

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

.....
UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE,
NEW YORK DISTRICT OFFICE,
NEW YORK, NEW YORK

Respondent

and

Case No. 12-CA-10366

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1917

Charging Party
.....

Salvatore Vassallo
For Charging Party

Scott D. Cooper, Esq.
Vincent Pizzigno
For Respondent

Verne R. Smith, Esq.
Richard Zaiger, Esq.
For General Counsel of the FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7101 et seq. and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2423.

The charge in this case was filed and amended by the American Federation of Government Employees, Local 1917 (AFGE Local 1917), against U. S. Immigration and Naturalization Service, New York District Office, New York,

New York (NYINS). Pursuant to this charge, as amended, the Acting Regional Director for the Boston Region of the FLRA issued a Complaint and Notice of Hearing alleging that NYINS violated section 7116(a)(1), (2), (5), and (8) of the Statute by denying the requests for union representation at investigative meetings, by proposing the disciplinary suspensions of these five employees for engaging in activity protected by the Statute, and by refusing to recognize and deal with representatives designated by AFGE Local 1917. INS filed an Answer denying it had violated the Statute.

A hearing in this matter was conducted before the undersigned in New York City, New York. NYINS, AFGE Local 1917 and the General Counsel of the FLRA were represented and afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Subsequent to the hearing, all the parties entered into a Stipulation of facts which is made a part of the record herein. Briefs were filed and have been fully considered.^{1/}

Prior to the hearing in this matter General Counsel of the FLRA filed a Notice of Intention to Amend the Complaint wherein it was advised that at the hearing General Counsel of the FLRA would move to amend the Complaint to refer to Respondent as "U.S. Immigration and Naturalization Service, Washington, D.C., and its Office of Inspector General, Washington, D.C., and its New York District Office, New York, New York." At the hearing the motion was made to amend the Complaint to add as an additional party "the Office of the Inspector General, Department of Justice, Office of Inspector General, Washington, D.C." This motion was denied because the charge and first amended charge herein did not in any way name the Office of the Inspector General or indicate it was a party to this proceeding and the Notice of Intention to Amend the Complaint was not served on the Office of the Inspector General. In its brief in this matter the General Counsel of the FLRA renewed the motion to amend the Complaint to add the Office of the

^{1/} Subsequent to the filing of briefs, NYINS filed a Motion To Strike portions of the brief of the General Counsel of the FLRA because the portions of the brief were allegedly contrary to the facts. General Counsel of the FLRA filed a Response to this Motion. The Motion is hereby Denied and, of course, the facts as found in this Decision will be based on the record of this case and not upon the factual representations of the briefs.

Inspector General as a Respondent herein. For the reasons set forth at the hearing this renewal of the motion is denied.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor, and my evaluation of the evidence, I make the following:

Findings of Fact

The American Federation of Government Employees, AFL-CIO, (AFGE) is the exclusive representative for a unit employees of the United States Immigration and Naturalization Service (INS), including employees at NYINS. AFGE Local 1917 is an agent of AFGE for representing unit employees located at NYINS.

AFGE Local 1917 is part of the Eastern Region and is the largest local in the Eastern Region, representing about 1000 unit employees. Ignatius Gentile and Salvatore Vassallo are employees of NYINS within the unit represented by AFGE Local 1917. During 1989 and 1990 Gentile was President of the local and in 1991 he was Vice President. Vassallo was First Vice President of AFGE Local 1917 during 1989 and 1990, and was President in 1991. Both are assigned to a NYINS facility at 26 Federal Plaza in Manhattan.

In September 1990, George Grotto, AFGE Eastern Regional Vice President, appointed Vassallo and Gentile as representatives to the Eastern Regional Consultations between INS and AFGE. The Consultations are held for two days, twice a year, and are attended by representatives of AFGE and INS Eastern Region management.

The Consultations that are relevant to this case were scheduled by INS to be held on November 28 and 29, 1990 in the INS Regional Headquarters in Burlington, Vermont. This meeting, presided over by Robert Metcalf, Chief Labor Management Relations Specialist in Burlington, was scheduled to discuss the settlement of pending cases and 30 agenda items that had been previously submitted by AFGE. NYINS authorized Gentile and Vassallo to travel to the Consultations on November 27, 1990 and to return on November 30, 1990.

Employees of NYINS are sometimes subjected to question and answer examinations (Q and A's) conducted by NYINS, the Office of the Inspector General (OIG) of the Department of Justice (DOJ), or other entities. For the two or three years prior to November 1990, Vassallo and Gentile were the

only union representatives who represented unit employees at Q and A examinations.

Q and A examinations, when conducted by OIG, are conducted by OIG employees or INS employees who are assigned "collateral" investigation duties on behalf of OIG. Dave Smith, an INS employee located in the INS Burlington, Vermont, office who was the liaison to OIG for the collateral investigations, and Frankie DeConstanza, the head of the OIG office in New York City, knew that Vassallo and Gentile were the only union representatives who represented unit employees in the Q and A examinations.

Within DOJ, bureaus such as INS must refer certain allegations of misconduct to OIG, which is a separate entity within DOJ. Once OIG receives a referral, OIG alone is responsible for conducting the investigation. Pursuant to 5 U.S.C. Appendix 3 § 6(a)(3), OIG may ask INS to provide it with a "collateral investigator." Although a collateral investigator continues to receive pay from INS, such collateral investigator performs investigations for OIG in exactly the same manner and under the same authority as full-time OIG employees.

In 1990 NYINS initiated an investigation of allegations of misconduct by Rupa Bhatia, Anadina Hernandez, Robert Pelech, Aurea Rivera and Evangalista Zarafonitis-Dibbs, employees of NYINS stationed at the John F. Kennedy Airport (JFK) and in the unit represented by AFGE. The investigation was requested by New York City Port Director Roseanne Sonchik, an INS employee, who initiated the matter by referring the allegations of misconduct to Smith. INS Special Agent Gerald Crispino was the collateral investigator assigned to investigate this case on behalf of OIG.

Between May 1988 and October 1991, Crispino was employed as an INS Special Agent at the INS Washington District Office. He had an INS supervisor and INS credentials. Crispino also acted as a collateral investigator under the supervision and direction of the OIG, when acting as such a collateral investigator. While conducting the subject investigation, as a collateral investigator, INS had no authority to control the method or manner in which Crispino conducted the investigation.

Crispino received the assignment to conduct the subject investigation by letter dated October 11, 1990. Crispino was under no particular time constraints to initiate the investigation of the case. He set his own time frame, in coordination with his work as an INS Special Agent.

On November 21, 1990, supervisors, who were INS employees, served Notices to Appear on each of the five employees who were the subject of the investigation. The Notices, signed by Crispino, were on INS forms that had INS letterhead and that also bore the INS seal. Each employee being investigated was notified to appear at JFK on November 28, 1990 before Crispino, whose only title or capacity was set forth as "Special Agent", and to answer questions concerning alleged cheating on a "post-Academy examination" held on August 22, 1990. The Notices stated the employees being questioned were subjects of the allegations and not just witnesses. The Notices indicated that Crispino represented the "Office of the Regional Commissioner" and it set forth Crispino's business address in Arlington, Virginia, and his telephone number. Nothing on the Notices indicated OIG was in anyway involved in the examinations.

Along with the Notices to Appear the employees were served with another standard INS form entitled "Notice of Right to Representation", which advised the employees of their representation rights in accordance with the negotiated agreement between INS and AFGE.

Upon being served with these Notices on November 21, 1990, the employees telephoned Vassallo and Gentile and requested them to attend the Q and A examinations on November 28 as the employees' representatives. Vassallo and Gentile advised the employees that the Regional Consultations were also scheduled for November 28, 1990. AFGE Local 1917 President Gentile appointed himself and Vassallo as the employees' representatives.

AFGE Local 1917 had never had any trouble in the past securing alternate dates for Q and A examinations when they conflicted with other commitments. AFGE Local 1917 coordinated the date changes with the Special Agent assigned to the case or worked through Smith or DiConstanza. Vassallo called Crispino on November 21, 1990, to arrange an alternate date to conduct the Q and A examinations.^{2/}

^{2/} With regard to the telephone conversations, to the extent the versions differ, I credit Vassallo and not Crispino. I found Vassallo a candid and believable witness whose testimony was consistent with the other facts and circumstances, whereas Crispino was an evasive and argumentative witness who appeared less candid and whose testimony was less consistent with the other facts and circumstances.

Vassallo explained the conflict between the Q and A examinations and the Regional Consultations and offered alternate dates for the Q and A examinations, including November 23 and 26, 1990, and December 3, 1990, or any other date after Vassallo and Gentile return from the Regional Consultations. Crispino rejected all the suggested dates, without offering specific reasons, except for his rejection of November 26, because it would require him to travel on the preceding day, Sunday. Crispino advised Vassallo that Crispino would see what he could do.^{3/} On November 23, 1990, Vassallo again called Crispino, who told Vassallo that he should try to reschedule the Eastern Regional Consultations. Vassallo stated that would be impossible because of the number people who were scheduled to be present at the consultation. Crispino suggested that Vassallo call Crispino's supervisor Smith in Burlington, Vermont.

On November 23, 1990, Gentile telephoned Robert Metcalf, INS' Chief Labor Management Relations Specialist in Burlington, who was the chairman of the Eastern Regional Consultations. Smith and Metcalf work in the same building in Burlington, Vermont. Gentile asked Metcalf to talk with Smith to work out an alternate date for the Q and A examinations. Metcalf stated that he would see what he could do to delay the Q and A examinations. Gentile also called Crispino, who was sympathetic but did not commit to an alternate date.

Rivera telephoned Crispino's office on November 24, 1990, and left a message with Crispino's office mate, requesting an alternate date for her Q and A examination so that Vassallo could attend as her representative. Crispino did not respond to this telephone call.

^{3/} Crispino testified that he expressed to Vassallo that Crispino would meet with Vassallo during the time Crispino was in New York. Crispino did not testify that he told Vassallo the date and time Crispino was arriving in New York and the date and time he was departing New York. Thus the record does not establish that Vassallo knew Crispino would be in New York on any day other than November 28. Accordingly, Counsel for NYINS's argument that Crispino advised Vassallo that they could meet on November 27 and 29 is unsupported. In fact the record fails to indicate that Crispino and Vassallo or Gentile could reasonably have met on November 27th and 29th, taking into consideration their various travel requirements.

On November 27, 1990, Crispino travelled to New York City, to JFK, and Vassallo and Gentile left for Burlington, Vermont.

Before leaving New York, Gentile spoke to AFGE Local 1917 3rd Vice President Robert Hutnick. Hutnick was a union Steward and was the only union representative located at JFK. Both Gentile and Vassallo considered Hutnick an ineffective union representative and Gentile told Hutnick that AFGE Local 1917 had not designated Hutnick to represent the employees at the November 28, 1990, Q and A examinations and that Hutnick should not be involved. The employees subject to the November 28, Q and A examinations felt Hutnick to be an ineffective union representative. Hutnick had never represented an employee in a Q and A examination.

Upon arriving at JFK, Crispino met with the INS Port Director to arrange for the use of INS facilities, supplies, and personnel. Crispino also confirmed that Hutnick would be on duty on November 28, 1990, and would be available to represent employees if they so requested.

On November 28, 1990, Crispino called each of the five subject employees, individually, into a conference room in the INS facility at JFK to question them concerning allegations that they had cheated on August 22, 1990, on a post-Academy examination.

Each of these Q and A examination sessions, which Crispino taped and was transcribed, was attended only by Crispino and the employee being questioned. Crispino began each session by reading from a standard INS Form G-793, which stated that Crispino was an officer of the U.S. Department of Justice, Immigration and Naturalization Service, representing the Regional Commissioner, in connection with the administration of INS. Also, before commencing the questioning, Crispino showed each employee Crispino's INS credentials and told each employee that any statement the employee made could be used against the employee in an administrative disciplinary proceeding. Crispino did not identify himself as representing the OIG.

Crispino started each examination by asking each employee if his or her representative was present. Each employee responded that his or her union representative was either Vassallo or Gentile and that such representative was not available.

Each employee stated that he or she would answer Crispino's questions concerning the alleged misconduct on August 22, 1990, when the employee's union representative was present. Crispino advised each employee that a union representative was available. Crispino did not identify the union representative, but was apparently referring to Hutnick. Each employee replied that he or she was unwilling to answer Crispino's questions in the absence of his or her chosen representative, Gentile or Vassallo. During the course of each interview Crispino gave each employee some time to secure a union representative. Crispino continued to ask each employee questions, and each employee continued to request his or her union representative. Crispino then terminated the interview. The interviews lasted from 8 to 30 minutes.

When OIG conducts an investigation, it cannot take disciplinary action. Once OIG completes its investigation and reaches its conclusions concerning the merits of an allegation of misconduct, OIG forwards its conclusions to the appropriate bureau, in this case INS. It is the responsibility of the bureau, in this case INS, to initiate and take any personnel action it deems appropriate.

By letters dated May 1, 1991, NYINS Acting Deputy District Director Edward J. McElroy proposed a disciplinary 5 day suspension of each of the five employees questioned by Crispino because of each employee's "Refusal to Cooperate in an Official Investigation". In referring to the Q and A examination on November 28, 1990, each letter stated: "You would not answer the investigators questions unless a specific union representative, who was not available at that time, was present. You were informed that a union steward was available to represent you but you declined to utilize the available union representative."

Discussion and Conclusions of Law

Section 7114(a)(2)(B) of the Statute provides that an exclusive representative of an appropriate unit 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"

General Counsel of the FLRA contends that the November 28, 1990, Q and A examinations were examinations in connection with an investigation within the meaning of Section 7114(a)(2)(B) of the Statute and that the employees' requests for representation by AFGE Local 1917 were unlawfully denied. Accordingly, it is contended that NYINS violated Section 7116(a)(1) and (8) of the Statute. General Counsel of the FLRA contends further that NYINS violated Section 7116(a)(1) and (2) of the Statute by proposing the employees' suspension because the employees refused to answer questions at the Q and A examinations unless they had union representation. General Counsel of the FLRA also alleges that NYINS violated section 7116(a)(1) and (5) of the Statute by refusing to recognize and deal with the union's designated representatives when it, allegedly, unreasonably refused to reschedule the November 28, 1990, Q and A examinations.

I conclude the Q and A examinations conducted on November 28, 1990, were examinations of employees by a representative of the agency in connection with an investigation within the meaning of section 7114(a)(2)(B). The purpose of the examinations was to inquire into whether the employees being questioned had cheated on an examination. Section 7114(a)(2)(B) applies to the subject Q and A examinations because it applies to all examinations of employees in connection with all investigations, involving both criminal and non-criminal matters. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas, 36 FLRA 41 (1990), remanded 939 F. 2d 1170 (5th Cir. 1991), affirmed 42 FLRA 834 (1991) (Border Patrol).

I conclude that Crispino was a representative of the agency, within the meaning of section 7114(a)(2)(B), when he conducted the November 28 Q and A examinations. Both INS and OIG are subdivisions of DOJ and, in the subject case, DOJ is the "agency" within the meaning of section 7114(a)(2)(B) and thus Crispino, an INS employee conducting the Q and A examinations as a collateral investigator for OIG, was a representative of DOJ, the agency. Department of Defense, Defense Criminal Investigative Service, 28 FLRA 1145 (1987), aff'd sub nom. DCIS v FLRA, 855 F. 2d 93 (3rd Cir. 1988) (DCIS). The FLRA cited with approval the court's decision in DCIS. Border Patrol.

Each of the employees that was the object of a Q and A examination on November 28, 1990, reasonably believed that the examination may have resulted in disciplinary action against the employee.

Each of the five employees summoned to the Q and A examinations on November 28, 1990, specifically asked Crispino for union representation and specifically asked for either Gentile or Vassallo to be their union representative.

Thus the Q and A examinations met all the requirements of section 7114(a)(2)(B) of the Statute and, accordingly, AFGE Local 1917 was entitled to be given the opportunity to be represented at such examinations.

Section 7114(a)(2)(B) provides the union an opportunity to be represented at the examination once all the requirements of the section have been met. It is the union's right to be represented. Although the FLRA has never said that the union has a right to a specific representative, such a conclusion necessarily follows from the purpose of section 7114(a)(2)(B). In order for the employee involved in an investigation to be meaningfully assisted by the union, the employee has the right to be represented by a knowledgeable union representative.^{4/} The representative must be able to provide the employee with adequate advice and a proper defense. U.S. Department of the Treasury, Customs Service, Washington, D.C., 38 FLRA 1300 (1991). Thus, in order to provide the employee who is the object of an examination meaningful and useful representation the union must be able to designate as its representative someone capable of providing the employee the best possible assistance.

^{4/} Section 7114 deals with the labor organization's "Representation rights and duties." Thus it appears to be the union's right to be represented at the examination. But such a right is only triggered if the employee requests representation. This apparently creates some confusion as to whether the employee or the union has the right to be represented. I submit section 7114 deals with and defines the union's rights and section 7102 sets forth the "Employees' rights". See Federal Prison System, Federal Correctional Institution, Petersburg, Virginia, 25 FLRA 210 (1987) (FCI Petersburg). In the subject case it makes no difference as both the union and the employees asked for the same union representatives.

In the subject case AFGE Local 1917 and the employees designated Gentile and Vassallo to represent the union and the employees because Gentile and Vassallo had extensive experience and knowledge concerning Q and A examinations. NYINS and OIG, on the contrary, wanted Hutnick, a person with no real experience or knowledge concerning such examinations and a person in whom the union and employees had no confidence, to be the representative. It makes no sense, in a section 7114(a)(2)(B) situation, to permit the agency to, in effect, insist that the union representative be an ineffective and inadequate one.

Accordingly, I conclude that when AFGE Local 1917 sought to be represented at the Q and A examinations it had the right to choose its own representatives and it did so by designating Gentile and Vassallo.

The section 7114(a)(2)(B) right to be represented at the Q and A examinations was denied AFGE Local 1917 and the employees when Crispino and his superiors refused to reschedule and readjust the examinations so the Vassallo and/or Gentile could attend.

In this regard AFGE Local 1917 immediately contacted Crispino and other OIG and INS officials after being advised of the Q and A examinations and advised them of the conflict in schedules and were lead to believe the management officials would try to make arrangements to resolve the scheduling problems and would communicate further with the union officials. Neither Crispino nor any of the other management officials communicated further with Vassallo or Gentile. In the past when there had been AFGE Local 1917 asked to have Q and A examinations rescheduled, management officials had arranged to have the examinations rescheduled. In their conversations with Crispino and the other management officials Gentile and Vassallo indicated they would be available on November 23rd and 26th, December 3rd, and any date thereafter. Crispino rejected all of these suggestions with no explanation, except he rejected on November 26 because it would require him to travel the prior day, a Sunday.

The event which prevented the two union officials from attending the Q and A examinations was the Regional Consultations previously scheduled by INS officials. It was not an event whose timing and scheduling was determined by AFGE Local 1917.

The record establishes that there was no rush to conduct these Q and A examinations and that Crispino had four or five months to conduct them. There is nothing in the record to indicate that postponing or rescheduling the examinations would have interfered with or compromised the investigation. Such a rescheduling might have been inconvenient for Crispino requiring him to travel early in the morning of November 26th or on a Sunday or it might have been inconvenient with his INS assignments, although he did not specify the precise nature or times of any such INS assignments, but it would not have compromised or interfered with the investigation. Further the record fails to establish that there were no other employees available to OIG to conduct these Q and A examinations.

In all of these circumstances I conclude that request of the union representatives to reschedule the Q and A examinations was justified, reasonable, and would not have unreasonably interfered with the integrity of the investigation. The effective denial of the union's request frustrated the very purpose of section 7114(a)(2)(B), with the agency offering no counterbalancing factors or considerations to justify the denial of the request.

Accordingly, I conclude the Q and A examinations were covered by section 7114(a)(2)(B) of the Statute providing AFGE Local 1917 with the right to be represented and that the union was denied this right when management made no attempt to reschedule the Q and A examinations to permit AFGE Local 1917 to be represented by representatives of its choosing.

NYINS contends, however, it is not responsible for any such denial of the union's right because the examinations were conducted by Crispino, as an agent of OIG, and NYINS had no power or authority to tell Crispino how to conduct the investigation or compel him to permit the union to be represented at the Q and A examinations. In this regard it must be noted that OIG is not a named respondent in or a party to this proceeding. In urging that NYINS is not responsible for the conduct of OIG, NYINS relies upon DCIS.

I conclude the facts in the subject case is distinguishable from the facts present in DCIS. In DCIS the investigator was an employee of DCIS and in no way identified as an employee of the Defense Logistics Agency and the local Defense Logistics Agency representatives urged the DCIS investigator to grant the union its rights under section 7114(a)(2)(B).

In the subject case the investigation was initiated at the request of NYINS because the employees were suspected of cheating on their post academy exams. Crispino, an employee of INS, but functioning as a collateral investigator for OIG, on behalf of OIG and with the apparent approval of DOJ,^{5/} identified himself to the examination subjects as an INS employee both in issuing his notices of examination and at all times during the examinations.

Prior to conducting the examinations Crispino met with a NYINS official who provided Crispino with the rooms and facilities for conducting the examinations and told Crispino that Hutnick was available to represent the employees. Further, when advised that the employees had refused to answer questions during the examinations without a union representative of their choosing, NYINS proposed five day suspensions of these employees because of the exercise of section 7114(a)(2)(B) rights.

All of these circumstances compel me to conclude that NYINS was responsible denying the employees and AFGE Local 1917 their section 7114(a)(2)(B) rights.^{6/} See MSHA. To hold otherwise would defeat the purposes of section 7114(a)(2)(B), the rights it was meant to provide, and it would permit this unfair labor practice to go unremedied. Cf. United States Department of the Treasury, Internal Revenue Service, and Internal Revenue Service, Austin District, and Internal Revenue Service, Houston District, 23 FLRA 774 (1986).

Having concluded that NYINS denied AFGE Local 1917 representation of the five unit employees at the Q and A

^{5/} It must be noted that DOJ is the parent organization of INS and OIG and is responsible for the actions of each and, presumably each is responsible for DOJ's actions. See DCIS v. FLRA, 855 F.2d 93 (3rd Cir. 1988) and U.S. Department of Labor, Mine Safety and Health Administration, 35 FLRA 790 (1990) (MSHA).

^{6/} This entire discussion is necessary because of the chimerical lines the FLRA has drawn between parent agencies and their component subdivisions. These inconcinnate distinctions permit agencies to attempt to avoid their obligations under the Statute by using convenient internal agency subdivisions and organizations.

examinations conducted on November 28, 1990, which the union was guaranteed by section 7114(a)(2)(B) of the Statute, I accordingly conclude that NYINS violated section 7116(a)(8) and (1) of the Statute. MSHA and DCIS.

Section 7116(a)(2) of the Statute provides that it is an unfair labor practice of an agency "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment."

The General Counsel of the FLRA contends that NYINS violated section 7116(a)(1) and (2) of the Statute when it issued the letters of proposed 5 day disciplinary suspensions to the five employees because they had refused to answer questions during the Q and A examinations without union representation, as provided in section 7114(a)(2)(B).

The letters of proposed 5 day suspension to the five employees clearly state that the suspensions were proposed because the employees refused to cooperate in the Q and A examinations unless they were represented by a specific union representative. The employees' refusal to answer Crispino's questions was based upon their insistence on exercising rights under section 7114(a)(2)(B). Thus NYINS proposed the disciplinary actions because the employees insisted upon exercising rights protected by the Statute and this action by NYINS would tend to discourage membership in and support of AFGE Local 1917. See Letterkenny Army Depot, 35 FLRA 113 (1990) and Department of the Navy, Norfolk Naval Base, Norfolk, Virginia, 14 FLRA 731 (1984).^{7/}

In light of the foregoing, I conclude NYINS violated section 7116(a)(2) and (1) of the Statute by issuing the letters of proposed suspension to the five employees who were the subjects of the Q and A examinations.

^{7/} I would find that NYINS's proposed suspensions would tend to discourage membership in and support for AFGE Local 1917 even if the FLRA were to conclude that NYINS was not directly responsible for denying the employees the section 7114(a)(2)(B) rights. Thus NYINS was punishing the employees because they had insisted upon exercising Statutory rights, even if those rights were denied the employees by OIG.

General Counsel of the FLRA contends that NYINS violated section 7116(a)(5) and (1) of the Statute by refusing to recognize and deal with AFGE Local 1917's designated representatives by unreasonably refusing to reschedule the Q and A examinations of the five employees.

As discussed above the employees were entitled to AFGE Local 1917 representation at the November 28, 1990, Q and A examinations, that the employees and the union designated Vassallo and Gentile to represent the union at the Q and A examinations, and that NYINS and OIG representatives knew of this designation. Further, AFGE Local 1917, as discussed above, was entitled to designate its own representatives at section 7114(a)(2)(B) examination. See FCI Petersburg. As I concluded above, NYINS unreasonably refused to cooperate in rescheduling the examinations and in so doing refused to permit the union to be represented by representatives of its choosing. In fact, OIG and NYINS went further and designated Hutnick as the union representative, someone who was unacceptable to both the union and the employees.

The FLRA has held that inherent in a union's right to bargain and represent employees is to designate its own representatives and that an agency may not usurp that power by dealing with and recognizing some representatives and not others. See Department of the Air Force, 915th Tactical Fighter Group, Homestead Air Force Base, Florida, 13 FLRA 135 (1983), and Department of Labor, Employment Standards Administration, 13 FLRA 164 (1983).

Accordingly, I conclude that NYINS violated section 7116(a)(5) and (1) of the Statute by refusing to recognize and deal with the AFGE Local 1917's designated representatives by unreasonably refusing to reschedule the Q and A examinations.

Having concluded that NYINS violated section 7116(a)(1), (2), (5) and (8) of the Statute, I recommend the Authority issue the following Order:

ORDER

Pursuant to section 2423.9 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the United States Immigration and Naturalization Service, New York District Office, New York, New York, shall:

1. Cease and desist from:

(a) Requiring any bargaining unit employee of the United States Immigration and Naturalization Service, New York District Office, New York, New York, to take part in an examination in connection with an investigation without affording the employee the rights guaranteed by section 7114(a)(2)(B) of the Statute when union representation has been requested by the employee and the employee reasonably believes that the examination might result in disciplinary action against him or her.

(b) Proposing a 5 day suspension of any employee or otherwise discouraging or intimidating any employee who insists on exercising rights to representation by a labor organization guaranteed by section 7114(a)(2)(B) of the Statute during an examination in connection with an investigation if the employee reasonably believes that the examination might result in disciplinary action against the employee and the employee requests union representation.

(c) Refusing to recognize and deal with representatives designated by American Federation of Government Employees, Local 1917, the representative of certain of its employees, in examinations of employees in connection with investigations within the meaning of section 7114(a)(2)(B) of the Statute or otherwise refusing to consult or negotiate in good faith this labor organization.

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

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

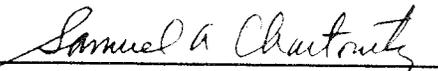
(a) Repeal and withdraw the proposed 5 day suspensions issued to Rupa Bhatia, Anadina Hernandez, Robert Pelech, Auria Rivera, and Evagelia Zarafonitis-Dibbs, on May 1, 1991, because they had exercised rights under section 7114(a)(2)(B) of the Statute by refusing to answer questions during examinations on November 28, 1990, unless afforded representation by representatives designated by American Federation of Government Employees, Local 1917.

(b) Recognize and deal with representatives designated by American Federation of Government Employees, Local 1917, the representative of certain of its employees, in examination of employees in connection with investigations within the meaning of section 7114(a)(2)(B) of the Statute.

(c) Post at its facilities, copies of the attached Notice on forms furnished by the Authority. Upon receipt of these forms, they shall be signed by the District Director, U.S. Immigration and Naturalization Service, New York District Office, New York, New York, and shall be posted and maintained for 60 consecutive days, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that these Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, Notify the Regional Director, Boston Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued: Washington, D.C., April 10, 1992



SAMUEL A. CHAITOVITZ
Administrative Law Judge

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 of the United States Immigration and Naturalization Service, New York District Office, New York, New York, to take part in an examination in connection with an investigation without affording the employee the rights guaranteed by section 7114(a)(2)(B) of the Statute when union representation has been requested by the employee and the employee reasonably believes that the examination might result in disciplinary action against him or her.

WE WILL NOT propose a 5 day suspension of any employee or otherwise discourage or intimidate any employee who insists on exercising rights to representation by a labor organization guaranteed by section 7114(a)(2)(B) of the Statute during an examination in connection with an investigation if the employee reasonably believes that the examination might result in disciplinary action against the employee and the employee requests union representation.

WE WILL NOT refuse to recognize and deal with representatives designated by American Federation of Government Employees, Local 1917, the representative of certain of our employees, in examinations of employees in connection with investigations within the meaning of section 7114(a)(2)(B) of the Statute or otherwise refusing to consult or negotiate in good faith this labor organization.

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.

WE WILL repeal and withdraw the proposed 5 day suspensions issued to Rupa Bhatia, Anadina Hernandez, Robert Pelech, Auria Rivera, and Evagelia Zarafonitis-Dibbs, on May 1, 1991, because they had exercised rights under section 7114(a)(2)(B) of the Statute by refusing to answer questions during examinations on November 28, 1990, unless afforded

representation by representatives designated by American Federation of Government Employees, Local 1917.

WE WILL recognize and deal with representatives designated by American Federation of Government Employees, Local 1917, the representative of certain of our employees, in examination of employees in connection with investigations within the meaning of section 7114(a)(2)(B) of the 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, Boston Regional Office, whose address is: 10 Causeway Street, Room 1017A, Boston, MA 02222-1046, and whose telephone number is: (617) 565-7280.