UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

OGDEN AIR LOGISTICS CENTER, HILL AIR FORCE BASE, UTAH and AIR FORCE LOGISTICS COMMAND WRIGHT-PATTERSON AIR FORCE BASE, OHIO Respondents and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO LOCAL 1592, Charging Party	Case No. 7-CA-80444

Matthew L. Jarvinen, Esq.
For the General Counsel

Clare A. Jones, Esq.
For the Respondents

Mr. Juan Pinedo
Mr. Tom Montez
For the Charging Party

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. section 7101 et seq., 92 Stat. 1191 (herein referred to as the Statute) and the Rules and Regulations of the Federal Labor Relations Authority (herein referred to as the Authority) 5 C.F.R. Chapter XIV section 2410 et seq.

On April 22, 1988 the American Federation of Government Employees, AFL-CIO, Local 1592 (herein referred to as the Union) filed an unfair labor practice charge which it first amended on December 20, 1988, against Ogden Air Logistics Center, Hill Air Force Base, Utah and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio (herein called Respondent or Respondents).[1/] Based on the charge, the Regional Director of Region VII issued a Complaint and Notice of Hearing on June 13, 1989 alleging that Respondent violated section 7116(a)(1) and (8) of the Statute when Respondent failed and refused to comply with section 7114(a)(2)(A) of the Statute by not giving the Union the opportunity to be present during the course of a formal discussion without notifying the Union and allowing it the opportunity to be present at the formal discussion. The Complaint also alleged an independent violation of section 7116(a)(1) of the Statute based on the same conduct as above.

A hearing was held before undersigned in Ogden Utah. At the request of the General Counsel, Daniel Jacksch was deposed on September 29, 1989. All parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Timely post hearing briefs were filed and have been duly considered.

Upon consideration of the entire record in this case, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendations.

1/ The Authority has long held that upper level management would be held responsible for requiring management at the level of exclusive recognition to follow its directions. See for example, Department of Health and Human Services, Social Security Administration, Region VI and Department of Health and Human Services, Social Security Administration, Galveston, Texas District, 10 FLRA 26 (1982). Here there is no evidence that the Air Force Logistics Command played any part in the events giving rise the violations herein, nor is there any contention that the actions were not those of Ogden Air Logistics Center. See also, Ogden Air Logistics Center, 7-CA-80212, OALJ 89-123 (Devaney, 9/20/89). Accordingly, the portions of the Complaint alleging violations by Respondent Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, are hereby dismissed.

Findings of Fact

1. The Union has been the exclusive representative of all unit employees at Respondent Ogden's Hill Air Force Base, at all times material herein. At all times material herein, the Union has been an affiliate and agent of the American Federation of Government Employees, AFL-CIO, Council 214 (Council 214), which holds exclusive recognition with a nationwide unit of Air Force Logistics Command employees. Council 214 and Respondent AFLC are parties to a collective bargaining agreement applicable to Respondents' unit employees.

2. Jimmy Del Gonzales a bargaining unit employee was issued a 14-day suspension in 1987 for alleged involvement in the theft of five gallons of paint on July 24, 1987. The Union invoked arbitration of its grievance challenging Gonzales' suspension by letter dated December 17, 1987 addressed to the Federal Mediation and Conciliation Service (FMCS). Thereafter, on December 17, 1987, letters to the FMCS designated Tom Montez as the Union's representative for purposes of the arbitration. Montez, was also designated as the Union's arbitration representative on a form dated January 11, 1988.2/ At the time Montez was designated as the Union's representative for purposes of the Gonzales arbitration, Squires Poelman, employed by Hill AFB as an Employment Relations Specialist in the Personnel Office. Poelman served as management's representative. Montez met with Poelman to strike for arbitrators, and the parties notified the FMCS of their selection of Herbert Oestreich as the arbitrator for Gonzales' hearing by letter dated January 27. Montez learned that Lt. Col. Gerald Shea from the Office of the Staff Judge Advocate (SJA), would represent management at the Gonzales arbitration when he received a letter from Shea dated February 24 listing management's witnesses for the arbitration hearing. Montez in return forwarded the Union's witness list to Shea by letter dated March 7. This witness list included Max Romero, a unit employee then employed by Respondent as a Sheet Metal Mechanic. Romero's name had been given to Montez by the grievant, Gonzales, as an employee with whom Gonzales had gone to lunch on the date of the alleged paint theft. Montez also confirmed April 12 as the date for the arbitration hearing by letter dated March 7 which was sent to the arbitrator with a copy to Poelman.

2/ All dates hereafter are 1988, unless otherwise noted.

3. On March 9, Detachment 1404 of the Air Force's Office of Special Investigations (OSI) received a call from Poelman, who indicated he was calling at the request of Shea. Poelman informed the OSI of a possible bribery situation between Gonzales and Gregory Child concerning the alleged paint theft in July 1987.3/ Based on Poelman's phone call, the OSI initiated an investigation of Gonzales to determine whether Gonzales had attempted bribery or had solicited a false official statement. Daniel Jacksch, employed at all material times as an OSI Special Agent at Respondent's facility, subsequently assumed responsibility for the Gonzales investigation. Jacksch reluctantly admitted that the Gonzales investigation was initiated at the request of Poelman and Shea.

4. The OSI conducts certain criminal, security and intelligence investigations within the Air Force. OSI Detachment 1404 is a tenant activity at Respondent's facility, but reports to the OSI District Office in Denver. The OSI provides investigative services to the Base Commander and conducts investigations at the request of the Base Commander if the allegations meet certain investigative criteria. OSI investigations are usually initiated when the OSI receives allegations of criminal conduct, and such investigations are generally coordinated with the SJA at the Base. Accordingly, the OSI has frequent dealings with the SJA. The OSI work product is a Report of Investigation (ROI) drafted by the Special Agent upon completion of the investigation. The OSI routinely provides copies of its ROIs to the Base Commander (also known as the Action Commander) and to the SJA.

5. Agent Jacksch initially testified that he could not recall the date when he first became personally involved in the Gonzales investigation. However, Jacksch's deposition reveals that he first became involved in the investigation when he requested that two OSI reservists furnish him with certain information by March 11. Jacksch's request in this regard was in writing, and the reservists' response was

---

3/ Child served a suspension based on his involvement in the paint theft. Child and Gonzales apparently stole the paint for Child's personal use. After being caught Gonzales it seems offered Child $500.00 or about half the pay from his proposed 14 day suspension if Child would sign a statement exonerating him.

returned to Jacksch on March 11. That response identified Montez as the Union official handling the Gonzales investigation. Jacksch indicated he did not know why Montez' name appeared on the reservists' response other than to state that OSI always obtains information regarding who is the Union's local representative. Jacksch denied that Montez' name appeared because Montez was known to be representing Gonzales.

6. At the time Jacksch first became involved in the Gonzales investigation, he reviewed all materials pertaining to the investigation and learned that Gonzales' suspension for involvement in the paint theft was pending an arbitration hearing.4/ Although Jacksch testified at the hearing that he did not know who represented management at the April 12 arbitration hearing, Jacksch's deposition disclosed not only that he coordinated his "investigation" of Gonzales closely with Shea and Poelman, but that Shea specifically requested on April 6 that Jacksch make himself available to testify at the April arbitration hearing.

7. Jacksch testified that his initial contact with Shea occurred on March 14. Shea advised Jacksch at that time that he had coordinated with Poelman about removing Gonzales from employment at Hill AFB. Shea further instructed Jacksch to obtain statements from two witnesses to prove the case against Gonzales to remove him. Jacksch recalled Shea stating that the two witness statements would be used to support the removal of Gonzales, but said he could not recall when Shea told this to him. At the time, Jacksch knew that Child would be one of the witnesses. Jacksch denied that his March 14 meeting with Shea had anything to do with the arbitration hearing. Rather, according to Jacksch, the March 14 briefing by Shea was to discuss the importance of being able to show not only that Gonzales paid Child for making a statement, but also that the statement was untrue. Jacksch could not recall how long he met with Shea on March 14.

8. During the hearing, Jacksch testified that Romero's name surfaced during the OSI's investigation of Gonzales when Child indicated that Romero had also been contacted by Gonzales. Although Jacksch testified that such information

---

4/ Jacksch indicated that it was not until March 28 when he interviewed Child that he learned that the Gonzales arbitration hearing was scheduled for April 12.

should be reflected in the ROI which he prepared, Jacksch admitted that nothing in his ROI reflected that it was Child who told him Romero had also been contacted. During the September 29, 1989 deposition, Jacksch conceded further that the first time Romero's name came up was when he received a call from Poelman on March 21 to the effect that Gonzales may have attempted to bribe Romero. Furthermore, Jacksch repeatedly during the hearing, denied that any management official or supervisor contacted him to suggest that he interview Romero. During the disposition, however, Jacksch acknowledged that it was Poelman's call on March 21 which led him to contact Romero.

9. On March 24, Jacksch further coordinated with Shea, at which time Shea discussed with Jacksch the need for a statement from Romero concerning Gonzales seeking a false alibi. Jacksch denied that the March 24 meeting with Shea dealt in any way with the arbitration hearing or that he and Shea even discussed the arbitration. According to Jacksch, that meeting was solely to discuss the logistics and techniques of the Gonzales investigation. Apparently it was agreed that Gonzales was not to be interviewed. Jacksch denied, however, that one of the reasons not to interview Gonzales was to avoid possible representation by the Union. In this regard, Jacksch first explained that it was essential not to interview the subject in a bribery case. Jacksch indicated that an interview of Gonzales was to be avoided because of the possibility that the Union had instructed Gonzales to make false statements. When Jacksch was questioned about an entry in his notes for March 28 that "No [subject] interview because potential for Labor Union Rep's involvement," Jacksch explained that he did not want the Union to know that Gonzales was under investigation because of possible Union complicity and because interviewing Gonzales would involve notifying the Union. Jacksch's final explanation for not interviewing Gonzales was a professed responsibility to maintain the integrity of the investigation and to maintain the reputations of witnesses and subjects of OSI investigations.

10. Sometime around March 28, Jacksch obtained a second OSI statement from Child in which Child indicated that he had been offered money by Gonzales if he signed a statement exonerating Gonzales from any involvement in the theft of paint. Also on March 28 Jacksch made his first attempt to contact Romero about obtaining a statement, but Romero was unavailable at the time. Jacksch briefed two of his superiors in the OSI on the same day and discovered that it was the SJA's plan to use the investigation of Gonzales for

impeachment of Gonzales during the scheduled arbitration hearing concerning the July 1987 theft incident, and then to fire Gonzales. Jacksch acknowledged that the source of the "SJA plan" was Shea. The line reference to the "SJA plan" is contained in his notes regarding the March 28 briefing of his superiors. Jacksch explained the absence of any previous reference to Shea's "SJA plan" by stating that he would not write it down if it were not relevant to the case. However, Jacksch was unable to reconcile such testimony with the obvious reference to the "SJA plan" in his notes for the March 28 briefing. Specifically, Jacksch testified that it was Shea's plan to use both Romero's and Child's statements at the April 12 arbitration hearing to impeach Gonzales, if that became necessary. As previously noted, Jacksch denied that he and Shea discussed the arbitration at either the March 14 or March 24 briefings. At the same time, however, Jacksch acknowledged that sometime prior to March 28, Shea told him of the plan to use the OSI statements to impeach Gonzales at the April 12 arbitration.

11. Subsequently, on April 4 Jacksch contacted Romero's supervisor, Ken Folkman to arrange a meeting with Romero. Romero first learned that Jacksch wanted to speak to him when he received a note from Folkman upon his return from Air Force Reserve duty. Romero's initial reaction when he learned the OSI wanted to talk to him was to be upset and confused because he did not know what the OSI wanted to talk to him about. Romero tried immediately to return Jacksch's call on April 4, but Jacksch was not in. When Romero did reach Jacksch on April 5, Jacksch said he had some questions for Romero but did not otherwise indicate why he wanted to talk to Romero. Jacksch then suggested that they meet in his office. When Romero said he had no transportation, Jacksch arranged to pick Romero up at work. During the ride to Jacksch's office, Romero asked if their meeting pertained to the incident involving Child and Gonzales. Jacksch responded that it did, but that they would discuss it when they arrived at his office.

12. Upon arrival at the OSI building on April 5, Jacksch and Romero proceeded through security and to Jacksch's office, a small room estimated to be about eight by eight feet in dimension. Once in Jacksch's office, Jacksch shut the door and they both sat down. Jacksch proceeded to ask Romero to describe in his own words what happened. Although Jacksch did not indicate Romero was under investigation, Jacksch did ask if Romero was involved in the paint theft in July 1987. Romero denied any

involvement. Jacksch then asked where and with whom Romero went to lunch on the day in question, and Romero indicated he had gone to lunch with Gonzales and Child to Kentucky Fried Chicken. In response to Jacksch's question whether they had discussed the paint theft during lunch, Romero said they had not, but had instead discussed a detail position. Romero further explained that upon their return from lunch, Romero had seen the Security Police by Child's vehicle, but that when he asked Child what was going on, Child said he did not know. Jacksch then asked whether Romero had signed any papers or been given any money or offered a bribe with regard to the paint theft. Romero responded that he had not, and that he did not know what was going on. Somewhere around the middle of the meeting, Romero mentioned to Jacksch that he had received a call from Gonzales in early March concerning testifying at the arbitration hearing on April 12. Romero explained to Jacksch that he told Gonzales he was unsure whether he would be back in time, but told Gonzales that he would be a witness on April 12 if he was back from reserve duty. Romero also volunteered to Jacksch that he had seen a rough draft of a document Gonzales planned to have typed up for Child to sign. Jacksch asked whether Romero was aware there was paint in Child's car, but Romero responded that he knew nothing about it. Jacksch then warned Romero that it was a serious offense if he had signed any papers, taken any money or been bribed. Romero said he had done nothing of the sort. When Jacksch had finished his questioning, he told Romero that if he heard from Gonzales, was asked to sign any papers, was offered a bribe, or if any thing out of the ordinary happened, Romero should contact Jacksch.[5/] Jacksch then gave Romero one of his cards and took Romero back to work at about 3:00 p.m. The meeting lasted about 2 to 2 1/2 hours. Romero estimated that nearly 2 hours were spent covering the events of July 24, 1987,[6/] while only a small

---

5/ Jacksch agreed he told Romero to let him know if Gonzales contacted Romero or asked him to sign anything or offered a bribe, but did not believe he gave Romero these instructions until after Romero had signed a sworn statement at a subsequent meeting on April 6.

6/ Jacksch acknowledged spending a considerable amount of time asking Romero what he did on the day in question in July 1987 even though the theft incident was not a matter under investigation. The July 1987 incident was presumably of interest to the OSI to establish an element of the offense of soliciting a false official statement.

portion of the meeting was spent on whether Romero had been shown any papers by Gonzales or had been asked to sign anything. When asked if he was required to attend the interview in Jacksch's office, Romero testified that one does not say no to the OSI, so he agreed to cooperate. In this regard, although Jacksch testified he followed his routine procedure of asking if the person was willing to talk to the OSI when he questioned Romero, Romero testified that Jacksch did not advise him that his participation in the interview was voluntary. Nor did Jacksch advise Romero that no reprisal would be taken against him if he refused to answer Jacksch's questions. Jacksch did not at any time notify the Union that he planned to question Romero about the events of July 24, 1987 at issue in the Gonzales arbitration hearing, not even after Romero advised Jacksch that he had agreed to Gonzales' request that he testify at the arbitration hearing on April 12. Jacksch had prepared written questions to ask Romero prior to their first meeting on April 5 and referred to these questions during the meeting. Jacksch also took notes during the April 5 meeting.

13. On the same evening that Romero met with Jacksch, April 5, Gonzales visited Romero's residence. Gonzales showed Romero a letter pertaining to the July 1987 incident and asked Romero to read it. When Romero read the letter, he noted several inaccuracies. The inaccuracies apparently concerned where, when, how, and with whom Gonzales had gone to lunch on the day in question. Romero told Gonzales the letter was untrue. Meanwhile, Gonzales did not ask Romero to sign anything, but said the letter was just to refresh his memory. Gonzales then folded the letter and put it back in his pocket. Romero asked Gonzales whether he had given anyone any money or had asked anyone to sign any papers. Gonzales said he had not, but said that if he could settle the matter with Child (apparently referring to a letter Gonzales had drafted for Child to sign) and if he got reimbursed, he would pay Child. It is clear from the record that the offer of payment to Child was the "meat" of the bribery charge against Gonzales.

14. When Romero returned to work on April 6 he called Jacksch to let him know about the previous evening's meeting with Gonzales. Romero returned to Jacksch's office on that same day. This second meeting between the two lasted some one to two hours. During this meeting Romero discussed only what had occurred when Gonzales visited with him on the previous evening of April 5. Jacksch again took notes. Jacksch as already noted, prepared a sworn statement for

Romero's signature based on his notes regarding information provided by Romero during the two interviews or meetings. Although boiler-plate language on Romero's statement recites that Romero provided the statement voluntarily and without coercion, Romero testified that he felt edgy when Jacksch said he could get into serious trouble if he signed any papers or if he had taken any money as a bribe and that he felt compelled to cooperate with the OSI to the extent he could.

15. Later during the day of April 6, Jacksch met with Shea and Poelman in order to brief them regarding the entire OSI investigation of Gonzales. Although Jacksch did not complete his ROI in the Gonzales matter until April 11, Jacksch furnished copies of Romero's and Child's OSI statements to Shea during this briefing. When Jacksch gave the statements to Shea, Shea said they were just what he wanted.7/ Shea also requested that Jacksch be available to testify at the Gonzales arbitration hearing, if necessary. Jacksch stated that he always coordinates OSI investigations with the SJA (and with Shea) to discuss the elements of criminal offenses under investigation and to ensure the OSI investigation is sufficient for Shea's purposes. At the same time, Jacksch denied that his meetings with Shea dealt with preparation for the arbitration hearing. In fact, Jacksch denied that he had anything to do with the arbitration case.

16. As earlier noted, Jacksch completed his ROI concerning the Gonzales investigation on April 11. His report was forwarded to the Security Police; and the Security Police, in turn, forwarded copies of the ROI to the Base Commander and to the SJA by transmittal memorandum dated April 12.

17. As scheduled, the Gonzales arbitration hearing was held on April 12. Management was represented by Shea and Poelman, while the Union was represented by Montez and its attorney, Daniel Minahan. Although Romero had been listed as a Union witness, Romero was called to testify at the

---

7/ While Jacksch knew that Shea planned to use the statements at the arbitration hearing on April 12 to impeach Gonzales, Jacksch explained Shea's statement (that the statements were just what he wanted) in terms of the SJA's need for the statements to prove the bribery allegation against Gonzales.

hearing by Shea. Shea's questioning of Romero closely tracked the matters contained in his OSI statement. Shea also introduced Romero's OSI statement into the record as Agency Exhibit 6. Although Jacksch showed up at the arbitration hearing, he did not testify.

Conclusions

This case involves an issue of whether Respondent violated section 7116(a)(1) and (8) of the Statute when an OSI agent conducted a formal discussion within the meaning of section 7114(a)(2)(A) by conducting a pre-arbitration interview of a witness without providing the union an opportunity to be represented. Also involved is the question of whether the interview of the OSI agent constituted a coercive interview of a union arbitration witness.

A. Whether Respondent Violated Section 7116(a)(1) And (8) Of The Statute By Conducting A Formal Discussion Within The Meaning Of Section 7114(a)(2)(A) Without Providing The Union With An Opportunity To Be Represented.

The General Counsel contends that the meeting in this matter contained all of the elements of a formal discussion; that OSI special agent Jacksch represented Respondent; and that Respondent was obligated to afford the Union an opportunity to be represented at this formal discussion. The General Counsel also asserts that the questioning by the OSI special agent constituted "coercive questioning" and as such independently violated section 7116(a)(1) of the Statute.

Respondent submits that the April 5 meeting was an investigatory interview which did not meet the required elements for a formal discussion. According to Respondent the meeting was an investigatory interview which was not conducted for the purpose of "preparing for any arbitration or any other administrative proceeding." Since the meeting was indeed an investigatory interview Respondent submits that "union participation" was not required.

A formal discussion exists if there is (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more employees in the bargaining unit or their representatives; (4) concerning any grievance or personnel policies or other general condition of employment. Department of the Air Force, F.E. Warren Air Force Base, Cheyenne, Wyoming, 31 FLRA 541 (1988) Where

such interview constitutes a formal discussion an agency has an obligation to assure that it is not coercive.

1. The Meetings were "Formal"

In Department of Health and Human Services, Social Security Administration, San Francisco, California, 10 FLRA 115, at 118 (1982), the Authority listed several elements it would consider when analyzing whether a discussion is "formal" within the meaning of Section 7114(a)(2)(A). Those elements are as follows:

> . . . (1) whether the individual who held the discussions is merely a first-level supervisor or is higher in the management hierarchy; (2) whether any other management representatives attended; (3) where the individual meetings took place (i.e., in the supervisor's office, at each employee's desk, or elsewhere); (4) how long the meetings lasted; (5) how the meetings were called (i.e., with formal advance written notice or more spontaneously and informally); (6) whether a formal agenda was established for the meetings; (7) whether each employee's attendance was mandatory; [and] (8) the manner in which the meetings were conducted (i.e., whether the employee's identity and comments were noted or transcribed).

The General Counsel maintains that sufficient elements of formality are present in Jacksch's interviews of Romero on April 5 and 6 to conclude that the meetings were "formal." Respondent of course insists that the meetings were investigating interviews. Although Jacksch was the only management representative present for the meetings, and Jacksch was outside Romero's chain of command, the fact that the interviews were conducted by an OSI Special Agent with unquestioned authority to investigate criminal misconduct does suggest that the meeting was formal. The instant meeting was scheduled in advance; the subject matter was determined in advance (Jacksch had prepared notes from which to question Romero); the meetings were held away from Romero's work area in a secured area in Jacksch's small OSI office; the meetings lasted 2 to 2 1/2 hours and 1 to 2 hours, respectively; Jacksch took notes during the meetings; and a formal "Statement of Witness" was prepared for Romero's signature. Additionally, notwithstanding that Romero's witness statement recites that it was given voluntarily, such boiler-plate language hardly nullifies the

attitude reflected by Romero's testimony that one does not say no to the OSI. Although Romero was not specifically ordered to meet with Jacksch on April 5 and apparently initiated the contact with Jacksch which led to the April 6 meeting, there can be little question that Romero felt compelled to cooperate with the OSI to the extent he was able. In all these circumstances, it is concluded that Jacksch's meetings with Romero on April 5 and 6 were "formal" within the meaning of the Statute.

2. The Meetings Constitute a "Discussion"

It is well established that the term "discussion" as it appears in section 7114(a)(2)(A) is synonymous with "meeting." Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 29 FLRA 594 (1987). Since it is uncontested that Jacksch did meet with Romero on April 5 and April 6, it is herein found that both meetings constituted "discussions" within the meaning of the Statute.

3. The Meetings Were Between a "Representative of the Agency" and a Bargaining Unit Employee

While it is unquestioned that Romero is a bargaining unit employee a threshold question of whether Jacksch is a "representative of the agency" within the meaning of Section 7114(a)(2)(A) of the Statute certainly exists. The General Counsel argues that the evidence shows that Jacksch represented Respondent when he questioned Romero on April 5 and 6. At the outset, the General Counsel notes that Respondent's Answer admits paragraph 8 of the Complaint to the effect that Jacksch has, at all times material, been a supervisor and/or management official and an agent of Respondent.8/ Record evidence establishes that although OSI, Detachment 1404 is not within the chain of command of the Base, it routinely initiates investigations of employees at the request of the Base Commander and furnishes the results of its investigations (in the form of Reports of Investigation) to the Base Commander and to the SJA. Furthermore, OSI also routinely coordinates its investigations with the SJA at the Base. Additionally, the particular facts of this case established a close collaboration between management's arbitration representatives and the OSI agent conducting the

---

8/ Respondent made no effort to amend the Answer prior to or during the hearing in this matter.

Gonzales investigation. Thus, the OSI investigation was initiated by a phone call from Poelman (calling at Shea's request), and Romero's name was first given to Jacksch as a potential witness by Poelman. Finally, Jacksch coordinated his investigation of Gonzales with Shea on several occasions. During those meetings, Shea advised Jacksch of Respondent's intention to remove Gonzales from employment at the Base and discussed the need for OSI to obtain a statement from Romero with Jacksch. Shea also advised Jacksch on the "SJA's plan" to use Romero's statement at the April 12 arbitration hearing to impeach Gonzales. Similarly, on April 6 Jacksch briefed Shea and Poelman on the entire OSI investigation eventhough he had not yet completed his Report of Investigation. Jacksch further provided Shea with copies of both Romero's and Child's OSI statements to the delight of Shea, who said the statements were just what he wanted. Jacksch then agreed to Shea's request that he be available to testify at the April 12 hearing, if necessary. The collaboration was complete when Shea questioned Romero at the April 12 arbitration based on his OSI statement and then introduced the statement as an agency exhibit. Under these circumstances, it appears that Jacksch's actions were those of Respondent and it cannot reasonably be disputed that Jacksch was a "representative of the agency" when he questioned Romero.

There are a limited number of Authority decisions dealing with degree to which an agency may be held accountable for the conduct of its criminal investigators. One such case is, Lackland Air Force Base Exchange, Lackland Air Force Base, Texas, 5 FLRA 473 (1981) where the administrative law judges' conclusion that the agency violated the Weingarten provision of the Statute through the conduct of an OSI investigator, who questioned a unit employee at length about possible cash register manipulation without granting the employee's request for union representation was adopted. Facts similar to those in the case at bar were cited by the administrative law judge to support his conclusion that the employee had been questioned by a "representative of the agency." The administrative law judge also noted, among other things, that it was a call from one of the agency's representatives which initiated the OSI investigation, the agency briefed the OSI about the matter, and the agency used the OSI work product for its own administrative purposes. In the instant matter the OSI investigation was similarly initiated at the request of one of Respondents' agents (Poelman), the OSI coordinated its investigation closely with Respondent's SJA office, and Respondent made use of the OSI's work product (Romero's

statement) for its own administrative purposes during the Gonzales arbitration hearing. Although Jacksch was not assisted when he interviewed Romero, the following observation by the administrative law judge in Lackland, supra appears applicable to the instant case:

> This was not a case where the OSI investigation was conducted independently of the Respondent and without Respondent's prior awareness of the OSI's investigative activity. It was one initiated in the first instance, and facilitated throughout, by the Respondent. . . . It is immaterial that the OSI had the sole responsibility to conduct a criminal investigation. It is sufficient that the interests and actions of the Respondent . . . were closely tied to, and identified with, the investigatory interview conducted.

Id., at 486.

In Department of the Air Force, Office of Special Investigations, McChord Air Force Base, Tacoma, Washington and Department of the Air Force, McChord Air Force Base, Tacoma, Washington, OALJ 90-09, Case No. 9-CA-80368 (November 2, 1989), Administrative Law Judge Garvin L. Oliver held that the OSI and the agency both violated the Weingarten provision of the Statute by placing unreasonable limitations on the union representative's participation in an investigatory interview. While it was the OSI investigator who imposed the restrictions on the union representative's participation in the interview, the Air Force Base was also found in violation of the Statute by its joint participating in the interview and its acquiescence in the imposition of the improper constraints. Judge Oliver distinguished Department of Defense, Defense Criminal Investigative Service, Defense Logistics Agency and Defense Contract Administration Services Region, New York, 28 FLRA 1145 (1987), enforced sub nom., Defense Criminal Investigative Service (DCIS), Department of Defense (DOD) v. FLRA, 855 F.2d 93 (3rd Cir. 1988), where a Weingarten violation was found against the DCIS, but not against the employing agency.9/ The absence of a violation by the

---

9/ The Authority held that Respondent DCIS violated the Statute when its agents interfered with employee rights by

(Footnote continued)

employing agency in DCIS was based on its not being at the investigatory interview conducted by the DCIS agent and on the employing agency's cautioning of the DCIS investigator that the employee was entitled under the applicable negotiated agreement to union representation. In McChord, supra, Judge Oliver distinguished DCIS by noting that a representative of the employing agency participated in the investigatory interview in McChord and by noting a failure to denounce the improper constraints prior to the questioning of the employee.

While the General Counsel acknowledges that McChord is distinguishable from the instant case since only Jacksch was present for the questioning of Romero and does not assert that the questioning of Romero was conducted jointly by the OSI and Respondent as in McChord, the General Counsel does contend that close collaboration between Jacksch and management's arbitration representatives is sufficient to warrant a conclusion that Jacksch was a "representative of the agency" for purposes of his interview of Romero on April 5 and 6. In short, it is argued that Respondent should not be permitted to subvert the requirements of the formal discussion provision of the Statute by the simple expedient of having Jacksch, rather than Shea or Poelman, conduct the pre-arbitration interview of the Union's witness, Max Romero. From the facts presented it is clear that Jacksch investigated and coordinated this matter at the direction of Respondent's labor-relations and SJA officials who were preparing for an arbitration hearing. It matters not, in the General Counsel's opinion that the Jacksch's interviews were performed under the cloak of the OSI. I agree that the collaboration in this matter is sufficient to establish that

---

(Footnote continued)

denying an employee's request for a Weingarten representative. Even though the DCIS was not the employing entity and was not in the same chain of command as the entity at the level of exclusive recognition, the Authority found that the DCIS was a "representative of the agency" for purposes of the Weingarten violation. The Authority based its finding in this regard on its finding that both the DCIS and the employing entity were components of the same agency, the Department of Defense. The Third Circuit, in enforcing the Authority's Order, emphasized that information obtained by the DCIS during its investigation was made available to management at the level of exclusive recognition. DCIS, 855 F.2d, at 99, 100. The information obtained by the OSI was furnished to Respondent in this case and used for purposes other than a criminal investigation of bribery charges for which it was allegedly obtained.

Jacksch was acting as a representative of the agency in examining Romero and coordinating Respondent's preparation for the April 12 arbitration hearing.

4. The Meetings Concerned a "Grievance"

In McClellan, supra the Authority held that management's interview of a bargaining unit employee, whom management knew would be a union witness at arbitration, prior to arbitration concerned a "grievance" within the meaning of Section 7114(a)(2)(A) of the Statute. Since Respondents was aware that Romero would be called as a Union witness at the April 12 Gonzales arbitration hearing, the General Counsel argued that Jacksch's interview of Romero prior to the arbitration hearing similarly concerned a "grievance" under section 7114(a)(2)(A) of the Statute.

Respondent's defense is that Jacksch questioned Romero solely in furtherance of the OSI investigation of Gonzales concerning the crime of bribery and solicitation of a false official statement and that as such the questioning had nothing to do with the Gonzales arbitration hearing on April 12. The General Counsel urges and the undersigned agrees that such an argument ignores the undisputed facts of the case.

The record evidence established that Jacksch was aware that Gonzales' 14 day suspension for his involvement in the paint theft on July 24, 1987 was to be the subject of an upcoming arbitration hearing. The record also reveals that Jacksch knew Romero would be a witness at the Gonzales arbitration scheduled for April 12. Even if Jacksch was unaware that the Union on March 7 had listed Romero as a witness for the arbitration hearing, Romero himself advised Jacksch on April 5 that he would be a witness. The record further discloses that management's arbitration representatives (Shea and Poelman) not only initiated OSI's investigation of Gonzales, but strongly influenced the course of the investigation. Thus it was a telephone call from Poelman (At Shea's request) that initiated the investigation of Gonzales; it was Poelman's telephone call to Jacksch on March 21 which first identified Romero as a potential witness and which led Jacksch to interview Romero; and Shea told Jacksch prior to questioning Romero that it was the "SJA's plan" to use Romero's statement at the April 12 arbitration hearing to impeach Gonzales. Following all this, Jacksch still questioned Romero at length concerning the events of July 24, 1987, ostensibly to establish one of the elements of the offense of soliciting a

false statement. It is difficult to see a connection between the two since the alleged "bribery" about which Jacksch was concerned occurred sometime later and since Romero was not suspected of being involved in the theft itself. At the same time, Jacksch was fully aware that the events of July 24 were the subject of the Gonzales arbitration. That Jacksch subsequently furnished Shea and Poelman with a copy of Romero's OSI statement on April 6 prior to the completion of his ROI further undercuts Respondent's position that Jacksch's questioning of Romero dealt only with the OSI investigation of Gonzales. If the Romero interview was concerned solely with the OSI investigation, there would have been no reason for Jacksch to furnish copies of Romero's statement to Shea prior to completion of his Report on the Gonzales investigation five days later. Shea's statement that the OSI statements of Romero and Child were just what he wanted can be understood only in terms of his stated plan to use them during the April 12 arbitration hearing. Not surprisingly, this is precisely what Shea did. Not only did Shea's questioning of Romero at the April 12 hearing closely parallel his OSI statements; Shea also introduced the OSI statement into evidence as agency exhibit 6. Such use of Romero's OSI statement at the April 12 hearing constitutes strong circumstantial evidence that Jacksch's questioning of Romero concerned a "grievance," namely, Gonzales' arbitration case and not so much the bribery aspect of the case as Respondent would have one believe.

Even assuming the Jacksch's interview of Romero was in furtherance of OSI's investigation of Gonzales, that interview must nevertheless be found to concern a "grievance" within the meaning of section 7114(a)(2)(A) of the Statute. In all the circumstances, including Jacksch's understanding of the subject matter of the Gonzales arbitration, his knowledge that Romero would be testifying at the April 12 hearing, and his understanding that the SJA (i.e., Shea) planned to use Romero's OSI statement at the April 12 arbitration, it cannot be denied that Jacksch's questioning of Romero on April 5 and 6 and his preparation of Romero's sworn statement concerned Gonzales' grievance over the 14 day suspension.

5. Respondent Violated the Statute By Failing to Notify the Union of the Formal Discussion

Since all elements of a formal discussion have been established with respect to Jacksch's pre-arbitration questioning of Romero, Respondent was obligated to afford

the Union an opportunity to be represented at such formal discussions. F.E. Warren, supra. Montez' testimony that the Union was not notified of Jacksch's interview of Romero is further corroborated by Jacksch's admission that he did not notify the Union (even after Romero indicated he would be testifying at the April 12 hearing). Accordingly, it is concluded that Respondents failed and refused to comply with the requirements of section 7114(a)(2)(A) in violation of section 7116(a)(1) and (8) of the Statute.

B. Whether Respondent Independently Violated Section 7116(a)(1) of the Statute On Or About April 5 When OSI Special Agent Daniel Jacksch Conducted A Coercive Interview Of Union Arbitration Witness Max Romero.

The General Counsel urges that Jacksch's interview of Romero on April 5 and 6 constituted "coercive questioning" and independently violative of section 7116(a)(1) of the Statute. In F.E. Warren, supra the Authority held that the circumstances surrounding a pre-arbitration interview must be closely scrutinized to determine whether an employee has been subjected to coercive questioning in violation of section 7116(a)(1). In making this assessment, the Authority specifically rejected any mechanistic inquiry concerning whether agency management provided the employee with each of the warnings described in Internal Revenue Service and Brookhaven Service Center, 9 FLRA 930 (1982),10/ but indicated instead that the Authority would determine whether the purpose of the Brookhaven safeguards "to protect employees from coercive questioning concerning matters involving employees' protected rights" has been fulfilled. F.E. Warren, supra, at 548, 549.

The General Counsel submits that the circumstances surrounding Jacksch's questioning of Romero require a

---

10/ In Brookhaven, the Authority concluded that certain safeguards were necessary to protect employee rights under section 7102 of the Statute when management interviewed those employees "to ascertain necessary facts." The Authority stated that (1) management must inform the employee of the purpose of the questioning, assure that there will be no reprisal for a refusal to participate, and obtain that participation voluntarily; (2) the questioning must not occur in a coercive context; and (3) the questions must not exceed the scope of the legitimate purpose of the inquiring or otherwise interfere with the employee's protected rights. Brookhaven, 9 FLRA, at 933.

conclusion that the questioning herein was coercive under the Authority's F.E. Warren decision. First, it asserts that the interviews were conducted in a coercive setting where Romero was isolated from his work area and placed in unfamiliar surroundings. Both interviews were held in a small office in a secured area of the OSI building and both were conducted by an individual with uncontested authority to investigate criminal misconduct by employees. Further, it is doubtful whether Romero was given any of the Brookhaven warnings. Respondent of course asserts that no such warnings were required. In any event it is undisputed that Jacksch did not assure Romero that no reprisal would be taken against him if he refused to participate. In addition, while it appears Jacksch informed Romero that the questioning pertained to the incident involving Child and Gonzales (i.e., the theft incident), there was no specific evidence that Romero was advised that the OSI was investigating Gonzales for the offenses of attempted bribery and solicitation of a false statement. Moreover, although boiler-plate language in Romero's OSI statement recites that it was voluntarily and without coercion, Romero credibly testified that "one does not say no" to the OSI. Thus when one considers the criminal investigative powers of the OSI, it is not surprising that Romero felt upset and confused upon learning on April 4 that the OSI was interested in speaking to him. Regardless of Romero's state of mind, Jacksch did nothing to lessen Romero's fears when he asked Romero at the outset of the April 5 interview if he was involved in the theft. This coercive context was reinforced by Jacksch's warning to Romero that it was a serious offense if he had signed any papers or taken any money as a bribe. Nor did Jacksch confine his questioning to the alleged purpose of the OSI's inquiry into the criminal allegations against Gonzales. As noted above, Jacksch specifically asked Romero whether he was involved in the theft. Jacksch also asked whether Romero knew there was paint in Child's car, a question clearly designed to disclose any complicity by Romero. Such questions concerning Romero's knowledge and involvement with respect to the theft incident could only intensify an already coercive atmosphere.

The April 6 meeting between Jacksch and Romero was little more than an extension of the April 5 meeting. Although Romero initiated the contact with Jacksch upon his return to work on April 6, Jacksch had specifically instructed Romero to contact him if there were any new developments concerning Gonzales. Combine this with Romero's understandable apprehension concerning Jacksch's warning that signing any papers or accepting any money as a

bribe would constitute a serious offense, Romero's initiation of the April 6 meeting after Gonzales' visit on the evening of April 5 must be viewed as directly responsive to Jacksch's instructions. As noted by Romero during the hearing, he felt compelled to cooperate with the OSI to the extent that he could. As a continuation of the April 5 meeting, all of the coercive import of the April 5 meeting carried over to the April 6 meeting.

The appropriate inquiry here must be how a reasonable employee in Romero's position would react when isolated from his co-workers and interrogated by the Air Force's criminal investigative unit concerning his involvement in a theft incident occurring almost nine months earlier. Despite the fact that Romero had not been involved in the theft incident, could very easily have thought management's investigation had been reopened, to include him, when he was asked about his involvement in the July 1987 incident. First of all, most employees would certainly be apprehensive about being questioned by the OSI. Add to this an intimidating setting behind closed doors in a small OSI office, Jacksch's lengthy questioning about the incident (including whether Romero knew there was paint in Child's car), and Jacksch's warning about the seriousness of any offense related to bribery or false statements, and the conclusion is undeniable that a reasonable employee in Romero's place would consider Jacksch's questioning to be coercive.

The Authority found no violation in F.E. Warren, however this case is different. Several factors such as Romero not being offered Union representation, Respondent expanding its questioning far beyond the legitimate scope of the inquiry, and a coercive atmosphere which no doubt was exacerbated by Jacksch's warning and questions regarding Romero's complicity in the paint theft make this a case in which the pre-arbitration interviews were coercive. Under such circumstances, it is found that Jacksch's questioning of Union witness Max Romero on April 5 and 6 concerning matters known to be at issue in the April 12 arbitration hearing constituted coercive questioning independently violative of section 7116(a)(1) of the Statute.[11/]

In light of the foregoing findings that Respondent violated the Statute, it is recommended that the Authority adopt the following:

11/ The General Counsel's uncontested motion to correct transcript is granted.

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that Ogden Air Logistics Center, Hill Air Force Base, Utah shall:

1. Cease and desist from:

(a) Requiring any bargaining unit employee to take part in a pre-arbitration interview which constitute a formal discussion without notifying and allowing the American Federation of Government Employees, AFL-CIO, Local 1592, the exclusive representative of its employees the opportunity to be present.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at its facilities 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 Commanding Officer 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 insure 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, Region VII, 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.

IT IS FURTHER ORDERED that all allegations of the complaint relating to Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, be dismissed.

ELI NASH, JR.
Administrative Law Judge

Dated: May 21, 1990
Washington, D.C.

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT require any bargaining unit employee to take part in a pre-arbitration interview which constitutes a formal discussion without notifying and allowing the American Federation of Government Employees, AFL-CIO, Local 1592, the exclusive representative of our employees the opportunity to be present.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

_____
(Activity)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VII, whose address is: 535 16th Street, Suite 310, Denver, CO 80202, and whose telephone number is: (303) 844-5224.