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

U.S. PATENT AND TRADEMARK OFFICE Respondent	
and	Case No. 3-CA-10521
NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 243 Charging Party	

Phillip Boyer, Esq.
For the Respondent

Laurence Evans, Esq.
For the General Counsel

Aileen A. Johnson, Esq.
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on July 31, 1991 by the Regional Director for the Washington, DC Regional office of the Federal Labor Relations Authority, a hearing was held before the undersigned on October 29, 1991 at Washington, DC.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 et seq. (herein called the Statute). It is based on a charge filed on May 6, 1991 by the National Treasury Employees Union, Chapter 243 (herein called the Union) against U.S. Patent and Trademark Office (herein called the Respondent or PTO).

The Complaint alleged, in substance, that on May 1 and June 3, 1991, Respondent, by Inspectors General Lem Florey and George Rosenkranz held a mandatory interview at Respondent's Washington, DC location with Union president Ollie Person; that an affidavit was taken of Ollie Person after she was questioned coercively concerning matters at issue in a scheduled arbitration hearing - all in violation of section 7116(a)(1) of the Statute.

Respondent's Answer, dated September 9, 1991, denies the essential allegations of the Complaint and the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Briefs were filed with the undersigned which have been duly considered.

Upon the entire record, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times hereinafter mentioned the Union has been, and still is, the collective bargaining representative of a unit of Respondent's employees.

2. Both the Union and Respondent are, and have been at all times material herein, parties to a collective bargaining agreement covering the unit employees, and the said agreement included a provision concerning the submission of disputes to arbitration.

3. On July 31, 1990 Respondent's Branch Chief, James C. Cooper learned that an employee had forged her supervisor's signature on papers requesting subway tickets; that the employee also used her office computer for internal union business and personal business of union stewards.

4. Cooper questioned the employee on July 31, 1990 re the matter. The employee admitted to the personal use of the subway tickets as well as typing half of the documents during her duty hours for which she was paid $2.00 per hour by the Union.

5. The matter was reported by Respondent to the Office of Inspector General (OIG) of the Department of Commerce. Several days later, about August 2 or 3, 1990, OIG investigators interviewed Cooper re the misuse of time, equipment and farecards.

6. Respondent filed a grievance against the Union on August 21, 1990, alleging that it used PTO employees to type union related documents during government time and on government property.

7. Respondent sent a letter on September 24, 1990 to Ollie M. Person, president of the Union, advising her that the PTO desired to invoke arbitration under the negotiated agreement re the Union's use of PTO's employees to type union/personal documents during government time and on government equipment.

8. In April 1991 George Rosenkranz, an employee of OIG called Person to arrange an interview of her re the misuse of government property as hereinabove described. The meeting was scheduled for April 24, 1991 at the Department of Commerce. Person attended with Union counsel Jefferson Friday, but Rosenkranz did not appear.

9. Later in the day of April 24, 1991 Rosenkranz telephoned Friday to reschedule the interview. Friday informed the OIG representative of the pending arbitration.1/ He also said that it was the Union's position that a mandatory interview of its witness in that proceeding would be an unfair labor practice. Rosenkranz replied he would check it out. On the same day Friday wrote Rosenkranz a letter confirming the Union's position.

10. The interview of Person by Rosenkranz took place on May 1, 1991. Friday was present along with another individual from the Department of Commerce. The OIG did not advise Respondent that it would be interviewing Person. At the outset Rosenkranz stated he would be taking an affidavit from the Union president based on questions and answers thereto; that Person had to provide an affidavit otherwise there would be a rules of conduct problem for her. Person was told that the purpose of the interview was about an

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1/ The arbitration proceeding was still pending at the time of this hearing.

employee typing on office equipment. Rosenkranz questioned Person for about 1-1½ hours.[2/]

11. On June 3, 1991 Person and Friday met again at Rosenkranz's office for the purpose of having Person sign the affidavit. She executed it but not before striking out language that she "freely and voluntarily" gave the affidavit without any threats or awards or promises of benefit.

12. The record reflects that Respondent was never advised of the interview by OIG; that the latter never provided PTO with a copy of Person's affidavit, nor did OIG provide any information to PTO which was obtained from the interview.

13. Record testimony indicates that PTO exercises no control over OIG, nor does it direct any of the latter's activities, including investigations involving PTO employees. In respect to acts of abuse by Respondent's employees, management turns over information in that regard to OIG which decided whether to conduct an investigation. If OIG concludes no law was broken, it would not make a report to PTO. If it concludes that a law or regulation has been violated, it may issue a formal report but none was issued in this case.

Conclusions

There are two principal issues for determination herein: (1) whether Respondent is responsible for the conduct of the Office of Inspector General in interviewing an employee of Respondent, including an infringement of the employee's protected rights by the OIG representative; (2) if so, whether the interview was undertaken without preserving the employee's rights under the Brookhaven[3/] doctrine, and, in any event, whether the employee was coerced by the interview in the exercise of her protected rights in violation of section 7116(a)(1) of the Statute.

2/ Rosenkranz did not testify at the hearing herein. Respondent offered in evidence his statement which was rejected and marked as a rejected exhibit.

3/ Internal Revenue Service and Brookhaven Service Center, 9 FLRA 930 (1982).

It is contended that OIG agent Rosenkranz was, at the time of the interview, an agent of Respondent and acted on behalf of Respondent and the Department of Commerce. The General Counsel argues that Respondent is bound by the conduct of Rosenkranz. Reliance is placed on the Authority's holding that OIG was a "representative of the agency" in Department of Defense, Defense Criminal Investigative Service, Defense Logistics Agency and Defense Contract Administration Services Region, New York, 28 FLRA 1145, 1149 (1987) (DCIS); aff'd. sub nom. DCIS v. DOD, 855 F.2d 93 (3rd Cir. 1988). In essence, it is urged that since the OIG agent is with an Office of the Department of Commerce, the parent of Respondent PTO, the OIG is the "representative" of Respondent agency. Hence, the latter is responsible for Rosenkranz's actions during the interview of Ollie Person.

The reliance by General Counsel upon the DCIS case, supra, is misplaced. The Defense Criminal Investigative Services (DCIS), which conducted the investigation in the cited case, is a component of Department of Defense (DOD). The investigation involved employees of Defense Logistics Agency (DLA). But the Authority concluded that DCIS was a representative of DOD; that DCIS was not acting as an agent of DLA. It concluded that DCIS, but neither DOD nor DLA, was responsible for interfering with the rights of DLA employees.

In the case at hand Respondent PTO occupies the same status or position as DLA, and, under the same rationale as expressed in the cited case, OIG would not be the "representative" of Respondent. Contrariwise, OIG would be the agent of the Department of Commerce.

Reference is made by the General Counsel to the statement by the Authority in the DCIS case, supra, re an organizational entity of an agency in the same "chain of command" as the entity at the level of recognition; that such organizational entity violates section 7116 of the Statute by unlawfully interfering with the rights of employees other than its own. But this statement was in support of its conclusion that DCIS violated the Statute by its conduct.

While it may be true that OIG would be responsible for the conduct of agent Rosenkranz in much the same manner, DCIS was held accountable, the fact remains that OIG was not charged nor named in the Complaint herein as a party. The Complaint is solely against PTO.

There is no evidence to support the conclusion that Respondent is responsible for the actions of OIG representative Rosenkranz in conducting the interview of Ollie Person. Respondent PTO exercises no control over OIG, does not direct its activities or investigations, and plays no part in the manner or extent of the interview which OIG's agent conducts of Respondent's employees. In respect to the interview of Person, it was conducted by OIG without informing PTO beforehand. Further, OIG never provided Respondent with a copy nor did it furnish any information to PTO which was obtained from the interview.

Several cases decided by the Authority have held an agency responsible for conduct of "outside" investigators involving the agency's employees. I find them distinguishable. Thus, in U.S. Department of Labor, Mine Safety and Health Administration, 35 FLRA 790 (1990) the Office of Inspector General (OIG) of the Department of Labor conducted an interview of an employee of Mine Safety and Health Administration (MSHA) re certain criminal activity by the latter's inspectors. The Authority held that the OIG agent was a representative of MSHA and the latter was responsible for his conduct during the interview. Note is taken, however, that in the cited case the OIG agent arranged with MSHA to have the interview with the latter's employee; that information disclosed during the interview would be sent to MSHA by OIG. The degree of cooperation and the close cooperation between OIG and the agency lends support to the conclusion that the OIG acted as a representative of MSHA, and that the latter was responsible for the actions of the OIG agent at the interview.

Likewise in Ogden Air Logistics Center, Hill Air Force Base, Utah, et al., 36 FLRA 748 (1990), the Respondent agency called the Air Force's Office of Special Investigation (OSI) to investigate a possible bribery by an employee at the base. The OSI agent was deemed to be a representative of the agency during an examination of the agency's employees. However, as indicated by the Administrative Law Judge, there was a sufficient collaboration between the OSI and the agency to warrant that conclusion. The OSI coordinated its investigation closely with the agency's Staff Judge Advocate. They worked together and discussed the statements obtained by OSI. The latter briefed the agency during the investigation as to the developments and matters disclosed thereat.

Based on the record facts which reveal that the OIG herein worked independently of Respondent and that the latter exercised no control over the OIG, I conclude that

the latter did not act as a PTO representative so as to bind the PTO for the conduct of OIG investigator Rosenkranz.4/ Since the OIG was neither charged nor named as a respondent herein, I conclude that it may not be found to have committed an unfair labor practice.

Having concluded that Respondent PTO was not responsible for the actions of OIG representative Rosenkranz during the interview, I recommend that the Authority adopt the following:

ORDER

The Complaint in Case No. 3-CA-10521 be, and the same is hereby, dismissed.

Issued, Washington, DC, March 24, 1992

WILLIAM NAIMARK

4/ In view of the conclusions reached herein, I find it unnecessary to decide whether the OIG representative coerced employee Person during his interview of her on May 1, 1991.