zielinski. This set of facts does not add up to a voluntary waiver of the right to representation under the Authority's standard.

D. Respondent OIG Effectively and Unlawfully Denied the Right to Union Representation

Zielinski raised several issues with Manuel with respect to his continued presence at the July 10 meeting. However, as soon as Manuel identified himself as a union official, and before Zielinski gave any other reasons for his objection to Manuel's presence, he told him that he had no standing to be there. Zielinski made it clear, both in that conversation and in his testimony, that he was not going to proceed with a union representative present. This, he testified, was OIG policy.

The fact that Zielinski had an additional, unstated reason for intending not to ask T any substantive

questions--his correct belief that T had retained an attorney--did nothing to diminish the fact that Zielinski denied T Manuel's assistance at the examination because Manuel was a union representative. Nor did T's exercise of his right to outside counsel preclude the Union from exercising its right to have its representative present to safeguard the interests of the entire bargaining unit. *NASA*, 50 FLRA at 610 n.7; *American Federation of Government Employees, Local 1941 v. FLRA*, 837 F.2d 495, 499 n.5 (D.C. Cir. 1988).

E. Zielinski Made a Coercive Statement to Manuel

Zielinski told Manuel that, by his presence, he was interfering with and obstructing the investigation, in violation of agency regulations. As I have found, Zielinski made at least some reference to possible discipline in connection with this conduct. Were the agency regulations to be applied as Zielinski implied that they might, they would conflict with the Union's right to be represented at a section 7114(a)(2)(B) examination. To require the Union to select a non-employee representative in order to avoid the application of the NLRB's "Audits and investigation" regulation (GC Exh. 2) would seriously interfere with that right. Manuel, attempting to exercise that right, was being warned that his insistence on doing so could jeopardize his status as an employee. This warning had sufficient coercive implications to meet the Authority's objective test for violations of section 7116(a)(1) of the Statute--the statement tending to coerce or intimidate the employee or being one from which the employee could reasonably have drawn a coercive inference--as applied, for example, in *Department of the Air Force, Scott Air Force Base, Illinois*, 34 FLRA 956, 962-66 (1990).

I previously found that Zielinski did not threaten to report Manuel to a State Bar. I conclude that his mere mention of Manuel's alleged conflict of interest being "potentially actionable" by the Bar was not coercive under the Authority's objective section 7116(a)(1) standard.

F. Zielinski's Conduct Violated Sections 7116(a)(1) and (8), for Which OIG, but Not OGC or Region 12, is Responsible

By failing, through its agent, to comply with section 7114(a)(2)(B), Respondent OIG violated sections 7116(a)(1) and (8) of the Statute. *NASA*, 50 FLRA at 620. By its agent's coercive statement to Manuel, OIG committed an independent violation of section 7116(a)(1).

In *NASA*, the Authority announced a change of policy with respect to holding an agency headquarters responsible for the statutory violations of its Inspector General. The Authority reasoned, in holding NASA Headquarters responsible in that case:

> [OIG's i]nvestigative information is shared with the agency head and other subcomponents of the agency and is a basis upon which disciplinary action is taken. Thus, the OIG represents not only the interests of the OIG, but ultimately NASA, HQ and its subcomponent offices.
>
> Moreover, the IG Act specifically provides that IGs report to and are under the supervision of the head of the agency. 5 U.S.C. app. § 3(a) . . . . Accordingly, NASA, HQ is responsible for the statutory violations committed by its OIG in this case.

Id. at 621. One might read this excerpt as establishing a two-part rationale for holding an agency headquarters responsible, leaving unstated whether either of these factors, standing alone, would be deemed sufficient. However, in further explaining its decision to no longer follow its precedent declining to hold an agency headquarters responsible, the Authority stated:

> [I]t 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." 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.

Id. at 622 (citation omitted).

I conclude from this more detailed explanation for its current position that the Authority intends to rely primarily on the parent agency's administrative responsibility for the OIG, which includes the supervisory authority to advise the Inspector General to have OIG investigators comply with the Statute. Respondent OIG does not report to the NLRB's General Counsel, or to any component of Respondent OGC. The Inspector General reports only to the Chairman, who is not, as the NLRB itself is not, a respondent in this case. Thus, although the Inspector General's agent was acting as a "representative of the agency" for section 7114(a)(2)(B) purposes, he was not acting as an agent of OGC, the General Counsel was not his "statutory superior," and OGC is not responsible for his conduct.

Respondent Region 12 is under the general supervision of the General Counsel. Region 12 did not initiate this investigation, nor has it any authority over OIG, but, as a component of the NLRB, it has the duty to assist OIG to the extent provided by section 6 of the IG Act. This presumably includes the duty to make employees available for OIG interviews. In fulfilling this duty, Region 12 presumably is authorized to direct employees to attend such interviews in compliance with the NLRB's "Audits and investigations" regulation (GC Exh. 2). In *DCIS* the Authority stated:

> Although not alleged as a violation of the Statute, we note that the conduct of [the deputy director of the local subcomponent of the operational component that employed the employees being interviewed] in providing a room and having the employees summoned for the interviews did not constitute a violation in the circumstances presented. As previously stated, no one within DOD may interfere with a DSCIC investigation except the Secretary of Defense, and then only in limited circumstances. For [the local subcomponent] to have refused to provide a room or to summon the employees for the interviews arguably would have interfered with the investigation.

28 FLRA at 1150 n.3. I find this statement and its rationale controlling here and conclude that Region 12 is not responsible for the unfair labor practices.

The Remedy

Counsel for the General Counsel has requested only a cease-and desist order (T having been exonerated), but accompanied by a nationwide posting of a notice signed by the Inspector General. None of the other parties has addressed the question of the appropriate remedy. I find the General Counsel's requested remedy to be appropriate, given the Union's nationwide representative status. In order to give full effect to the purposes served by the notice, a posting in all locations where employees in the Union's bargaining unit are located will best effectuate the purposes of the Statute. *U.S. Department of Justice, Office of the Inspector General, Washington, D.C. and United States Immigration and Naturalization Service, El Paso, Texas*, 47 FLRA 1254, 1262-63 (1993). Further, the OIG policy regarding exclusion of union representatives from interviews was a nationwide policy and has at least potentially affected NLRB employees nationwide. Nor has the Authority refrained from ordering a nationwide posting on the ground that such postings would occur within the geographical jurisdictions of United States Courts of Appeals that have rejected the Authority's application of section 7114(a)(2)(B) to OIG examinations.

Accordingly, I recommend that the Authority issue the following order.

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the National Labor Relations Board, Office of Inspector General, Washington,
D.C., shall:

1. Cease and desist from:

(a) Requiring any bargaining unit employee of the National Labor Relations Board to take part in an examination in connection with an investigation without allowing the National Labor Relations Board Union (NLRBU), the exclusive representative of the employees in the bargaining unit, through its affiliates and agents, to attend the examinations, when the employee reasonably believes that the examination might result in disciplinary action against him or her and the employee requests such representation.

(b) Telling any employee designated by the exclusive representative to attend such an examination that his or her presence at the examination is interfering with or obstructing the examination and could result in disciplinary action against him or her.

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

2. Take the following affirmative action designed and found necessary to effectuate the policies of the Statute:

(a) Post at all locations within the National Labor Relations Board where employees represented by NLRBU 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 Inspector General and shall be posted and maintained for 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.

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

Issued, Washington, DC, February 10, 1999.

_____
JESSE ETELSON
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 National Labor Relations Board, Office of the Inspector General, Washington, D.C., has violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT require any bargaining unit employee of the National Labor Relations Board to take part in an examination in connection with an investigation without allowing the National Labor Relations Board Union (NLRBU), the exclusive representative of the employees in the bargaining unit, through its affiliates and agents, to attend the examinations, when the employee reasonably believes that the examination might result in disciplinary action against him or her and the employee requests such representation.

WE WILL NOT tell any employee designated by the exclusive representative to attend such an examination that his or her presence at the examination is interfering with or obstructing the examination and could result in disciplinary action against him or her.

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

Date:_____By:_____
__
(Signature) (Title)

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 its provisions, they may communicate directly with the Regional Director, Atlanta Region, Federal Labor Relations Authority, whose address is: Marquis Two Tower, Suite 701, 285 Peachtree Center Avenue, NE, Atlanta, GA 30303, and whose telephone number is: (404) 331-5212.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by JESSE ETELSON, Administrative Law Judge, in Case No. AT-CA-80026, were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT NOS:	**CERTIFIED**
Sherrod Patterson, Esquire Federal Labor Relations Authority Marquis Two Tower, Suite 701 285 Peachtree Center, NE Atlanta, GA 30303	P168-059-614
Michael MacHarg, Esquire NLRBU, Suite 530 201 E. Kennedy Blvd. Tampa, FL 33602	P168-059-615
Peter Winkler, Esquire NLRB, OIG, Rm. 8408 1099 14th Street, NW. Washington, DC 20570	P168-059-622
Jennifer Kovachich, Esquire NLRB, OGC, Rm. 10319 1099 14th Street, NW. Washington, DC 20570	P168-059-623

REGULAR MAIL:

Richard Siegel
NLRB, OIG, Rm. 8408
1099 14th Street, NW.
Washington, DC 20570

Eric Brooks, Grievance
Committee Chairperson
NLRBU, Rm. 3614
26 Federal Plaza
New York, NY 10278

_____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: FEBRUARY 10, 1999
WASHINGTON, DC