

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

SOCIAL SECURITY ADMINISTRATION
HEADQUARTERS, BALTIMORE, MARYLAND

Respondent

and

SOCIAL SECURITY ADMINISTRATION
EL CENTRO BRANCH OFFICE EL CENTRO,
CALIFORNIA

Respondent

and

SOCIAL SECURITY ADMINISTRATION
OFFICE OF THE INSPECTOR GENERAL
SAN DIEGO, CALIFORNIA

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2879, AFL-CIO

Charging Party

AND

SOCIAL SECURITY ADMINISTRATION
HEADQUARTERS, BALTIMORE, MARYLAND

Respondent

and

SOCIAL SECURITY ADMINISTRATION
OXNARD BRANCH OFFICE
OXNARD, CALIFORNIA

Respondent

and

SOCIAL SECURITY ADMINISTRATION
OFFICE OF THE INSPECTOR GENERAL
SAN FRANCISCO, CALIFORNIA

Respondent

Case No. SF-CA-60704

and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2452, AFL-CIO Charging Party	Case No. SF-CA-70031

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 **JANUARY 20, 1998**, and addressed to:

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

ELI NASH, JR.
Administrative Law Judge

Dated: December 17, 1997
Washington, DC

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

MEMORANDUM

DATE: December 17, 1997

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION
HEADQUARTERS, BALTIMORE, MARYLAND

Respondent

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EL CENTRO BRANCH OFFICE
EL CENTRO, CALIFORNIA

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HEADQUARTERS, BALTIMORE, MARYLAND

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OXNARD, CALIFORNIA

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and

SOCIAL SECURITY ADMINISTRATION
OFFICE OF THE INSPECTOR GENERAL
SAN FRANCISCO, CALIFORNIA

Respondent

and

Case No. SF-CA-70031

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2452, AFL-CIO

Charging Party

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

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

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HEADQUARTERS, BALTIMORE, MARYLAND

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HEADQUARTERS, BALTIMORE, MARYLAND

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SOCIAL SECURITY ADMINISTRATION
OFFICE OF THE INSPECTOR GENERAL
SAN FRANCISCO, CALIFORNIA

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and

AMERICAN FEDERATION OF GOVERNMENT

Case No. SF-CA-60704

Case No. SF-CA-70031

EMPLOYEES, LOCAL 2452, AFL-CIO	
Charging Party	

Mark S. Ledford, Attorney
For the Respondent

Jonathan L. Lasher, Attorney
For the Respondent

Jenny D. Salvez-Almada
For the Charging Party

Andrea A. Palmer
For the Charging Party

John R. Pannozzo, Esquire
and Christopher J. Pirrone, Esquire
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Statute, Chapter 71 of Title 5 of the U.S. Code, section 7101, *et seq.* (herein called the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (herein called the Authority), 5 C.F.R. section 2411, *et seq.*

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 2879 (here-in called the Charging Party or Local) a Complaint and Notice of Hearing issued on May 23, 1997, in Case No. SF-CA-60704. The complaint alleges a violation of section 7116(a)(1) and (8) of the Statute. It was alleged that the Social Security Administration, El Centro Branch Office, El Centro, California (herein called Respondent El Centro) and the Social Security Administration, Office of the Inspector General, San Diego, California (herein called Respondent OIG San Diego) failed to comply with the provisions of section 7114(a)(2)(B) of the Statute by denying employees their right to have a representative of the Local present during examinations, when the employees reasonably feared that disciplinary action would be taken against them.

A Complaint and Notice of Hearing issued on May 19, 1997, in Case No. SF-CA-70031, based upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 2452, AFL-CIO (herein called the Charging Party or Local) alleging that the Social Security Administration, Oxnard Branch Office, Oxnard, California (herein called Respondent Oxnard) and the Social Security Administration, Office of the Inspector General, San Francisco, California (herein called Respondent OIG San Francisco), through Special Agents Deborah Hurless and Durrell Mackey, failed to comply with section 7114(a)(2)(B) of the Statute, and the Respondents' failure to comply with the above section violated section 7116(a)(1) and (8) of the Statute. Thus, the Complaint alleged that on September 25 and October 9, 1996, respectively, Respondents' violated the Statute by denying employees their requests to have the Charging Party's Representative, present during examinations when the employees reasonably feared that disciplinary action would be taken against them.

Subsequently, on June 18, 1997, an Order Consolidating Cases was issued by the Regional Director of the San Francisco Region. The Amended Consolidated Complaint included the Social Security Administration Headquarters, Baltimore, Maryland (herein called SSA or Respondent SSA) as a named Respondent and, further specified that Sheila H. Brown was an agent of Respondent SSA; Robert Brewer was an agent of Respondent El Centro; and, Julie Peart Brown was an agent of Respondent Oxnard.

Thereafter, all the parties entered into a Stipulation Of Facts In Lieu Of Hearing and on September 29, 1997, filed a Joint Motion Transferring Consolidated Cases To The Chief Administrative Law Judge, waiving a hearing before an administrative law judge and requesting a decision based on the stipulation and exhibits which the parties agreed constitutes the entire record in these matters. In addition all the parties agreed that no oral testimony was necessary and that no material issue of fact exists. The parties all urged that the instant cases would be more effectively processed by means of a stipulation to an administrative law judge. The parties did not waive the right to raise objections or make any legal arguments on brief as to the relevance, materiality, or necessity of any stipulated fact, however.

Thereafter, the case was assigned to the undersigned and on September 30, 1997, an Order issued setting October 29, 1997, as the last day to postmark briefs in these matters.

Pursuant to the Order of September 30, 1997, all parties filed timely briefs in the matter. The briefs, stipulations and exhibits have been duly considered in reaching a recommended decision herein finding that Respondents violated section 7116(a)(1) and (8) of the Statute.

Findings of Fact

The American Federation of Government Employees, AFL-CIO is the certified exclusive representative of an appropriate nationwide, consolidated unit of certain employees of the Social Security Administration, including employees at Respondent El Centro and Respondent Oxnard. The Locals have been affiliates of the American Federation of Government Employees and its agents for purposes of representing Respondent's field employees in El Centro and Oxnard, respectively. Mendoza and Flores were employees in the bargaining unit represented by Charging Party Local 2879 at El Centro. The employees were all in the bargaining unit represented by Charging Party Local 2452 at Oxnard.

Special Agent Sally High, Investigative Assistant Lois Ann Lykins, SSA Facilitator Sheila H. Brown, Labor Relations Specialist Robert Brewer, Special Agent Deborah Hurless, Special Agent Durrell Mackey and Manager Julie Peart Brown are all SSA employees.

A. The Relationship of SSA and its Office of Inspector General.

Originally, SSA operated under the supervision of the Department of Health and Human Services (herein called DHHS). On August 15, 1994, President Clinton signed Public Law 103-296, the "Social Security Independence and Programs Improvements Act of 1994" (SSIPIA) which established SSA as an independent agency in the Executive Branch of the Government effective March 31, 1995.

The legislation which made SSA an independent agency also established an independent SSA-OIG. Public Law 95-452, as amended, 5 U.S.C. Appendix 3, hereinafter referred to as the IG Act. The SSIPIA specifically provided for the appointment of an Inspector General, in accordance with section 3(a) of the Inspector General Act of 1978, and amended sections of the IG Act to include SSA within its purview.

SSA's Inspector General assumed the same responsibilities formerly handled by OIG in the Department of Health and Human Services and "is directly responsible to the Commissioner for carrying out the OIG mission and

providing general supervision to the major components of
OIG." The mission of SSA-OIG is as follows:

The Office of Inspector General (OIG) is directly responsible for meeting the statutory mission of promoting economy, efficiency and effectiveness in SSA programs and detecting and preventing fraud, waste and abuse. To accomplish this mission, OIG conducts and supervises audits, investigations, inspections and evaluations relating to SSA's programs and operations. The OIG also searches for systemic weaknesses in SSA programs and operations and makes recommendations for needed improvements.

The SSA-OIG organizational chart, which was in effect at the time of the alleged statutory violation indicates that SSA-OIG consisted of three offices: Office of Investigations, Office of Audits, and Office of Evaluations and Inspections. Sometime in July 1996, SSA-OIG eliminated the Office of Evaluation and Inspections. Respondent OIG's special agents work for the Office of Investigations, whose mission is as follows:

[C]onducts and coordinates investigative activity related to fraud, waste, abuse and mismanagement in SSA programs and operations. This includes wrong-doing by . . . SSA employees in the performance of their official duties. It serves as OIG liaison to the Department of Justice on all matters relating to investigations of SSA programs and personnel, and reports for the Attorney General when the OIG has reason to believe Federal criminal law has been violated. OI works with other investigative agencies and organizations on special projects and assignments . . .

The SSA-OIG "directs, conducts and supervises a comprehensive program of . . . investigations relating to SSA's programs and operations." Further, SSA-OIG has the discretion to investigate cases, but advises SSA when it has evidence of fraud in SSA programs or has evidence that an employee might be engaging in fraud or criminal activity.

Prior to the creation of an independent SSA, Sally High, Deborah Hurlless and Durrell Mackey were employed as special agents in their respective field offices, Office of Investigations, Office of the Inspector General for DHHS. Lois Ann Lykins, occupied the position of Investigative Assistant. Currently, all of the special agents operate on a day-to-day basis under the administrative supervision of the Special Agent-In-Charge, Santa Ana Field Office of the

SSA-OIG. Furthermore, all special agents are under the general super-vision of the Assistant Inspector General for Investigations.

After the creation of an independent SSA, all GS-1811 Law Enforcement Officers, including the three special agents, were provided new position descriptions effective March 31, 1995. The SSA-OIG special agent position description includes responsibilities for:

[P]lanning, conducting and coordinating extremely complex and highly sensitive investigations related to fraud, waste, abuse and mismanagement in Agency programs and operations. Investigative oversight includes wrongdoing by . . . Agency employees in the performance of their official duties . . .

The investigations may involve "criminal and noncriminal cases involving persons . . . under the charge and control of the Agency" and Agents may "conduct[s] interviews with suspects . . . in case development." Further, special agents are required to possess "[e]xpert knowledge of Agency programs and operations, laws, policies, regulations, directives, procedures, and instructions in order to plan, conduct and coordinate investigations related to fraud, waste, abuse and mismanagement in the Agency."

Oasis is a publication for SSA employees issued by the SSA Office of Communications. The Fall 1995 issue of Oasis contained a message from SSA Commissioner Shirley Charter entitled "Getting Tough on Fraud," which stressed stopping employee fraud, waste and abuse. It also detailed the numbers of employees who were criminally prosecuted and jailed; and employees who were administratively reprimanded, suspended, or terminated as a result of OIG investigations. In the article the SSA Commissioner stated:

When SSA became an independent agency on March 31, the Office of the Inspector General (OIG) functions previously provided by the Department of Health and Human Services were transferred to us, along with the personnel who had carried out these responsibilities.

Similarly, in the August-September 1996 issue, an article appeared entitled "Closer Inspection - Office of Inspector General now part of SSA." The article stated that the SSA's efforts to prevent fraud and abuse by SSA employees had been greatly strengthened by the transfer of OIG to SSA. The article quoted Dan Blades, Deputy Inspector General, as stating that although OIG represents a new addition to the SSA organizational charts, the OIG has a

history of service in supporting the integrity of SSA programs.

In 1997, SSA made its request for fiscal year 1998 funding. In conjunction with the SSA 1998 Appropriation request, John Callahan, Acting Commissioner of Social Security, appeared before the House of Representatives Committee on Appropriations. Mr. Callahan also submitted a written budget request to the House Committee on Appropriations, in which he stated:

The Office of Inspector General (OIG) is charged with protecting the integrity of SSA's programs, as well as promoting their economy, efficiency and effectiveness. The OIG uses a combination of audits, investigations and inspections to detect, prevent and prosecute fraud, waste and abuse in SSA's programs and operations.

The FY 1998 request for the OIG totaled \$44.4 million to cover OIG's operating expenses, including salaries for its staff and other costs such as rent and supplies. As part of the Acting Commissioner of SSA's appropriation request, he also submitted a "Statement by the Acting Commissioner of Social Security on Office Of Inspector General" in which he stated:

As part of the Social Security Independence and Program Improvements Act of 1994, SSA was provided with its own statutory Inspector General. The fiscal year (FY) 1998 appropriation request for the Office of Inspector General (OIG) totals \$44,424,000. This includes \$10,164,000 to be appropriated from general funds and \$34,260,000 to be transferred from the Social Security Trust Funds.

B. Organizational Description.

Respondent El Centro and Respondent Oxnard are SSA Branch Offices which are part of SSA's San Francisco Region IX, one of ten regions throughout the country. The head of the San Francisco Region is Regional Commissioner Linda McMahon, who reports to the Deputy Commissioner for Operations. The Deputy Commissioner for Operations, like the Inspector General for SSA-OIG, is directly responsible to the Commissioner of SSA.

Respondents OIG San Diego and OIG San Francisco are part of the OIG Santa Ana Field Office. The Santa Ana Field Office is one of eight Field Offices which report to the OIG Enforcement Operations Division, which, in turn, reports to

OIG Investigations. OIG Investigations is directly overseen by Inspector General David Williams, who reports to and is under the general supervision of the Commissioner of the Social Security Administration.

C. SSA-OIG's Weingarten Policy.

The OIG has discretion to investigate cases, but generally advises SSA when it has evidence of fraud in SSA programs or has evidence that an employee might be engaged in criminal activity. A National Fraud Committee (NFC) has been established within SSA comprised of SSA's top management. The NFC's responsibility is to ensure that SSA has a viable plan in place to address fraud and abuse. As one of the 29 initiatives in the tactical plan to combat fraud, SSA established Regional Fraud Committees (RFC) in March 1996, which became effective upon approval by the SSA Commissioner and the Inspector General (IG). The RFCs are chaired by the IG's Special Agent-In-Charge and each committee includes the Regional Security Officer, an area director, a district or branch manager and several other staff representatives. The RFCs allow SSA and SSA-OIG to work together in order to develop regional strategies to combat fraud, waste and abuse.

On August 1, 1996, James Huse, the Assistant Inspector General for Investigation of SSA-OIG, issued a memorandum to all Investigations Staff regarding employee's rights to union representation during OIG interviews. The purpose of the Memorandum was to provide written guidance regarding the *Weingarten*¹ issue pending the publication of the Office of Inspector General, Office of Investigation's Special Agents' Handbook. The memo provides:

The OIG's position is that all interviews conducted by agents in the Office of Investigations (OI) are pursuant to the Inspector General Act and are not subject to the Weingarten statute. This is regard-less of whether the interviews are conducted for criminal or administrative purposes. Therefore, union representatives should not be allowed to participate in interviews of employees conducted by the OI.

1

/ *Weingarten* refers to *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975), in which the Supreme Court first established an employee's right to representation during an investigatory examination. The term *Weingarten* is used to describe employee rights under 7114(a)(2)(B) of the Statute.

Subsequently, the Office of Inspector General published an Office of Investigation's Special Agents' Handbook. Section 10-75 of the Handbook sets forth the OIG's policy with regard to an employee's right to representation during investigatory interviews and is identical to the policy statement contained in the Huse Memorandum of August 1, 1996. Section 10-75 states:

The policy of the SSA/OIG/OI is that all interviews conducted by OI SSA are pursuant to the Inspector General Act and are not subject to the Weingarten statute at 5 U.S.C. 7114(a)(2)(B). This is regardless of whether the interviews are conducted for criminal or administrative purposes. Therefore, union representatives should not be allowed to participate in interviews of employees conducted by OI SSA.

On November 25, 1996, the SSA Commissioner, Inspector General David Williams and SSA's Deputy Commissioner for Operations Janice Warden, jointly opened the SSA Inspector General (OIG) Fraud Hotline. The SSA Commissioner sent an electronic mail to all SSA employees, which stated that the hotline was now available for reporting suspected fraudulent actions.

On February 4, 1997, the SSA Commissioner and Inspector General David Williams jointly issued a Memorandum to all SSA employees concerning Reporting Suspected Fraud. The joint memorandum stated that SSA employees have a duty to report any suspected wrongdoing or misconduct to SSA's Office of the Inspector General. The memorandum gave examples of situations which the OIG would investigate, including: submission of false claims or fraudulent statements to obtain SSA benefits or services; theft, alteration or improper access or destruction of SSA records; assistance to others in wrongdoing against SSA programs and operations; and violations of trust by improperly disclosing sensitive information. The memorandum further stated that:

The OIG is responsible for establishing the facts regarding allegations of wrongdoing; therefore it is important that you report any apparent violation of the law.

D. Case No. SF-CA-60704 (El Centro Branch Office).

At the time of the alleged violation, Angie Q. Mendoza and Gracie M. Flores were Claims Representatives in the Respondent El Centro Branch Office. The employees were in the bargaining unit represented by Charging Party AFGE, Local 2879. On December 1, 1995, a Social Security claimant

named Guadalupe Florez filed a complaint with Don Thompson and Gloria Garcia, El Centro Branch Office Operations supervisors, concerning employees Mendoza and Flores.

On December 14, 1995, Branch Manager Quinonez informed employee Mendoza about Florez' complaint and conducted separate meetings with employees Mendoza and Flores to discuss that complaint.

On March 7, 1996, Carol Dorham of SSA's Security and Integrity Staff contacted OIG Special Agent Sally High about the situation in El Centro. High requested copies of all pertinent documents concerning the matter and stated that she would look into it. Dorham faxed High several documents relating to the matter, including the complaint and SSA computer printouts of beneficiary records.

Agent High contacted Quinonez to arrange employee interviews at the El Centro Office on April 17, 1996. High first met with Quinonez, who provided High with background information on the case and original copies of the documents that had been faxed by Dorham, as well as the 7B Emergency Procedure Cards on employees Mendoza and Flores. The 7B Emergency Procedure Cards contained personal information on SSA employees.

On April 17, 1996, when High attempted to interview Mendoza and Flores, both employees requested union representation. As a result, High rescheduled the interviews for April 30, 1996, to permit a union representative to travel to El Centro from San Diego. High, subsequently, learned that the SSA-OIG policy was to disallow union representation during investigatory interviews. High informed Quinonez of the rescheduled employee investigative interviews in order to allow for union representation. No investigatory interviews were conducted that day by High.

Sometime thereafter, SSA Area Director Bob McClure called High to inquire about the El Centro case. High also sent Quinonez a fax stating that High would be out of town from April 29 to May 1, 1996, and would need to reschedule the interviews for a later date. On April 22, 1996, Quinonez notified Local 2879 Representative Daniel Brant that the meetings with employees Mendoza and Flores had been rescheduled for May 6, 1996 at 11:00 a.m., in the El Centro Branch Office. Brant conveyed Quinonez' message to Local 2879 President Sandra Matthis.

On the morning of May 6, 1996, Local 2879 Representatives Matthis and Jenny D. Salvez-Almada drove from San Diego to El Centro in order to represent Mendoza

and Flores at the investigatory interviews which were scheduled to begin at 11:00 a.m. Meanwhile, High and Lykins arrived at the El Centro Office and met with Quinonez. Quinonez escorted High and Lykins to the room that Quinonez had reserved for the investigative interviews.

At approximately 10:00 a.m., before Local 2879 Representatives Matthis and Salvez-Almada arrived, High and Lykins met with Mendoza. Upon learning that High and Lykins were not going to allow the Local 2879 representatives into the investigatory interviews, Quinonez unsuccessfully attempted to contact the representatives prior to their departure from San Diego. High and Lykins met with Mendoza alone. Mendoza informed High and Lykins that her union representatives were not there, but High stated that she could not wait.

Respondents stipulated that it was reasonable for Mendoza to believe that the May 6, 1996 investigatory interview conducted by High and Lykins could result in disciplinary action. High told Mendoza that Respondent OIG had to proceed with the investigation without her union representatives being present and that her representatives could not advise her in any way concerning the investigation. Furthermore, High told Mendoza that because the investigation concerned a criminal violation, Mendoza was not allowed to have a union representative present. High told Mendoza that she was not under arrest but she did question Mendoza about the allegations contained in the Florez complaint. Mendoza's responses appeared in a signed affidavit.

After a three hour drive, Local Representatives Matthis and Salvez-Almada arrived in El Centro at approximately 10:15 a.m, about 45 minutes prior to the scheduled start of the investigatory interviews. Upon learning that the Mendoza investigatory interview had already begun, the representatives spoke with employee Flores and called Local Representative Brant in San Diego. It is uncontroverted that Brant, immediately called SSA Labor Relations Specialist Robert Brewer in San Francisco. Brewer told Brant that SSA Headquarters Facilitator Sheila Brown in Baltimore had directed him not to allow union representatives into the investigatory interviews.

Around 10:30 a.m. that morning, Salvez-Almada entered the Mendoza investigatory interview, requested that she be allowed to remain and presented High with a copy of the Authority's decision in *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) (NASA)*. High stated that OIG was

a separate agency, that OIG did not honor the SSA-AFGE contract and that Local Representative Salvez-Almada would not be allowed to be present during the investigatory interview. Further, High stated that the "higher ups" would have to deal with this matter. After being told that she could not stay, Salvez-Almada left the meeting and High questioned Mendoza about the Florez complaint for an additional 20 minutes, without representation.

Sometime before 10:50 a.m., Local Representatives Matthis and Salvez-Almada called SSA Facilitator Sheila Brown to complain about High's denying representation during the investigatory interviews. It is not denied that Brown acknowledged that she had previously spoken with SSA Labor Relations Specialist Brewer and directed him not to allow union representatives into the investigatory interviews of Mendoza and Flores.

The investigatory interview of Flores took place shortly after High's and Lykins' meeting with Mendoza. Respondents stipulated that it was reasonable for Flores to believe that the investigatory interview conducted by High and Lykins could result in disciplinary action. High told Flores that because the interview concerned a potential criminal violation, Flores would not be allowed to have a union representative present. High then questioned Flores about Florez' allegations and employee Flores' responses appeared in a signed affidavit. The information obtained during the May 6, 1996 investigatory interviews was cited by Respondent El Centro in its proposal and decision to suspend Flores for 30 days. The proposal and decision were not based solely on the information obtained during the course of the investigatory interviews.

High prepared affidavits from her notes taken during each interview. Mendoza and Flores read their respective affidavits, orally modified and signed their own affidavit. High administered an oath to each employee before they executed their affidavits, in accordance with the Inspector General Act of 1978. Lykins' signature appeared on both affidavits as a witness.

On or about August 6, 1996, Carol Dorham of SSA's Security and Integrity Staff, called High to inquire about the status of the El Centro case. Several calls were made by SSA to High asking whether criminal charges had been filed.

On or about January 20, 1997, High received a request from Darlene Hewitt of SSA's Human Resources Office for documentation in connection with the investigation. High explained that she could not provide any OIG documents, but

did provide copies of those documents which High had obtained from SSA as set forth in paragraph 26 of the Stipulation. Agent High did not inquire about or discuss with SSA any administrative action. On or about February 10, 1997, SSA Region IX's Regional Commissioner Linda McMahon was given a copy of the OIG investigative report and exhibits. On or about June 5, 1997, Dominic Napolski, Special Agent-In-Charge for OIG's Santa Ana Field Office sent a letter to McMahon with an attached copy of High's closing report in the investigation. The OIG report contained a number of exhibits, including the Mendoza's and Flores' affidavits and a memorandum from Quinonez to High dated April 12, 1996.

Criminal charges were brought against both Mendoza and Flores. On January 14, 1997, Mendoza resigned from her position at SSA before the agency could make a decision with respect to what, if any, disciplinary action it was going to take against her. Flores was issued a Proposal to Suspend dated February 26, 1997, by Don Thompson, El Centro Field Office Operations Supervisor, for misuse of the SSA system of records. In the Proposal to Suspend, Thompson cited and relied upon information obtained during the OIG investigatory interviews. The proposal stated that both Mendoza and Flores made sworn written statements and explained the facts regarding the computer inquiries to High and Lykins. Thompson further stated in the proposal, that based on all of the facts and evidence, including that obtained from the OIG investigators, he did not find Flores' explanation credible.

In accordance with the collective bargaining agreement entered into by SSA and AFGE, Flores procured union representation (Ivan Weich) and responded to the proposed suspension on April 4, 1997.

On April 17, 1997, Quinonez issued a Decision on the Proposal to Suspend Flores. The decision cited information obtained from the OIG investigation and Quinonez relied upon that information in her decision to suspend Flores. Further-more, in that decision, Quinonez stated that Flores signed a sworn statement prepared by the OIG investigators and that Flores admitted to OIG Investigator High, that Flores accessed SSA records. Quinonez stated that after a review of all the evidence, a 30-day suspension was warranted. Thereafter, Flores served the 30-day suspension from April 18, 1997 through May 19, 1997.

E. Case No. SF-CA-70031 (Oxnard Branch Office).

Sonja Meza, Linda Vining and Carmen Hernandez are SSA employees in the Oxnard, California Branch Office. All

three employees are in a bargaining unit represented by Charging Party Local 2452. Local President Jeanette Perkins, who is located in Downey, California, serves as the Local's representative for the Oxnard Branch Office facility.

In September 1996, Congressman Elton Gallegly received an anonymous letter dated September 10, 1996, which alleged social security number and claim fraud. The Congressman's office forwarded the letter to Brown, Oxnard Branch Manager, under a cover letter dated September 17, 1996. Brown forwarded both letters to SSA District Manager Larry Boland, who, in turn, forwarded these documents, together with a September 18, 1996 cover memorandum, to Gregory Ricks, SSA Section Chief, Security and Fraud Unit. Brown also forwarded the documents, with a routing slip attached, to the Office of Inspector General, Santa Ana Field Office, Santa Ana, California.

On September 24, 1996, OIG Special Agent Deborah Hurless telephoned Boland to advise him that the OIG would be conducting interviews in connection with an investigation. The details of the allegations were not discussed in their short conversation. Hurless also telephoned Brown to arrange to meet with her and interview a number of the Oxnard Branch Office employees. Again, the specific reasons for the interviews were not discussed.

On September 25, 1996, at approximately 9:00 a.m., Hurless and Mackey arrived at the Oxnard Branch Office. First they interviewed Brown and then made arrangements to interview the bargaining unit members. At the special agent's request, Brown provided them with a branch office telephone listing. The special agents had to contact each employee by telephone because the room provided to them for the interviews was located in another building. Hurless and Mackey proceeded to conduct their interviews in the private interview room of the adjacent Southern California Edison Building. Hurless and Mackey met with two employees, Claims Representatives Doreen Menerey and Sally Weschler early that morning before Perkins was informed that the special agents were conducting an investigation of employees in Oxnard.

Around 10:15 a.m., employee Sonja Meza telephoned Perkins and told Perkins that investigatory interviews were being conducted at the facility. Perkins, in turn, immediately called Brown and informed Brown that Perkins wanted to be present when the OIG investigators spoke with bargaining unit employees. In addition, Perkins stated that she did not want the OIG investigators to speak with the employees until she arrived. Brown immediately forwarded this message to the OIG investigators.

The OIG investigators, through Brown, told Perkins that the employees did not have a right to union representation during the investigation. Perkins asked to speak with the OIG investigators. Hurless came to the telephone and informed Perkins that there was no obligation to have the union present during these investigatory interviews because OIG was separate from SSA and was not a party to the bargaining agreement that regulated the relationship between SSA and its union employees. Perkins reiterated her request to be present during the investigatory interviews and further stated that she would seek statutory relief. Hurless responded "do what you have to do."

After this telephone call, Perkins prepared three pieces of correspondence, specifically, a set of instructions to the employees, and letters to Brown and Hurless. At 12:41 p.m. that day, Perkins faxed the employee instructions, which directed the employees to request union representation, to employee Meza. Meza disseminated Perkins' instructions to the other bargaining unit employees. Thereafter, Perkins faxed letters to Brown and Hurless, confirming their earlier telephone conversations and again requesting that the investigatory interviews not take place.

On September 25, 1996, Perkins called Joyce W. Emrick, Labor Relations Specialist, Region IX Labor Relations Team, SSA, San Francisco, complaining that investigatory interviews were being conducted absent notification to the union. Emrick advised Perkins that the Agency's position was that the OIG agents were not representatives of SSA management, that no *Weingarten* rights were attached to such interviews, and that SSA had no obligation to inform the union about such interviews. Emrick further explained to Perkins that the OIG interviews were matters between OIG and the respective employees; and that neither Emrick nor the Field Office Manager had the authority to render a decision as to whether union officials could be present during the interviews, since that decision was left to the discretion of the OIG interviewer. Despite Perkins' requests to be present at the investigatory interviews on September 25, 1996, Hurless and Mackey continued their investigation and held separate meetings with employees Vining and Meza concerning allegations contained in the Congressional complaint.

In regard to the Vining meeting, Vining orally requested union representation at the outset of the meeting and the request was denied by the special agents. The special agents proceeded to interview Vining regarding the allegations contained in the Congressional complaint.

Respondents stipulated that it was reasonable for Vining to believe that the investigatory interview could result in disciplinary action.

Meza also orally requested union representation and also showed OIG's special agents a copy of Perkins' one page fax at her meeting. The special agents denied Meza's request for union representation, stating that they were not part of SSA and that they were a separate entity from SSA. The special agents proceeded to interview Meza regarding the allegations contained in the Congressional complaint. Respondents stipulated that it was reasonable for Meza to believe that the investigatory interview could result in disciplinary action.

Prior to the OIG special agents meeting with employee Hernandez, Brown provided the special agents with access to an SSA file containing records of previous disciplinary actions taken against Hernandez. The special agents reviewed SSA's file on Hernandez and copied several documents from that file.

Several days later, Hurless telephoned Brown and asked that employee Emergency Cards (7B Cards), containing employees home addresses and telephone numbers, be faxed to Hurless. Hurless intended to use these cards to interview certain employees at their homes where they might provide information more readily. Hurless did not tell Brown the reason for the request, and purposely asked for all of the cards for the office, so that Brown would not know whose information Hurless was actually seeking. There were 24 employee 7B Emergency Cards provided to Hurless. Hurless and Mackey later attempted to interview two employees at their homes, but neither was available when Hurless and Mackey visited.

On October 9, 1996, Hurless and Mackey met with Hernandez for approximately two hours. Hernandez orally requested union representation and also showed the special agents a copy of Perkins' one page fax. The special agents denied Hernandez' request for union representation. The special agents proceeded to interview Hernandez regarding the allegations contained in the Congressional complaint. During the investigatory interview, the special agents made reference to the aforementioned matters which were contained in Hernandez' disciplinary file. Respondents stipulated that it was reasonable for Hernandez to believe that the investigatory interview could result in disciplinary action.

After the Hernandez meeting, the special agents again met with Brown in her office. The purpose of this meeting was to review random samples of social security card

applications in connection with the allegations contained in the Congressional complaint. The interviews were not discussed, and no employee files were reviewed during this meeting.

As of the date of the Stipulation, no administrative or criminal action has been taken against Vining, Meza, or Hernandez. The cases remain open and are under investigation by OIG.

Analysis and Conclusions

These cases involve (1) whether the SSA-OIG Special Agents and its Investigative Assistant acted as "representatives of the agency" within the meaning of section 7114(a) (2)(B) of the Statute; and, (2) whether Respondent SSA Headquarters and/or its components El Centro and Oxnard also violated the Statute.

At least, three factors are necessary before section 7114(a) (2) (B) *Weingarten* rights of representation attach: (1) there must be an examination of an employee by a representative of the agency during the course of an investigation; (2) the employee must reasonably fear discipline; and, (3) the employee must request union representation. *Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California*, 29 FLRA 594, 602 (1987). Where these factors exist, an exclusive representative has the right to take an "active part" in the examination. *Department of Veterans Affairs, Veterans Affairs Medical Center, Hampton, Virginia*, 51 FLRA 84, 97 (1995), *motion for reconsideration denied*, 51 FLRA 1741 (1996); *NASA, affirmed, Federal Labor Relations Authority 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) (*NASA II*).

Respondents, in these cases, are depending on such cases as *U.S. Department of Justice v. FLRA*, 39 F.3d 93 (D.C. Cir. 1994) (*USDOJ*), to contend that OIG and SSA did not violate the Statute. With respect to the position that SSA can not be responsible for OIG conduct, Respondents also rely on *Department of Defense, Defense Criminal Investigative Service, Defense Logistics Agency and Defense Contract Administration Services Region, New York*, 28 FLRA 1145 (1987) (*DOD, DCIS*) and *Nuclear Regulatory Commission, Washington, D.C. v. FLRA*, 25 F.3d 229 (4th Cir. 1994) (*NRC*). In addition, Respondents contend that its three OIG Special Agents conducted investigations of five bargaining unit employees in connection with criminal investigations which are not subject to the *Weingarten* rule. In its view, there is no violation surrounding these

investigations since the Special Agents were not "representatives" of Respondent SSA. Thus Respondents claim that neither SSA nor the SSA branch offices were involved in this matter, are not responsible for the manner in which the interviews were conducted and, furthermore, the investigative interviews were beyond the scope of collective bargaining. Denying any responsibility, Respondent SSA argues that the OIG's autonomy would be contravened by extensions of the protection of the Statute to criminal interviews.

Respondent OIG also maintains that Congressional intent by the OIG law was to maintain a wall of separation between the OIG and SSA and therefore, investigative interviews by it are not subject to the *Weingarten* rule.

The stipulated record confirms that the five employees herein worked for one of Respondents' Branch Offices; were members of the unit represented either by AFGE Local 2879 or AFGE Local 2452; and were examined by OIG special agents; and, that each employee requested and was denied the right to have a representative from the respective Charging Party Locals present during examinations, when these five employees reasonably feared that disciplinary action would be taken against them. Each request for union representation was denied by the OIG special agents.

The General Counsel finds support in *NASA; DOD, DCIS, enforced sub nom. Defense Criminal Investigative Service, enforced sub nom. Defense Criminal Investigative Service, Department of Defense v. FLRA*, 855 F.2d 93 (3rd Cir. 1988) (*DCIS*). The General Counsel is confident that the OIG was a representative of SSA when it investigated the bargaining unit employees at the El Centro and Oxnard SSA Branch Offices and SSA, the SSA Branch Offices in El Centro and Oxnard and the OIG violated the Statute when the five employees herein were denied their requests for union representation.

At the outset, it is clear that the Authority precedent in OIG cases has been firm. Furthermore, as an Administrative Law Judge, I am required to follow the Authority precedent set out in *NASA*. Although I am cognizant of the Court of Appeals decisions relied on by Respondents which express views contrary to Authority precedent, my reliance on those cases where the Authority has not accepted the Courts' view would constitute fundamental error. See *Iowa Beef Packers*, 144 NLRB 615 (1963), enforcement granted in part and denied in part, 331 F.2d 176 (8th Cir. 1964). The NLRB counseled its [administrative law judge] that the Board's policy is to determine whether to acquiesce in a decision of a circuit

court which was contrary to its own or whether, with due deference to the court's opinion, adhere to **its** previous holding until the Supreme Court of the United States has ruled otherwise. The NLRB went on to say, "it is not for [the administrative law judge] to speculate as to what course the Board should follow where a circuit court has expressed disagreement with its views. On the contrary, it remains the [administrative law judge's] duty to apply established Board precedent which the Board or the Supreme Court has not reversed. . . ." Here the Authority has repeatedly spoken on the OIG issue and despite differing views from several circuit courts the Authority has not changed **its** position. Consequently, the undersigned is required to give the Authority's holdings on the issue effect. It is, therefore, clear to me that an administrative law judge cannot apply precedent which the Authority has not adopted as its own without committing error. Accordingly, any application of the Circuit Courts' decisions urged by Respondents, but not acquiesced by the Authority in this matter would be inappropriate.

A. Respondents OIG San Diego and OIG San Francisco, violated section 7116(a) (1) and (8) of the Statute in connection with the May 6, September 25 And October 9, 1996 Weingarten examinations of Mendoza, Flores, Meza, Vining and Hernandez.

1. Respondents OIG San Diego, through High and Lykins, and OIG San Francisco, through Hurless and Mackey, were "representatives of the agency" within the meaning of section 7114(a) (2) (B) of the Statute.

The Authority first addressed the application of section 7114(a) (2) (B) to Inspector General investigations in *Department of Defense, Defense Criminal Investigative Service; Defense Logistics Agency and Defense Contract Administration Services Region, New York*, 28 FLRA 1145 (1987) (*DOD, DCIS*) enforced sub nom. *Defense Criminal Investigative Service, Department of Defense v. Federal Labor Relations Authority*, 855 F.2d 93 (3d Cir. 1988) (*DCIS*). In *DOD, DCIS*, the Authority found that *DCIS*, the criminal investigative component of the Office of Inspector General at *DOD*, was "acting as a 'representative of the agency,' within the meaning of section 7114(a) (2) (B)" when investigating employees of the Defense Logistics Agency, another *DOD* component.

The Authority has consistently followed *DOD, DCIS* since its issuance. Thus, in *U.S. Department of Labor, Mine Safety and Health Administration*, 35 FLRA 790, 801-03 (1990) (*Mine Safety*), the Authority found that although the investigation was under the direction and control of the Office of the U.S. Attorney and FBI, an agent of Department

of Labor, Office of Inspector General (*DOL-OIG*) was present, actively participated and represented *DOL-OIG* during the interview. Under these circumstances, the Authority in *Mine Safety* concluded that the *OIG* agent held a dual role during the examination of assisting the *FBI* and representing the interests of *DOL-OIG* and ultimately the Department of Labor and its Mine Safety Health Administration. Thereafter, in *Immigration and Naturalization Service, Border Patrol, El Paso, Texas*, 36 *FLRA* 41, 44 (1990), rev'd on other grounds, 939 F.2d 1170 (5th Cir. 1991) (*Border Patrol*), the Authority found that "Congress intended section 7114(a)(2)(B) to apply to all examinations in connection with all investigating, not just to examinations of employees in connection with non-criminal matters." The Authority in *Border Patrol* concluded that the information secured by *OPR* could be used for disciplinary action by the *Border Patrol* where the collective bargaining unit was located. The *OPR* agents were thus found to be acting as "representatives of the agency" within the meaning of section 7114(a)(2)(B).

Likewise, in *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 (1993) *DOJ's* argument that its *OIG* acted autonomously in conducting investigations was rejected. There the Authority concluded that the *OIG* of *DOJ* was acting as a representative of *DOJ* when investigating employees of *INS*, another component of *DOJ*. The Authority also noted that "the degree of supervision exercised by agency management over investigators is irrelevant where the investigators are employees of the same agency and their purpose when conducting interviews is to solicit information concerning possible misconduct on the part of agency employees in connection with their work." Finally, the Authority determined that there was no basis on which to reconsider its decision in *DOD, DCIS*.

Finally, *NASA* gave the Authority the opportunity to rethink the statutory provisions, legislative case law, and consistent with its earlier decision in *DOD, DCIS* it found that a *NASA-OIG* investigator acted as a "representative of the agency," within the meaning of the Statute when it interviewed *NASA* employees (*NASA*). The Authority reached this conclusion based on its determination that: "(1) the term 'representative of the agency' under section 7114(a)(2)(B) should not be so narrowly construed as to exclude management personnel employed in other subcomponents of the agency; (2) the statutory independence of agency *OIGs* is not determinative of whether the investigatory interviews implicate section 7114(a)(2)(B) rights; and (3) section 7114(a)(2)(B) and the *IG Act* are not irreconcilable. See *DCIS*, 855 F.2d at 99-100." The Authority further noted that

despite a degree of independence, the Inspector General was nevertheless under the direct supervision of the head of the agency.

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

The instant cases are substantially the same as *NASA*, and also compel a finding that the OIG's special agents were "representatives of the agency" within the meaning of section 7114(a)(2)(B). Numerous organizational and statutory similar-ities exist between *NASA* and these cases. Organizationally, *NASA* and *SSA* are agencies within the meaning of section 7103(a)(3). Just as the Marshall Space Flight Center and *NASA-OIG* are components of *NASA*, the branch offices and *SSA-OIG* are components of *SSA*. In addition, the OIG agents in both matters are subject to the direction of individuals in the OIG chain of command.²

Statutorily, the OIG in both *NASA* and *SSA* was established by Public Law 95-452, as amended, 5 U.S.C. app. 3 (IG Act), and serves the same purposes, specifically, to conduct and supervise audits and investigations relating to programs and operations and to provide a means for keeping the head of the establishment and Congress fully and currently informed about problems and deficiencies. 5 U.S.C. app. 3, sections 2(1) and (3). The Inspector General in *NASA* as in these cases has a duty and responsibility "to provide policy direction for and to conduct, supervise, and coordinate" investigations. 5 U.S.C. app. 3, section 4(a)(1). The Inspector General in both instances reports to and

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Recently, the Eleventh Circuit in *NASA II* affirmed the Authority's *NASA* decision and thereby became the fourth United States Court of Appeals to issue a decision concerning whether an OIG investigator acts as a "representative of the agency" for purposes of section 7114(a)(2)(B) of the Statute. The Eleventh Circuit, in agreement with the Authority and the Third Circuit in *DCIS*, concluded that the investigator from *NASA-OIG* was a "representative" of *NASA* Headquarters thereby triggering the employee's *Weingarten* rights. *NASA II*, 120 F.3d at 1215-17.

is under the general supervision of the agency head, but that administrator could not "prevent or prohibit the Inspector General from initiating, carrying out, or completing" any investigation. 5 U.S.C. app. 3, section 3 (a).

In this case, the special agents, who are part of the Office of Investigations within SSA-OIG, conduct and coordinate investigative activity relating to fraud, waste, abuse and mismanagement in SSA programs and operations. That includes wrongdoing by SSA employees in the performance of their official duties. The OIG advises SSA when it has evidence of fraud in SSA programs or has evidence that an employee might be engaging in fraudulent activity.

This record discloses that the special agents, in the performance of their duties relative to the subject investigations received written and oral information from SSA components and were granted access to documentation maintained by SSA components. The OIG special agents here also disseminated information to SSA components, including OIG's preliminary and final investigative report in the El Centro investigation. The final report contained copies of affidavits provided by Mendoza and Flores to High and Lykins during the May 6, 1996 investigatory interviews. Furthermore, the information elicited from these employees was relied upon to suspend Flores for 30 days. In my opinion, there is little question that SSA and SSA-OIG work together during employee investigations, just as NASA and NASA-OIG did. Accordingly, as in NASA, the SSA-OIG special agents are found to be "representatives of the agency."

With respect to the OIG, the Authority in NASA held that a NASA-OIG investigator was acting as a "representative of the agency"³ within the meaning of section 7114(a)(2)(B). In circumstances that are much the same as here, the Authority recognized that NASA-OIG is a separate investigative component of NASA-HQ, created by the IG Act, that operates through its own chain of command. In NASA the Authority, after a thorough analysis of the Statute, rejected the D.C. Circuit's position in *USDOJ*, and held that NASA-OIG is a "representative of the agency" within the meaning of section 7114(a)(2)(B). NASA at 612-620; see also *DCIS* and *DOD, DCIS*.

Accordingly, the undersigned concludes, based on existing Authority precedent, that OIG is a representative of SSA within the meaning of section 7114(a)(2)(B) of the Statute and the five bargaining unit employees of the El Centro and Oxnard Branches are a component of SSA, and

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The agency in NASA is NASA-HQ.

therefore entitled to have union representation at the examinations conducted by the OIG agents. The OIG agents' denials of the requested union representation interfered with the rights of bargaining unit employees at the El Centro and Oxnard Branch Offices of SSA and violated section 7116(a) (1) and (8) of the Statute.

With respect to NASA-HQ, the parent organization in the NASA case, the Authority found that OIG represented "not only the interests of OIG, but ultimately NASA, HQ and its subcomponent offices." *Id.* at 621. The Authority, noting that the IG Act specifically provides that the IGs report to and are under the supervision of the head of the agency, found that NASA-HQ was responsible for the statutory violations committed by its OIG. The Authority went on to state that holding NASA-HQ responsible "for the manner in which OIG conducts investigative interviews pursuant to section 7114(a) (2) (B) fully effectuates the purposes of the Statute."

In light of the Authority decision and careful reasoning in NASA, one can only conclude that SSA was represented by and responsible for the manner in which OIG conducted the examinations in the subject case. In the subject case, the record fails to establish that SSA advised OIG of the employees' rights under section 7114(a) (2) (B) of the Statute or that OIG should grant the employees the right to union representation. Accordingly, I conclude that SSA was responsible for the conduct of OIG and, therefore, that SSA violated section 7116(a) (1) and (8) of the Statute.

In both cases, the meetings with the employees were plainly examinations in connection with ongoing investigations. In SF-CA-60704, High and Lykins, met with Mendoza and Flores in connection with a formal complaint submitted by Social Security claimant Florez on December 1, 1995. In SF-CA-70031, Hurless and Mackey, met with Vining, Meza and Hernandez concerning an anonymous letter, dated September 10, 1996, which alleged social security number and claim fraud, that was received by Congressman Elton Gallegly. There is no dispute that the employees were questioned concerning the matters under investigation by the special agents and the investigative assistant.

Interestingly, Respondents stipulated and thus, it is uncontested that the employees here reasonably feared discipline, requested union representation and had their requests for representation denied. There are no facts which indicate that the presence of a union representative, in either case, would have prevented the special agents from achieving their objectives or in any way compromised the integrity of the investigation. *Compare Federal Aviation*

Administration, New England Region, Burlington, Massachusetts, 35 FLRA 645, 652 (1990); *United States Department of Justice, Bureau of Prisons, Safford, Arizona*, 35 FLRA 431, 473 (1990) (*Safford*).

In *U.S. Department of Justice, Immigration and Naturalization Service, et al. v. FLRA*, 39 F.3d 361, 366 (D.C. Cir. 1994) (*Twin Cities*), the D.C. Circuit further noted that the parent agency-DOJ, in addition to supervising subcomponent INS, also supervised the Federal Bureau of Investigation (FBI). *Twin Cities* at 366. The D.C. Circuit found it "impossible to believe" that questioning by an FBI agent would also be subject to section 7114(a)(2)(B). However, the D.C. Circuit overlooked the FBI's authority under 28 U.S.C. section 535(a) to "investigate any provision of Title 18 involving Government officers and employees - (1) notwithstanding any other provision of law." (Emphasis added). Plainly, the special agents in these cases do not possess the same law enforcement mission as the FBI. Therefore, *Twin Cities* is readily distinguishable. Moreover, unlike the OIG, which constitutes an agency within the meaning of the Statute, the FBI is excluded from statutory coverage. 5 U.S.C. section 7103(a)(3).

Accordingly, it is found that Respondents OIG San Diego and San Francisco were acting as "representatives of an agency" within the meaning of section 7114(a)(2)(B) of the Statute during the May 6, September 25 and October 9, 1996 examinations of bargaining unit employees.

2. *OIG San Francisco and OIG San Diego violated the Statute by refusing to permit employees to have union representation at meetings within the meaning of section 7114(a)(2)(B) of the Statute.*

Since the three factors were present in these consolidated cases the section 7114(a)(2)(B) *Weingarten* right of representation does attach. As the record reveals, the first *Weingarten* factor was plainly satisfied in both cases. There were clearly ongoing investigations in Case No. SF-CA-60704 over Florez' formal complaint and in Case No. SF-CA-70031 concerning alleged social security number and claim fraud. Examinations of all five employees were conducted by special agents of Respondents' OIG San Diego and OIG San Francisco. As already found, Special Agents High, Hurless, Mackey and Lykins were "representatives of the agency" within the meaning of section 7114(a)(2)(B).

As already noted, Respondents stipulated that it was reasonable for the employees to believe that the investigatory interviews on May 6, September 25 and October 9 could result in disciplinary action and that there were numerous oral and written requests for representation,

which were denied by the special agents. Under those circumstances the undersigned is compelled to find that Respondents' OIG San Diego and San Francisco violated the employees' *Weingarten* rights in both cases.

The contention that the five employees were not entitled to union representation because the investigations involved criminal matters is also without merit. Such a defense is not supported by Authority case law and therefore, must be rejected.

The Authority has long held that an employee's section 7114(a)(2)(B) right to representation applies to criminal as well as non-criminal investigations. See *Department of the Treasury, Internal Revenue Service, Jacksonville District and Department of the Treasury, Internal Revenue Service, South-east Regional Office of Inspection*, 23 FLRA 876, 878-79 (1986) (IRS). See also, *Border Patrol*. In *IRS*, the Authority noted that "this result (1) comports with the language of section 7114(a)(2)(B) and the intent of Congress, (2) is consistent with the Supreme Court's explanation of the parameters of the right to representation in *Weingarten*, and (3) does not conflict with management's legitimate prerogatives or its right to determine internal security practices."

In any event, regardless of the possible criminal aspect of the investigations in issue, there is no dispute in the instant cases and the facts clearly demonstrate, that the information obtained by the OIG agents during its investigation could, and would be used by SSA to administratively discipline its employees. In the circumstances, it is concluded that the three elements needed to establish a *Weingarten* violation were met and the General Counsel therefore, met its burden of proof under section 7114(a)(2)(B) showing that Respondents' OIG San Diego and OIG San Francisco violated section 7116(a)(1) and (8) of the Statute in connection with the May 6, September 25 and October 9, 1996 *Weingarten* examinations of bargaining unit employees Mendoza, Flores, Meza, Vining and Hernandez.

B. Respondents' SSA Headquarters, El Centro and Oxnard violated section 7116(a)(1) and (8) of the Statute in connection with the May 6, September 25

**and October 9, 1996 Weingarten examinations of
Mendoza, Flores, Meza, Vining and Hernandez.**

1. Respondent SSA Headquarters is not only responsible for the conduct of its components, Respondents' OIG San Diego and OIG San Francisco, but it also independently denied the employees requests for representation.

In NASA, the Authority found that NASA Headquarters committed an unfair labor practice through its failure to comply with the provisions of section 7114(a)(2)(B) during an examination by the OIG of a Marshall Space Center employee. The Authority reasoned:

Investigative 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.

50 FLRA at 621.

The Authority further clarified and held:

[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." *DOD, DCIS*, 28 FLRA at 1151. It is with this objective in mind--ensuring that the Office of Inspector General is advised by its statutory superior of the obligation to comply with the Statute--that we find the purposes underlying the Statute will be effectuated by holding NASA, HQ liable for the actions of its Inspector General. As set forth in this decision, despite a degree of independence, the IG is nevertheless under the direct supervision of the head of the agency.

Accordingly, we will no longer follow Authority precedent declining to hold an agency headquarters responsible for the statutory violations of its Inspector General.

The organizational relationship of Respondents' OIG to Respondent SSA Headquarters is identical to that at issue in *NASA*. Accordingly, under the holding in *NASA*, Respondent SSA Headquarters also violated the employees' *Weingarten* rights based upon Respondents OIG San Diego and OIG San Francisco's failure to comply with section 7114(a)(2)(B) at the May 6, September 25 and October 9, 1996 examinations.

The stipulated facts also demonstrate that Respondent SSA Headquarters independently violated section 7114(a)(2)(B) of the Statute by its own conduct in these consolidated cases. As discussed above, in Case No. SF-CA-60704, Respondent SSA Headquarters Facilitator Sheila Brown specifically directed SSA San Francisco Regional Office, Labor Relations Specialist Robert Brewer not to allow Mendoza and Flores any representation during the May 6, 1996 examination, a directive which Brewer communicated to Charging Party representative Dan Brant. Similarly, in SF-CA-70031, Joyce Emrick made clear to Perkins that SSA took the position that the employees had no right to union representation during OIG investigations.

Accordingly, Respondent SSA Headquarters based on its relationship to the OIG and its own independent conduct violated section 7116(a)(1) and (8) of the Statute. *NASA*.

2. Respondents El Centro and Oxnard unlawfully denied employee requests for representation.

The General Counsel also contends that Respondents El Centro and Oxnard were more than "mere bystanders," and that each independently violated employee rights to *Weingarten* representation. The stipulated facts show that both offices were actively involved in the subject OIG investigations.

In *DOJ Washington D.C.*, OALJ 96-44 at 12, rev'd on other grounds *FLRA v. U.S. Department of Justice, Washington, D.C., U.S. Department of Justice, Immigration and Naturalization Service, New York District, New York and Department of Justice, Office of Inspector General, Washington, D.C.*, No. 97-400.1 (2nd Cir.) (Sept. 25, 1997), Chief Administrative Law Judge Chaitovitz concluded that the Activity level, New York Immigration and Naturalization Service (*NY INS*), was "not a mere bystander, or even a limited participant, to OIG's examinations of its employees." Judge Chaitovitz noted that *NY INS* initiated the OIG investigations, instructed the employees to attend

the examinations, received the results of OIG's administrative investigations, decided upon the appropriate administrative action to be taken against the employees and ordered the employees to cooperate with the OIG investigations under threat of discipline.

This matter contains more forceful reasons for finding that the El Centro and Oxnard Branch Offices independently violated the *Weingarten* statute by their conduct. Here, it was shown that the branch offices initiated the OIG investigations and instructed employees to attend the examinations and remained actively involved both before and after the investigations took place.

In El Centro, it was documentation received by El Centro concerning the Florez' complaint that was faxed to High which initiated the investigation. On April 17, 1996, Quinonez provided background information and documentation during a meeting in El Centro to High. On August 6, 1996, High informed SSA about the status of the El Centro investigation. Regional Commissioner McMahon received an advanced and a final copy of the OIG investigative report. The contents of the February 10, 1997 advanced copy of the OIG report were then cited in the February 26, 1997 proposal to suspend Flores. Furthermore, the same advanced copy of the OIG report was used by Quinonez in her April 17, 1997 suspension of Flores.

The Oxnard Branch Office forwarded documentation to OIG's Santa Ana Field Office. On September 25, 1996, Brown informed Perkins, per the OIG investigators, that the employees did not have a right to *Weingarten* representation during the investigation. Emrick later repeated SSA's position that Perkins was not allowed to represent employees at the Oxnard investigation. Hurless and Mackey interviewed Brown and received an office telephone listing from her in order to conduct the investigation. On October 9, 1996, Hurless and Mackey were given access to Oxnard Branch Office files by Brown, which contained records of prior disciplinary actions taken against Hernandez. Shortly thereafter, Brown faxed 7B Emergency Cards to Hurless.

Based on the foregoing, the undersigned finds and concludes that the branch offices were not "mere bystanders," and that they independently violated the employees' *Weingarten* rights.

In summary, it is concluded that the General Counsel has established the existence of all three section 7114(a) (2)(B) *Weingarten* factors in each of the investigative interviews involved in this consolidated matter. There were examinations conducted with five employees in connection

with two OIG investigations. The stipulation also demonstrated that all employees requested union representation and had those requests denied. Further it was stipulated, in both cases, that it was reasonable for the employees to believe that the investigatory interviews could result in disciplinary action.

In addition, it is found and concluded for the reasons discussed above, that Respondents' OIG San Diego and OIG San Francisco were "representatives of the agency" within the meaning of section 7114(a)(2)(B) of the Statute consistent with Authority precedent in NASA. Accordingly, the denial of union representation at the May 6, September 25 and October 9, 1996 meetings by the OIG special agents is found to have violated section 7116(a)(1) and (8) of the Statute.

Finally, the instant record confirms that Respondent SSA Headquarters was not only responsible for the conduct of its components, OIG San Diego and OIG San Francisco under the NASA rationale, but also independently, denied the employees' requests for representation. Accordingly, Respondent SSA Headquarters is also found to have violated section 7116(a)(1) and (8) of the Statute. Furthermore, it is found that the El Centro and Oxnard Branch Offices were not "mere bystanders" and they too unlawfully denied employee requests for representation. Accordingly, it is found and concluded that Respondents El Centro and Oxnard violated section 7116(a)(1) and (8) the Statute.

REMEDY

In addition to traditional remedies the General Counsel has requested as a remedy that Respondents SSA and OIG San Diego and OIG San Francisco be ordered to:

1. Respondent SSA Headquarters should order SSA's Office of the Inspector General to rescind Section 10-75 of the Office of the Inspector General, Office of Investigation's Special Agents' Handbook and the August 1, 1996 Memorandum issued by Assistant Inspector General for Investigations James G. Huse, which denied union representation during Respondent OIG's *Weingarten* examinations. See *Marine Corps Air Ground Combat Center, Twenty-Nine Palms, California*, OALJ 97-05 (November 29, 1996).

2. Cease and desist from conducting any additional *Weingarten* meetings with bargaining unit employees, without the presence of a union representative from the American Federation of Government Employees, the exclusive

representative of its employees. See *NASA*, 50 FLRA 601 at 622; and,

3. Respondent SSA Headquarters should order SSA's Office of the Inspector General to comply with the requirements of section 7114(a)(2)(B) when conducting investigatory examinations of employees pursuant to that section of the Statute.

In addition, the General Counsel requested that each of the Respondents should be ordered to post an appropriate Notice To All Employees:

4. Respondent SSA Headquarters should be ordered to post nationwide an appropriate Notice To All Employees signed by the Acting Commissioner of the Social Security Administration and the Special Agent-In-Charge of OIG's Santa Ana Field Office, who is responsible for Respondents OIG San Diego and OIG San Francisco. See *U.S. Department of Justice, Office of the Inspector General, Washington, D.C.*, 47 FLRA 1254 at 1266;

5. Respondent El Centro should be ordered to post at its facility an appropriate Notice To All Employees signed by the El Centro Branch Manager; and,

6. Respondent Oxnard should be ordered to post at its facility an appropriate Notice To All Employees signed by the Oxnard Branch Manager.

It appears to the undersigned that the above requirements would effectuate the purposes and policies of the Statute. Therefore, it is recommended in these consolidated cases that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Federal Service Labor-Management Relations Statute:

A. Social Security Administration Headquarters, Baltimore, Maryland, shall:

1. Cease and desist from:

(a) Requiring bargaining unit employees of the Social Security Administration to take part in investigatory examinations conducted pursuant to section 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute (Statute) without allowing the American Federation of

Government Employees, Local 2879 or Local 2452, AFL-CIO, the exclusive representatives of the employees, through its affiliates and agents, to attend the examinations, when such representation has been requested by the employees.

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

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

(a) Order Social Security Administration's Office of the Inspector General to comply with the requirements of section 7114(a)(2)(B) when conducting investigatory examinations of employees pursuant to that section of the Statute.

(b) Order Social Security Administration's Office of the Inspector General to rescind Section 10-75 of the Office of the Inspector General, Office of Investigation's Special Agents' Handbook and the August 1, 1996 Memorandum issued by Assistant Inspector General for Investigations James G. Huse, which denied representation by AFGE during investigatory examinations conducted by the Social Security Administration's Office of the Inspector General.

(c) Post at all its facilities nationwide, where members of the American Federation of Government Employees, AFL-CIO bargaining unit employees are located, copies of the attached notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Acting Commissioner of Social Security Administration and the Special Agent-In-Charge of Office of Inspector General's Santa Ana Field Office 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.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, San Francisco 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 herewith.

B. Social Security Administration, Office of the Inspector General, San Diego, California, shall:

1. Cease and desist from:

(a) Requiring bargaining unit employees of the Social Security Administration to take part in investigatory examinations conducted pursuant to section 7114(a)(2)(B) of the Statute without allowing the American Federation of Government Employees, Local 2879 and Local 2452, AFL-CIO, the exclusive representative of the employees, through its affiliates and agents, to attend the examinations, when such representation has been requested by the employees.

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

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

(a) Upon receipt of the attached notice by Respondent Social Security Administration Headquarters, it shall be signed by the Acting Commissioner and Special Agent-In-Charge of Office of Inspector General's Santa Ana Field Office.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, San Francisco 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 herewith.

C. Social Security Administration, El Centro Branch Office, El Centro, California, shall:

1. Cease and desist from:

(a) Requiring bargaining unit employees to take part in investigatory examinations conducted pursuant to section 7114(a)(2)(B) of the Statute without allowing American Federation of Government Employees, Local 2879, AFL-CIO, the exclusive representative of the employees, through its affiliates and agents, to attend the examinations, when such union representation has been requested by the employees.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of 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 its facility, copies of the attached notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the El Centro

Branch Manager 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 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, San Francisco 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 herewith.

D. Social Security Administration, Office of the Inspector General, San Francisco, California, shall:

1. Cease and desist from:

(a) Requiring bargaining unit employees of the Social Security Administration to take part in investigatory examinations conducted pursuant to section 7114(a)(2)(B) of the Statute without allowing American Federation of Government Employees, Local 2879 and Local 2452, AFL-CIO, the exclusive representative of the employees, through its affiliates and agents, to attend the examinations, when such representation has been requested by the employees.

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

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

(a) Upon receipt of the attached notice by Respondent Social Security Administration Headquarters, it shall be signed by the Special Agent-In-Charge of OIG's Santa Ana Field Office.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, San Francisco 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 herewith.

E. Social Security Administration, Oxnard Branch Office, Oxnard, California, shall:

1. Cease and Desist from:

(a) Requiring bargaining unit employees to take part in investigatory examinations conducted pursuant to

section 7114(a) (2) (B) of the Statute without allowing American Federation of Government Employees, Local 2452, AFL-CIO, the exclusive representative of the employees, through its affiliates and agents, to attend the examinations, when such representation has been requested by the employees.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of 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 its facility copies of the attached notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Oxnard Branch Manager 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 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, San Francisco 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 herewith.

Issued, Washington, DC, December 17, 1997

ELI NASH, JR.
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that Social Security Administration Headquarters, Baltimore, Maryland; Social Security Administration, Office of the Inspector General, San Diego, California; and, Social Security Administration, Office of the Inspector General, San Francisco, California have violated the Federal Service Labor-Management Relations Statute (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 Social Security Administration to take part in an investigatory examination conducted pursuant to section 7114 (a) (2) (B) of the Statute without allowing the American Federation of Government Employees, Local 2879 and Local 2452, AFL-CIO, the exclusive representative of our employees, through its affiliates and agents, to attend the examination, when such representation has been requested by the employee.

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.

WE WILL order Social Security Administration's Office of the Inspector General to comply with the requirements of section 7114(a) (2) (B) when conducting investigatory examinations of employees pursuant to that section of the Statute.

Headquarters

Social Security Administration
Baltimore, Maryland

Date

Acting Commissioner
Social Security Administration

Office of the Inspector General
Santa Ana Field Office

Date

Special Agent-In-Charge

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, San Francisco Region, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 220, San Francisco, California 94103, telephone number is (415) 356-5000.

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that Social Security Administration, El Centro Branch Office, El Centro, California has violated the Federal Service Labor-Management Relations Statute (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 Social Security Administration to take part in an investigatory examination conducted pursuant to section 7114 (a) (2) (B) of the Statute without allowing the American Federation of Government Employees, Local 2879, AFL-CIO, the exclusive representative of our employees, through its affiliates and agents, to attend the examination, when such representation has been requested by the employee.

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.

Social Security Administration
El Centro Branch Office
El Centro, California

Date

Branch Manager

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, San Francisco Region, Federal Labor Relations Authority, whose address is: 901

Market Street, Suite 220, San Francisco, California 94103,
telephone number is (415) 356-5000.

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that Social Security Administration, Oxnard Branch Office, Oxnard, California has violated the Federal Service Labor-Management Relations Statute (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 Social Security Administration to take part in an investigatory examination conducted pursuant to section 7114 (a) (2) (B) of the Statute without allowing the American Federation of Government Employees, Local 2452, AFL-CIO, the exclusive representative of our employees, through its affiliates and agents, to attend the examination, when such representation has been requested by the employee.

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.

Social Security Administration
Oxnard Branch Office
Oxnard, California

Date

Branch Manager

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, San Francisco Region, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 220, San Francisco, California 94103, telephone number is (415) 356-5000.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, JR., Administrative Law Judge, in Case Nos. SF-CA-60704 and SF-CA-70031, were sent to the following parties in the manner indicated:

CERTIFIED MAIL, RETURN RECEIPT

CERTIFIED NO.

John R. Pannozzo, Esquire and
Christopher J. Pirrone, Esquire
Federal Labor Relations Authority
901 Market Street, Suite 220
San Francisco, CA 94103-1791

P 600 696 180

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American Federation of Government
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P 600 696 183

Andrea A. Palmer
American Federation of Government
Employees, Local 2452, AFL-CIO
1321 Post Avenue
Torrance, CA 90501

P 600 696 184

REGULAR MAIL:

National President
American Federation of Government

Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: December 17, 1997
Washington, DC