

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

UNITED STATES DEPARTMENT OF TREASURY UNITED STATES CUSTOMS SERVICE CUSTOMS MANAGEMENT CENTER, ARIZONA UNITED STATES DEPARTMENT OF TREASURY UNITED STATES CUSTOMS SERVICE OFFICE OF INTERNAL AFFAIRS TUCSON, ARIZONA <p style="text-align: center;">Respondents</p>	Case Nos. DE-CA-80776 DE-CA-80829
and NATIONAL TREASURY EMPLOYEES UNION NATIONAL TREASURY EMPLOYEES UNION CHAPTER 116 <p style="text-align: center;">Charging Party</p>	

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 15, 1999**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

GARVIN LEE OLIVER
Administrative Law Judge

Dated: October 14, 1999
Washington, DC

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

MEMORANDUM
1999

DATE: October 14,

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: UNITED STATES DEPARTMENT OF TREASURY
UNITED STATES CUSTOMS SERVICE
CUSTOMS MANAGEMENT CENTER, ARIZONA
UNITED STATES DEPARTMENT OF TREASURY
UNITED STATES CUSTOMS SERVICE
OFFICE OF INTERNAL AFFAIRS, TUCSON, ARIZONA

Respondents

and

Case Nos. DE-CA-80776
DE-CA-80829

NATIONAL TREASURY EMPLOYEES UNION
NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 116

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 transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 00-02
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF TREASURY UNITED STATES CUSTOMS SERVICE CUSTOMS MANAGEMENT CENTER, ARIZONA UNITED STATES DEPARTMENT OF TREASURY UNITED STATES CUSTOMS SERVICE OFFICE OF INTERNAL AFFAIRS TUCSON, ARIZONA <p style="text-align: center;">Respondents</p>	Case Nos. DE-CA-80776 DE-CA-80829
and NATIONAL TREASURY EMPLOYEES UNION NATIONAL TREASURY EMPLOYEES UNION CHAPTER 116 <p style="text-align: center;">Charging Party</p>	

Dyann E. Medina
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Walter Dresslar
Counsel for the Charging Party

Mary A. Silvas
John M. Bates
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The consolidated unfair labor practice complaint alleges in Case No. DE-CA-80776 that the Respondents violated section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116 (a)(1), by beginning an investigation regarding Charging Party (Union) representative Nancy Ferguson, with respect to conversations between Ferguson and bargaining unit employee Gabriel Garcia which occurred while Ferguson was serving as Garcia's designated Union representative, and by questioning bargaining unit employees Garcia and Alvarez concerning the nature of Ferguson's communications to Garcia during the course of such representation.

In Case No. DE-CA-80829, the complaint alleges that the Respondents violated section 7116(a)(1) and (8) by denying

the Charging Party the right to designate a representative of its choice, Nancy Ferguson, to serve as the Union representative of bargaining unit employee Garcia at an examination in connection with an investigation under section 7114(a)(2)(B) of the Statute.

Respondents' answer admitted that the Union is an agent and affiliate of the National Treasury Employees Union for purposes of representing bargaining unit employees in Respondent Customs Management Center, but denied any violation of the Statute.

For the reasons explained below, I conclude that the Respondents did not commit the alleged unfair labor practices and recommend that the consolidated complaint be dismissed.

A hearing was held in Tucson, Arizona. The parties were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondents and the General Counsel filed helpful 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

In April 1998, Union Vice President Nancy Ferguson and Union Steward Rene Alvarez represented bargaining unit employee Gabriel Garcia during his formal counseling by Supervisor Robert Early over alleged excessive telephone calls. They also represented Garcia concerning his subsequent preparation of a written rebuttal to the formal counseling.

Following the counseling session, Supervisor Early telephonically advised Special Agent (Agent) Traci Lembke, Office of Internal Affairs (IA), that two individuals had reported that Garcia had made threats to physically harm Early because of the counseling.

As a result of this information, Agent Lembke opened an investigation of Garcia because of his alleged threats against Early. During a follow-up interview of Early, Early also advised Agent Lembke that Union steward Alvarez had said he overheard Nancy Ferguson instruct Garcia to lie in his official rebuttal to the counseling. Early said that Alvarez had also told him that if ever asked about making this report, Alvarez would deny it because he was a Union representative.

The allegation that Ferguson had instructed Garcia to lie in his official rebuttal to a formal counseling, if true, would be considered by the Respondents to constitute misconduct on Ferguson's part. Therefore, Agent Lembke

decided to make some preliminary inquiries concerning the credibility of the allegation as part of her investigation of the alleged threats by Garcia. The alleged threats reportedly followed Garcia's formal counseling and rebuttal, during which he had been represented by Ferguson and Alvarez, so there was a logical connection between the two. If the allegation against Ferguson were substantiated by the preliminary inquiries, Agent Lembke would, in accordance with IA procedures, open a separate file and an official investigation concerning Ferguson. She would then interview or re-interview all witnesses in more detail.

After Agent Lembke made an appointment with Garcia, Garcia requested that Nancy Ferguson represent him at the examination. When Ferguson advised Agent Lembke that she would be the representative, Agent Lembke advised Ferguson that she could not serve as Garcia's Union representative because a potential conflict existed in view of questions she needed to ask Garcia concerning Ferguson herself.¹ Ferguson stated that she would assign Steward Jim Mooney to represent Garcia.²

On April 21, 1998, Respondent Office of Internal Affairs, by Agent Lembke, conducted an examination in connection with an investigation of Garcia.³ Garcia was advised that he could be subject to disciplinary action for failure or refusal to answer proper questions and subject to criminal prosecution for any false answer. It was reasonable for Garcia to believe that the examination could result in disciplinary action. In accordance with Garcia's previous request for Union representation, and the above

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Union representative Ferguson testified that Agent Lembke merely said she could not be a Union representative for Garcia because she was "going to be a witness" concerning threats by Garcia. I have credited Agent Lembke's version, while recognizing that Ferguson could have gained this impression from the conversation since it was understood that Garcia was to be questioned about alleged threats.

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Union representative Ferguson and Agent Lembke disagree on whether Lembke at this time also precluded Rene Alvarez from being the Union representative during Garcia's interview "because he was a witness." This dispute need not be resolved as the complaint does not allege that the Respondents denied the Union the right to designate Alvarez.

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The examination was repeated by Agent Lembke on May 29, 1998. Agent Lembke advised Garcia that he could not be heard on the tape of the first interview. I conclude from the entire record that the above quotations from the transcript of the second interview accurately reflect the relevant questions asked during the interviews.

actions of Lembke and Ferguson, Garcia was represented by Union steward Jim Mooney.

Garcia was primarily questioned about his alleged threatening statements against a supervisor. With regard to his conversations with Union representative Nancy Ferguson, he was questioned substantially as follows:

Q. Okay. Did you and Nancy . . . have a discussion about what was gonna be put in . . . the formal statement that was gonna be given to the managers?

A. No. I wrote everything and all she did was review it for spelling and continuity, to make sure that there wasn't anything run on or anything like that.

Q. . . . At anytime while you were preparing either for your formal counseling or your written rebuttal . . . did Nancy Ferguson or any NTEU

representative instruct you to lie about what you were going to say or what you were going to put on paper as to why you were using the telephone?

A. I was never instructed in any way to lie.

Q. Okay.

A. Or anything like that.

On April 21, 1998, Agent Lembke interviewed Customs Inspector Rene Alvarez. He was also warned that his failure or refusal to answer proper questions could result in disciplinary action and that he could be subject to criminal prosecution for any false answer. Again, most of Lembke's questions pertained to Alvarez' knowledge of alleged threatening statements by Garcia against a supervisor. The following questions pertained to his knowledge of certain conversations between Union Representative Nancy Ferguson and Garcia:

Q. It has been brought to my attention that possible misconduct could have occurred between Gabe Garcia and an NTEU union steward, specifically Nancy . . . Are you aware of an instance where Nancy Ferguson instructed Agent Garcia, or Inspector Garcia to lie during, either during his formal counseling or his written rebuttal that was submitted following formal counseling?

A. No.4

Q. Okay. I needed to resolve that.

A. No. . . . I was there during the oral portion of it and we were questioning him as to what he thought that this was gonna be about because oftentimes we're not told what it's about. I don't recall whether Robert had informed me of it, but he, Gabe was pretty much aware that he thought it was gonna be about the telephone because he had . . . a discussion with Robert prior to . . . this incident.

Q. Right.

A. And we in turn asked him ... do you use the phone, do not use the phone, what's going on[?]

A. And the only thing that was mentioned by Nancy or myself, I don't even remember to tell you the truth, but I'm pretty sure it was Nancy . . . anything like let's . . . fish for something that's a viable excuse (inaudible)[.]⁵

After being advised by Garcia and Alvarez that the alleged conduct by Nancy Ferguson did not occur, Agent Lembke dropped the issue.⁶ She eventually submitted a report, the subject of which was not Ferguson, but Garcia's alleged threatening or inappropriate statements about Supervisor Early. She did record the allegation against Ferguson in the report as well as the denials by Garcia and Alvarez of any knowledge of such conduct by Ferguson.⁷

Discussion and Conclusions

Issues

The issues presented are:

(1) whether the Respondents violated section 7116 (a) (1) and (8) of the Statute by denying the Union the right to designate a representative of its choice, Nancy Ferguson, to serve as the Union representative of bargaining unit employee Garcia at an examination in connection with an investigation under section 7114(a) (2) (B) of the Statute, and

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Inspector Alvarez testified that in the ensuing portion of this conversation which was recorded as "inaudible," he explained to Agent Lembke that he and Nancy Ferguson had told Garcia to examine his memory to determine his exact role in the whole process.

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Asked whether she may have been concerned that the original allegation against Union representative Ferguson, as reported by Supervisor Early, was false, Agent Lembke responded that she took the employees' negative answers "and then I didn't even deal with the issue any further. It was . . . a very small part of my investigation and I just wanted to address the issue . . . and get on with what I needed to be investigating [the threats]."

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Union representative Ferguson was not interviewed by Agent Lembke. Ms. Ferguson testified that at no time did she tell Garcia to lie or make false statements in his rebuttal.

(2) whether the Respondents violated section 7116(a)(1) of the Statute by beginning an investigation regarding Union representative Nancy Ferguson with respect to conversations between Ferguson and Garcia which occurred while Ferguson was serving as Garcia's designated Union representative and by questioning bargaining unit employees Garcia and Alvarez concerning the nature of Ferguson's communications to Garcia during the course of such representation.

Alleged Interference With Designation of Representative in Case No. DE-CA-80829

In *U.S. Penitentiary, Leavenworth, Kansas*, 55 FLRA No. 127 slip op. at 25 (1999), the Authority recently stated:

An exclusive representative has the right to designate its representatives when fulfilling its responsibilities under the Statute, and, absent special circumstances, an agency violates section 7116(a)(1) and (5) of the Statute when it refuses to honor the union's designation. See Food and Drug Administration, Newark District Office, West Orange, New Jersey, 47 FLRA 535, 566 (1993). However, the agency may refuse to honor a particular designation where it can demonstrate "special circumstances" that warrant precluding a particular individual from serving in that capacity. Cf. Federal Bureau of Prisons, Office of Internal Affairs, Washington, DC and Federal Bureau of Prisons, Office of Internal Affairs, Aurora, Colorado, and Federal Bureau of Prisons, Federal Correctional Institution Englewood, Littleton, Colorado, 54 FLRA 1502, 1513 (1998) (FCI Englewood) (presumption that a union can designate the individual it wants as its representative during a Weingarten examination, pursuant to section 7114(a)(2)(B) of the Statute, may be rebutted only where the agency can demonstrate "special circumstances" that warrant precluding a particular individual from serving in this capacity) (citing New Jersey Bell Telephone Company and Local 827, International Brotherhood of Electrical Workers, AFL-CIO, 308 NLRB 277, 282 (1992)). The Authority has previously stated that this exception based on "special circumstances" will, consistent with its application in the private sector, be construed narrowly to preserve the union's normal prerogatives. FCI Englewood, 54 FLRA at 1513.

I conclude, under this criteria, that the Respondents demonstrated "special circumstances" that warranted precluding Union representative Ferguson from serving as the Union representative during Inspector Garcia's examination pursuant to 7114(a)(2)(B). A union may not interfere with an employer's legitimate interest and prerogative in achieving the objective of the examination or compromise its integrity. See *Federal Aviation Administration, New England Region, Burlington, Massachusetts and National Association of Air Traffic Specialists*, 35 FLRA 645, 652 (1990); *Federal Bureau of Prisons, Office of Internal Affairs, Washington, DC and Federal Bureau of Prisons, Office of Internal Affairs, Aurora, Colorado, and Federal Bureau of Prisons, Federal Correctional Institution Englewood, Littleton, Colorado*, 54 FLRA 1502, 1513 (1998). Ms. Ferguson was alleged to have instructed Inspector Garcia to lie in his official rebuttal to a formal counseling. A conflict of interests could exist if she were present as Ms. Ferguson's interests could be adverse to Garcia's. Garcia may assert that Ferguson did instruct him to lie, and Ferguson may dispute this. If the allegation were true, Garcia would be less likely to provide true, full, and complete answers in the presence of Ms. Ferguson, thus harming the integrity of the investigation.

Alleged Interference with Protected Rights by Investigation of Union Representative Nancy Ferguson and by Questioning Bargaining Unit Employees Garcia and Alvarez Concerning The Nature of Ferguson's Communications to Garcia During the Course of Union Representation in Case No. DE-CA-80776

The record reflects that the Respondent Office of Internal Affairs, by Agent Lembke, conducted a preliminary inquiry concerning Ferguson to determine whether there was any evidence to support an allegation that Ferguson had urged Garcia to lie in his official rebuttal to a formal counseling.

There is no dispute that Union representatives Ferguson and Alvarez were engaged in protected activity in representing employee Garcia in connection with his formal counseling and his official response to the formal counseling. Where a union representative is representing an employee, the rights and duties of the union and the employee under the Statute "demand that the employee be free to make full and frank disclosure to his or her representative in order that the employee have adequate advice and a proper defense." *U.S. Department of the Treasury, Customs Service, Washington, DC*, 38 FLRA 1300, (1991) (*Customs Service*). A union representative or employee may not be compelled to disclose confidential statements made in the course of representation in the absence of an overriding need. *Customs Service, supra; U.S. Department of Justice, Washington, DC and U.S. Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota and Office of Inspector General, Washington, DC*

and Office of Professional Responsibility, Washington, DC, 46 FLRA 1526 (1993) reversed on other grounds sub nom. U.S. Department of Justice, Immigration and Naturalization Service, et al. v. FLRA, 39 F.3d 361, 370 (D.C. Cir. 1994).

The general social benefit of providing for confidential communications between a union representative and an employee so that the employee may have adequate advice and a proper defense cannot be assumed where the purpose is to enable or aid the employee to commit a crime or fraud. In other words, while a union representative may assist an employee, the representative may not aid and assist an employee to engage in conduct that the representative knows is criminal or fraudulent. As the Supreme Court indicated in the context of representation under section 7114(a)(2)(B), "representation is not the equivalent of obstruction." *National Aeronautics and Space Administration, Washington, DC v. FLRA*, 119 S.Ct. 1979 (1999), citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 262-64 (1975). If a union representative knowingly aided and assisted an employee in the preparation and presentation of an official response to an agency containing fraudulent or false statements regarding a material matter, probable violations of Federal law, see 18 U.S.C. § 371 (conspiracy), § 1001 (false statements), would be involved, and such action would constitute flagrant misconduct, not protected activity under the Statute.⁸

Here there was more than a mere allegation that the confidential communication was used for a wrongful purpose. One of the employee's Union representatives allegedly reported overhearing such a wrongful purpose being discussed by another Union representative and the employee. Thus, there was sufficient evidence from outside the protected communication itself to justify the inquiry. Accordingly, I conclude that there was an overriding need to require employees Garcia and Alvarez to disclose confidential statements made in the course of representation to the extent reasonably necessary to determine whether Union representative Ferguson had urged Garcia to lie.

The conduct of the investigation in this case did not constitute an interference with protected rights under section 7116(a)(1). The record reflects that Agent Lembke asked the two employees pointed questions as to whether Ferguson had instructed Garcia to lie. While her initial question to Garcia, about whether he and Ferguson had "a

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Consistent with section 7102, an employee engaged in otherwise protected activity can only be disciplined by an agency for remarks or actions that exceed the boundaries of protected activity such as flagrant misconduct. *Department of Defense, Defense Mapping Agency, Aerospace Center, St. Louis, Missouri*, 17 FLRA 71, 80-83 (1985) (collecting cases).

discussion about what was [going to] be put in . . . the formal statement," could have elicited a broad answer, there is no indication that she intended to probe into the protected conversations more deeply than reasonably necessary to establish or disprove the allegation. She immediately followed the question up with the specific question about whether Ferguson had instructed him to lie. Agent Lembke accepted the negative answers of the two employees and dropped the issue.

Based on the above findings and conclusions, it is concluded that the Respondents did not commit unfair labor practices in violation of section 7116(a) (1) and section 7116(a) (1) and (8) as alleged. It is recommended that the complaint be dismissed⁹ and the Authority issue the following Order:

ORDER

The complaint in Case Nos. DE-CA-80776 and DE-CA-80829 is dismissed.

Issued, Washington, DC, October 14, 1999.

GARVIN LEE OLIVER
Administrative Law Judge

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In view of the recommendation that the complaint be dismissed in its entirety, it is not necessary to address the Respondents' request that Respondent Customs Management Center be separately dismissed as having had no responsibility for the alleged violations.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case Nos. DE-CA-80776 & 80829, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

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CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: OCTOBER 14, 1999
WASHINGTON, DC