UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: August 31, 1998

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION
HEADQUARTERS, BALTIMORE, MARYLAND

Respondent

and

SOCIAL SECURITY ADMINISTRATION
OFFICE OF THE INSPECTOR GENERAL
SEATTLE, WASHINGTON

Respondent

and Case Nos. SF-CA-80172
SF-CA-80174

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3937, 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

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

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WASHINGTON, D.C. 20424-0001

SOCIAL SECURITY ADMINISTRATION HEADQUARTERS, BALTIMORE, MARYLAND Respondent and SOCIAL SECURITY ADMINISTRATION OFFICE OF THE INSPECTOR GENERAL SEATTLE, WASHINGTON Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3937, AFL-CIO Charging Party	Case Nos. SF-CA-80172 SF-CA-80174

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 **SEPTEMBER 30, 1998**, and addressed to:

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

JESSE ETELSON
Administrative Law Judge

Dated: August 31, 1998
Washington, DC

OALJ 98-36

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION HEADQUARTERS, BALTIMORE, MARYLAND Respondent and SOCIAL SECURITY ADMINISTRATION OFFICE OF THE INSPECTOR GENERAL SEATTLE, WASHINGTON Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3937, AFL-CIO Charging Party	Case Nos. SF-CA-80172 SF-CA-80174

Christopher J. Pirrone, Esquire
For the General Counsel

Eileen M.I. Houghton, Esquire
For Respondent Social Security Administration
Headquarters

Jonathan L. Lasher, Esquire
For Respondent Social Security Administration
Office of the Inspector General

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Nature of the Case

This is another in a series of cases in which an agency and its Office of the Inspector General have been charged

with violating the Federal Service Labor-Management Relations Statute (the Statute) when OIG Special Agents (1) examined employees who reasonably believed that the examination might

result in disciplinary action against them and (2) denied

the employees' requests to have a union representative present.

The consolidated complaint, as amended, alleges that both Respondent Social Security Administration, Office of the Inspector General, Seattle, Washington (OIG) *and* Respondent Social Security Administration, Headquarters, Baltimore, Maryland (SSA) failed to comply with section 7114 (a)(2)(B) of the Statute, and thereby committed an unfair labor practice in violation of sections 7116(a)(1) and (8) of the Statute, when OIG Special Agents, acting on behalf of Respondents OIG *and* SSA, examined an employee in connection with an investigation, denied her request that a union representative be present, and threatened the employee with discipline when she asserted her right to have a union representative present.

In its answer, as amended, OIG denies that it is an agency under section 7103(a)(3) of the Statute. OIG further denies that it is a component of SSA, that the named Special Agents were supervisors or management officials under the Statute, that the Special Agents were acting on behalf of SSA, and that OIG failed to comply with, or is subject to, section 7114(a)(2)(B) or sections 7116(a)(1) and (8). OIG also denies that the Special Agents threatened the employee as alleged. Further, OIG asserts a lack of information sufficient to formulate a belief as to the truth of certain jurisdictional allegations and technical matters. OIG also asserts as an affirmative defense that the Federal Labor Relations Authority (the Authority) "lacks appropriate jurisdiction" over OIG and that the complaint does not state a claim upon which relief may be granted.

SSA's answer, as amended, denies that OIG is an agency. SSA admits that OIG is a component of SSA but states that SSA is without authority to control the manner in which OIG conducts investigations and denies that the Special Agents were acting on behalf of SSA. SSA states that it is otherwise without sufficient information to form a belief as to the truth of the allegations concerning the status and actions of the Special Agents. The answer also denies having sufficient information as to the examination and the conduct of the Special Agents. SSA denies any violation on its or OIG's part.

Procedural Status

The parties entered into a "Stipulation of Fact," jointly waived their right to a hearing, and requested that an Administrative Law Judge decide these cases based on the stipulated facts and exhibits. The Chief Administrative Law

Judge granted the request, cancelled the previously scheduled hearing, and permitted briefs to be filed by July 22, 1998. The cases were assigned to me for decision. Counsel for the General Counsel and for Respondents SSA and OIG filed briefs.

Findings of Material Facts[1]

A. Relationships of the Parties

SSA is an agency under section 7103(a)(3) of the Statute. The American Federation of Government Employees, AFL-CIO (AFGE), is a labor organization that has been certified as the exclusive representative of an appropriate nationwide consolidated bargaining unit of certain employees of SSA. The Charging Party (the Union) is AFGE's agent for the purpose of representing employees in SSA's Seattle Region, which includes the Olympia Field Office.

SSA field employees in the Seattle Region report to Regional Commissioner Martin Baer. Baer is under the chain of command of the SSA Deputy Commissioner, Operations, who reports to the office of the Commissioner of Social Security at Headquarters, Baltimore, Maryland.

OIG is headed by the Inspector General (IG), who is appointed by the President and must be confirmed by the Senate, in accordance with the Inspector General Act of 1978, 5 U.S.C. app. §§ 1-12 (IG Act). SSA's IG reports to and is under the general supervision of the Commissioner of Social Security. However, the Commissioner may not prevent or prohibit the IG from initiating, carrying out, or completing any audit or investigation.

An Assistant Inspector General for Investigations heads the Office of Investigations, whose mission includes the following (Exh. 3):

> [C]onducts and coordinates investigative activity related to fraud, waste, abuse and mismanagement in SSA programs and operations. This includes wrongdoing by applicants, grantees, or contractors, or by SSA employees in the performance of their official duties. Serves as the OIG liaison to the Department of Justice on all matters relating to investiga-

[1] Stipulation of Fact 49 provides that the Stipulation of Fact, including all attached exhibits, constitutes the entire record and that the parties agree that no material issues of fact exist.

tions of SSA programs and personnel, and reports to the Attorney General when the OIG has reason to believe Federal criminal law has been violated.

OIG receives fraud referrals from many sources. Upon receipt of an allegation of fraud, it has discretion as to whether to initiate an investigation. OIG generally advises SSA when it has evidence of fraud in SSA programs, or evidence that any employee might be engaging in fraud or criminal activity. Once OIG initiates an investigation, it does not discuss the ongoing investigation with SSA, which has no authority to direct the manner in which the investigation is conducted. When there is evidence of criminal activity, OIG is required to notify the Department of Justice (DOJ), which makes a determination as to whether to seek criminal prosecution. Upon completion of any investigation involving an SSA employee, OIG provides a copy of its Report of Investigation to the appropriate SSA official for any action SSA deems appropriate. Once a Report of Investigation issues, OIG's role is complete; OIG does not recommend for or against administrative sanctions based on its findings.

A National Fraud Committee, comprised of SSA's top management, meets to ensure that SSA has a viable plan in place to address fraud and abuse. SSA also established Regional Fraud Committees, which became effective upon approval of the SSA Commissioner and the IG. These committees develop regional strategies to combat fraud, waste, and abuse. They are chaired by the respective OIG Special Agents-in-Charge and include the Regional Security Officer, an area director, a district or branch manager, and several other staff representatives.

SSA's 1998 Appropriation Requests to the appropriate House Committee includes a request of $44.5 million for OIG operating expenses, including staff salaries. Pursuant to 31 U.S.C. § 1105(a)(25), a separate "appropriation account" for OIG must be submitted separately from SSA's overall appropriation request. In support of its Fiscal Year 1998 request for OIG, SSA stated that OIG was charged with protecting the integrity of SSA's programs and used a combination of audits, investigations, and inspections to detect, prevent, and prosecute fraud, waste, and abuse in SSA's programs and operations.

OIG Special Agents Judy Harris and Brian Dostal were assigned to the Office of Investigations, Seattle Field Office. They were under the day-to-day supervision of the Assistant Special Agent-in-Charge (ASAC) for the OIG Seattle

Sub-Office. The ASAC reported to the Special Agent-in-Charge for the Santa Ana (California) Field Office, who, in turn, reported to SSA-OIG Headquarters in Baltimore, Maryland.

These Special Agents are law enforcement officers and are authorized by the IG Act to investigate criminal activity. They have the status of Special Deputy U.S. Marshalls and are authorized to carry firearms, make arrests, and execute arrest and search warrants pursuant to their positions with OIG. Their positions require the possession of expert knowledge of investigative techniques, principles, methods, and procedures, In addition, they must possess both (1)"mastery knowledge" of the laws of evidence and rules of criminal procedure and (2) skill in planning, coordinating, and conducting extensive and extremely complex investigations. They must also possess expert knowledge of Agency programs and operations, laws, policies, regulations, directives, procedures, and instruc-tions in order to plan, conduct, and coordinate investigations related to fraud, waste, abuse, and mismanagement in the Agency.

Harris, Dostal and other OIG Special Agents regularly work with DOJ and are required to report to DOJ whenever reasonable grounds exist to believe there has been a violation of federal criminal law. They also conduct and coordinate investigative activity relating to fraud, waste, abuse, and mismanagement, including wrongdoing by SSA employees in the performance of their official duties. Their bi-weekly Earnings and Leave Statements read, at the top of the document, "Social Security Administration Earnings and Leave Statement."

B. OIG's Policy on Union Representation at Employee Interviews

On August 1, 1996, OIG's Assistant IG for Investigations issued a Memorandum to all Office of Investigations Staff, on the subject of "Employee's Right to Union Representation During Office of Investigations Interviews." The memorandum (Exh. 7) states:

> 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 [section 7114(a)(2)(B) of the Statute]. 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 the OI.

Some time later, OIG issued a Special Agent's Handbook in which the same policy statement regarding union representation at employee interviews appears.

C. Examination by OIG Special Agents in this Case

1. Events leading to examination

Susan Cornell (Cornell) is a Claims Representatives in the Olympia Field Office and is in the bargaining unit represented by the Union. On or about December 1, 1996, a routine review of the Alphident/Detailed Earnings Query Review (DEQY) and Certification report of queries made by employees of the Olympia, Washington Field Office revealed that certain queries had been made under Cornell's personal identification number (PIN). There was no apparent business-related need for these queries, which concerned the work history of two employees of a local automobile dealership with which Cornell had had personal dealings. Olympia Field Office management referred the matter to the SSA Security and Internal Controls Branch (SICB) in the Office of the Regional Commissioner.

SICB conducted an audit of queries made under Cornell's PIN and uncovered questionable inquiries regarding records of her mother, father, and sister, as well as those regarding the automobile dealership employees. Based on the fact that the queries were made under Cornell's PIN and the queries involved her relatives, it was presumed that Cornell had made the queries. If the queries were unauthorized, Ms. Cornell was in possible violation of 18 U.S.C. § 1030, a criminal statute. The Director of SICB referred its findings to the Assistant Special Agent in Charge, OIG, Seattle, Washington. After reviewing the allegations forwarded to it by SSA, OIG determined that an investigation was warranted. It so notified SSA. SSA took no action on Cornell's alleged misconduct while the matter was pending with OIG. During the OIG investigation, from June 9, 1997 to November 20, 1997, there were no discussions between OIG and SSA with respect to the substance of the investigation.

On September 9, 1997, OIG Special Agents Gordon Meyer and Judy Harris met with Cornell at her SSA office in Olympia, Washington. They told Cornell that she was the subject of a criminal investigation pertaining to computer queries Cornell had made in her capacity as a claims representative. Harris read Cornell the Federal Employee Warning Form.

Cornell stated that since she was the subject of an investigation, she wanted to speak with her union representative before proceeding. The OIG agents requested that Cornell contact them at a later date, after she spoke with her union representative, to answer more questions.

2. The examination and its results

OIG agents and Cornell met again on November 4, 1997, at the office of Cornell's attorney. Present at the beginning of the meeting were Special Agents Dostal and Harris, Cornell, Cornell's Union representative, Cornell's husband, and Cornell's attorney. Agents Dostal and Harris introduced themselves and showed Cornell their OIG identification. John Mack, Executive Vice President of the Union, was introduced to the OIG agents as Cornell's union representative.

The OIG agents stated that the purpose of the meeting was to interview Cornell to determine if she had made illegal computer queries while working as a claims representative. The OIG agents stated that they would not conduct the interview with Cornell's Union representative present. Agent Harris stated that the U.S. Attorney's office had declined to prosecute Cornell. Harris showed Cornell the Declination of Prosecution for an alleged violation of "18 USC 1030-A-Unauthorized computer queries." The reason given by the Assistant U.S. Attorney for declining prosecution was: "Minimal Federal interest-lack of use of material information that Cornell obtained" (Exh. 17).

Cornell told the OIG agents that she believed that the examination might result in disciplinary action. The OIG agents did not refute this. They then produced the standard *Kalkines* form. This form states that the employee is going to be asked a number of specific questions concerning the performance of her official duties, that she has a duty to reply truthfully to the questions, and that agency disciplinary proceedings resulting in her discharge may be initiated as a result of her answers. The *Kalkines* form further states that the employee is subject to dismissal if she refuses to answer or fails to respond truthfully and fully to any questions.

Cornell requested that her union representative remain present throughout the OIG interviews. Mack stated that he was Cornell's union representative and had a right to be present during the interview since Cornell had requested union representation. Mack stated that he had a right to be

present according to *NASA* and the 11th Circuit, referring to *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), *affirmed sub nom. FLRA v. National Aeronautics and Space Administration, Washington D.C. and National Aeronautics and Space Administration, Office of the Inspector General, Washington, D.C.*, 120 F.3d 1208 (11th Cir. 1997). Mack also stated that if *Kalkines* rights applied, then administrative sanctions were possible, and he had a right to be present as a union representative.

Harris and Dostal denied Cornell's request for union representation and insisted on proceeding with the examination without the union representative present. If Cornell refused, the OIG agents stated, they would leave and report to SSA officials that Cornell refused to cooperate with their investigation. The OIG agents admitted that disciplinary action, including possible removal, could then result.

Based on the OIG agents' statements, their refusal to proceed with Mack present, and the potential administrative sanctions to which Cornell could be subject if she refused to proceed, Mack left "under protest." After Mack had left the room under protest, the OIG agents read Cornell her "*Kalkines* rights" and Harris, Dostal and Cornell signed the *Kalkines* form. The OIG agents proceeded to question Cornell for about an hour regarding the computer queries, in the presence of her attorney and her husband.

It was reasonable for Cornell to believe that the November 4, 1997 investigatory interview conducted by Dostal and Harris could result in disciplinary action.

At the conclusion of the examination, the OIG agents stated that SSA would let Cornell know if any discipline would take place as a result of the information gained during the interview. In or about December 1997, OIG provided the SSA Seattle Regional Commissioner with the OIG Report of Investigation. The Report of Investigation included as an exhibit a Report of Interview based on the November 4, 1997 interview with Cornell that is the subject of this case. The Report of Interview states that Cornell admitted making

improper computer inquiries concerning accounts of her

mother, father, and sister. OIG advised SSA that no criminal action was being pursued against Cornell because the Assistant U.S. Attorney had declined to prosecute her. OIG made no recommendations to SSA regarding whether administrative discipline should or should not be taken against Cornell.

After OIG advised SSA that no criminal action was being pursued against Cornell, SSA Olympia Field Office management decided to question Cornell regarding the queries uncovered by the SICB audit and which had been addressed in the OIG Report of Investigation. On February 5, 1998 James Burkert, SSA Olympia Field Office Assistant Manager, met with Cornell and Mack to question Cornell about the same computer queries which OIG had investigated. Cornell requested and was permitted to have a union representative (Mack) present during this meeting.

On February 18, 1998, Burkert proposed to suspend Cornell for 14 days for failure to follow agency rules, regulations, and policies regarding the use of the SSA system of records for other than official business. The Union responded to this proposal. On April 1, 1998, Olympia Field Office Manager Bill Maurmann issued a decision to suspend Cornell for 14 days. Cornell filed a grievance over the decision but served her 14 day suspension. As a result of a grievance settlement, the suspension was later reduced from 14 to 7 days. OIG was not involved in the proposal or the decision to suspend, or in the grievance process.

Discussion and Conclusions

A. Applicability of the Statute to Cornell's Interview

Section 7116(a)(8) of the Statute makes it an unfair labor practice for an agency "to otherwise fail or refuse to comply with any provision of this chapter." The provision with which SSA and OIG are alleged to have failed to comply is section 7114(a)(2)(B), which provides that an exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at:

> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if-
>
> (i) the employee reasonably believes that the examination

> may result in disciplinary action against the employee; and
>
> (ii) the employee requests representation.

The fundamental issue presented here is whether the OIG Special Agents who conducted an examination of employee Cornell on November 4, 1997, were acting as representatives of SSA, the agency that was the employer of the appropriate unit in which Cornell was employed.[2] As the Authority has held, in its most recent statement on this issue:

> (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.

NASA, 50 FLRA at 614. While parts (1) and (2) of this statement are self-explanatory, part (3) is the Authority's response to the position of the United States Court of Appeals for the District of Columbia Circuit (and perhaps others) to the effect that the purposes of the IG Act, most significantly the creation of an entity independent from other agency officials and (in the court's view) from the Authority itself, would be compromised if section 7114(a)(2)(B) of the Statute were applicable to examinations conducted by Inspectors General.

For the reasons it set forth in *NASA*, at 616-19, the Authority determined that nothing in, or implied by, the IG Act warrants an exception from the application of section 7114(a)(2)(B). The Authority thus found that the investigator who represented the parent agency's separate investigative component in its office of inspector general was a

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[2] The General Counsel and OIG agree that this is the *only* issue as to merits of the allegation that OIG violated the Statute. As discussed below, SSA has raised additional issues.

"representative of the agency" under section 7114(a)(2)(B).

Id. at 612, 620. The principles announced in *NASA* govern the instant case, at least with respect to the "representative of the agency" issue.

SSA argues that the Authority's reasoning in *NASA* does not address the question of how an IG agent can be a "representative of the agency" if the agency head has no authority to prohibit the agent from conducting the interview or to direct the agent either to permit or to prohibit union representatives from attending interviews as representatives of bargaining unit employees. Irrespective of the quality of the Authority's reasoning, of course, I am bound by its conclusion. I note, however, that the Authority's answer to this argument may be implied in (1) its observation that the results of an OIG investigation may be used by other components of the agency to support administrative or disciplinary actions taken against unit employees and (2) its suggestion that the relationship between different components of the same agency is analogous to the relationship of different employers in the private sector between whom an "intimate business character" exists and who share a "community of interests." *Id.* at 616, 620, n.16. In the instant case, in fact, it is evident that at least one purpose of the examination in question was to provide SSA management with information that it could use to determine whether to proceed with administrative steps leading to discipline.

Although SSA admits that OIG is a component of SSA, OIG denies it. However, under controlling Authority precedent, I cannot regard this as more than an exercise in semantics. The Authority regards the agency that employs an IG as his or her "parent agency," notwithstanding the degree of independence prescribed by the IG Act. *NASA*, 50 FLRA at 615, 617. Thus, the Authority's observations about the relationship between agency components and about the use of OIG investigation results by other agency components are applicable here as well. The OIG Special Agents who examined Cornell on November 4, 1997, were, therefore, acting as representatives of SSA for section 7114(a)(2)(B) purposes.

The other elements of a section 7114(a)(2)(B) examination were present also: the examination was conducted in connec-tion with an investigation; Cornell

reasonably believed that the examination might result in discipline[3]; and she requested union representation.

SSA contends that Cornell chose to continue with the examination without a union representative after the OIG Special Agents exercised an agency's option to offer the employee the choice of (1) meeting with the investigator without a union representative or (2) not meeting with the investigator and having the investigator report the facts without the benefit of the employee's input. The stipulated facts do not support such an assertion. Rather, the choices presented to Cornell were (1) to proceed without a union representative or (2) to be reported as having refused to cooperate with the investigation. The second option carried, by itself, the risk of "disciplinary action" or "administra-tive sanctions" (Stipulations 38 and 39). In these circum-stances, Cornell's election to proceed did not constitute a voluntary waiver of the right to union representation, and the continuation of the examination after refusing her request for such representation violated the Statute. *See U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas*, 42 FLRA 834 (1991).

SSA also argues to the effect that the presence of Cornell's attorney and of her husband during the examination, and her opportunity to discuss the matter with her union representative during the two months between her September meeting with OIG Special Agents and the November examination, provided a legally cognizable substitute for the rights provided by section 7114(a)(2)(B). They did not. Upon an employee's request in an examination covered by section 7114(a)(2)(B), the union itself has a right to be represented at the examination. *U.S. Immigration and Naturalization Service, New York District Office, New York, New York*, 46 FLRA 1210, 1221 (1993), *rev. denied sub nom. American Federation of Government Employees, Local 1917 v. FLRA*, 22 F.3d 1184 (D.C. Cir. 1994)(without opinion).

B. Responsibility of OIG and SSA

Its Special Agents having failed to comply with section 7114(a)(2)(B), OIG violated sections 7116(a)(1) and (8) of

[3] To establish this element, it is necessary only to show, as has been stipulated here, that it was reasonable for the employee to so believe. It is unnecessary to inquire into the employee's subjective belief. *Internal Revenue Service*, 4 FLRA 237, 251-52 (1980), cited with approval in *Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina*, 32 FLRA 222, 229 (1988).

the Statute. SSA also violated these provisions of the Statute by virtue of its relationship with OIG and with its investigation. As SSA acknowledges, the Authority held, in *NASA*, that NASA, HQ was responsible for the denial of 7114 (a)(2)(B) rights by the agents of NASA, OIG. The Authority explained that:

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

50 FLRA at 621. SSA argues, however, that the instant case is distinguishable.

SSA contends that while, in *NASA*, the OIG agent ordered the employee to answer questions or face dismissal, no such evidence suggesting the agents' "representative of the agency" status can be found here. I find no meaningful distinction. The OIG agents informed Cornell that her failure to proceed without a union representative would be regarded as a failure to cooperate with the investigation and would subject her to unspecified disciplinary action.

SSA argues further that this cases is different from *NASA* because enough information had been uncovered before the OIG investigation to justify disciplinary action against Cornell, and because there is no factual basis for concluding that SSA would have disciplined her solely for refusing to meet with the OIG without a union representative. These alleged distinctions are also unpersuasive. First, speculations about how SSA might have proceeded absent an OIG investigation are manifestly irrelevant to the responsibilities of the parties with respect to the conduct of the OIG investigation that did occur. Second, the question of whether discipline would actually have resulted from Cornell's refusal cannot be decisive. Like the employee in *NASA*, Cornell was expressly placed at risk of discipline for non-cooperation. She was

advised of that risk by OIG agents who were sent to meet with her, originally at her workplace, by virtue of a series of actions originating with her field office management. These SSA-created trappings of the agents' authority to speak for SSA management make it unnecessary to attempt the formidable task of determining the credibility or the magnitude of that risk.

Finally, SSA relies on the fact that there were no discussions between OIG and SSA, during the OIG investigation, with respect to the substance of the investigation. This fact, however, does not distinguish the instant case from *NASA*, where the Authority placed decisive weight on OIG's sharing of its investigative information with other agency components and on the fact that such information was "a basis" for disciplinary action. Here, agency management received the OIG Report of Investigation and followed up by questioning Cornell about subjects covered by the OIG investigation. This questioning led to discipline. I conclude that the Authority intended that the phrase, "a basis upon which disciplinary action is taken," be read broadly enough to encompass SSA management's use of OIG's investigative information when it disciplined Cornell, even if management investigated further to confirm, augment, or otherwise test the information it received from OIG.

Appropriate Remedies

Counsel for the General Counsel has requested certain affirmative remedies similar to some of those requested in Case Nos. SF-CA-60704 and SF-CA-70031, in which SSA and a different geographical division of OIG were respondents. Judge Nash, in his recommended order in those cases, included those recommended remedies. They are, in brief, that SSA order OIG to rescind the section of its handbook that denies union representation during investigatory examinations, that SSA order OIG to comply with section 7114 (a)(2)(B), and that SSA post an appropriate notice nationwide. Neither SSA nor OIG has submitted arguments here with respect to these requested remedies, but I have taken official notice of their exceptions to Judge Nash's Decision and of their arguments against these recommended remedies.

With respect to the issue of requiring SSA to order OIG to take certain action, the requested remedies are consistent with the Authority's remedial order in *NASA*, as enforced by the United States Court of Appeals for the Eleventh Circuit. 120 F.3d at 1217. It would be inappropriate, therefore, for me to reject this approach. Insofar as the requested remedy in the instant case, like

that in Cases Nos. SF-CA-60704 and 70031, specifically orders rescission of the offending handbook section (no handbook having been mentioned in *NASA*), I agree with Judge Nash that ordering such a rescission would effectuate the purposes and policies of the Statute.

SSA and OIG excepted to Judge Nash's recommended order with respect to the nationwide posting of the remedial notice. However, a nationwide posting at all locations where employees in the bargaining unit are located is presumptively appro-priate. *See U.S. Department of Justice, Office of the Inspector General, Washington, D.C. and United States Immigration and Naturalization Service, El Paso, Texas*, 47 FLRA 1254, 1262-63 (1993). Moreover, the OIG policy regarding exclusion of union representatives from Office of Investigation interviews was a nationwide policy, and has at least potentially affected SSA employees nationwide. Nor has the Authority refrained from ordering a nationwide posting on the ground that, as SSA and OIG have noted, such postings would occur within the geographical jurisdictions of United States Courts of Appeals which have not passed on, or which have rejected, the Authority's application of section 7114(a)(2)(B) to OIG examinations.

For all of these reasons, I recommend that the Authority issue the following order:

ORDER

Pursuant to section 2423.41(c) of the Authority's 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 (SSA) to take part in investigatory examinations conducted pursuant to section 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute) without allowing the American Federation of Government Employees, AFL-CIO (AFGE), 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 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 SSA's Office of the Inspector General (OIG) 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 SSA's OIG to rescind Section 10-75 of the OIG, 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 examina-tions conducted by the SSA's OIG.

(c) Post at all locations within SSA where bargaining unit employees represented by AFGE are located copies of the attached notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Acting Commissioner of SSA and the Special Agent-In-Charge of OIG's Santa Ana, California, 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 2423.41(e) 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, Seattle, Washington shall:

1. Cease and Desist from:

(a) Requiring bargaining unit employees of the SSA to take part in investigatory examinations conducted pursuant to section 7114(a)(2)(B) of the Statute without allowing AFGE, 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 SSA Headquarters, it shall be signed by the Special Agent-In-Charge of OIG's Santa Ana, California, Field Office.

(b) Pursuant to section 2423.41(e) 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, D.C., August 31, 1998

_____
JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that Social Security Administration Headquarters, Baltimore, Maryland and Social Security Administration, Office of the Inspector General, Seattle, Washington have violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT require any bargaining unit employee of the Social Security Administration (SSA) 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, AFL-CIO (AFGE), 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.

SSA WILL order its 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.

Date:_____ By:
_____
(Signature) Acting Commissioner
Social Security
Administration Headquarters,
Baltimore, Maryland

Date:_____ By:
_____
(Signature) Special Agent-In-Charge
Office of the Inspector General,
Santa Ana, California Field Office

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, and whose telephone number is (415) 356-5000.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON , Administrative Law Judge, in Case Nos. SF-CA-80172 and SF-CA-80174, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Christopher J. Pirrone, Esq.
Counsel for the General Counsel
Federal Labor Relations Authority
901 Market Street, Suite 220
San Francisco, CA 94103
Certified Mail No. P 168 060 088

Eileen M.I. Houghton, Esq.
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Jonathan L. Lasher, Esq.
Office of the Counsel to the
Inspector General
Social Security Administration
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Baltimore, MD 21235
Certified Mail No. P 168 060 090

REGULAR MAIL:

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: August 31, 1998
Washington, DC