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

NATIONAL LABOR RELATIONS BOARD Respondent	
and	Case No. 3-CA-10395
NATIONAL LABOR RELATIONS BOARD PROFESSIONAL ASSOCIATION Charging Party	

Harvey A. Holzman, Esquire
For the Respondent

Peter B. Broida, Esquire
For the Charging Party

Laurence Evans, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S. C. § 7101, et seq.,[1/] and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether: (a) the interview of non-targeted unit employees by Respondent's Director of Equal Employment

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1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, e.g., Section 7114(a)(2)(A) will be referred to, simply, as "§ 14(a)(2)(A)".

Opportunity (EEO) were formal discussions within the meaning of § 14(a)(2)(A) of the Statute; (b) the above interviews concerned, ". . . any grievance or any personnel policy or practices or other general conditions of employment" within the meaning of § 14(a)(2)(A) of the Statute; and (c) if the above interviews were formal in nature and concerned general conditions of employment, were they conducted without affording the Union notice and an opportunity to be represented, in violation of §§ 16(a)(1) and (8) of the Statute as alleged in the Complaint, or had the Union, with notice of the interviews, waived its right to be present?

This case was initiated by a charge filed on April 2, 1991 (G.C. Exh. 1(a)). The Complaint and Notice of Hearing issued on June 28, 1991 (G.C. Exh. 1(b)) and the hearing was set for October 3, 1991. By Order dated August 30, 1991 (G.C. Exh. 1 (d)), the hearing was rescheduled for October 18, 1991, pursuant to which a hearing was duly held on October 18, 1991, in Washington, D.C., before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, November 18, 1991, was fixed as the date for mailing post-hearing briefs and Respondent, Charging Party and General Counsel each timely filed, or mailed, an excellent brief received on, or before, November 20, 1991, which have been carefully, considered. Upon the basis of the entire record[2/], including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

2/ Respondent submitted with its Brief a Motion to Correct Transcript, to which no objection has been filed, and, finding the requested corrections wholly proper, Respondent's motion, is hereby granted. In addition, on my own motion, the transcript is further corrected as follows: (a) on page 1, on page 4, and thereafter where the name of the undersigned is spelled "Devanney" or "Delanney" (Tr. 97, et al.) it is hereby corrected to read "Devaney"; and (b) on page 57, line 23 the word "investigation" is deleted and the word "Union" is substituted therefore. Accordingly, the transcript is hereby corrected as more fully set forth in the Appendix hereto.

Findings

1. On November 7, 1990, Respondent NLRB's General Counsel, Jerry M. Hunter (hereinafter referred to as "G.C. Hunter"), received an undated, typed, anonymous letter which was postmarked November 6, 1990 (Res. Exh. 1; Stipulation[3]; Tr. 8, 178-179, 185-187). It was never determined whether this anonymous letter was from a unit member represented by the Charging Party, National Labor Relations Board Professional Association (hereinafter referred to as the "Union"), a member of the clerical unit represented by another labor organization, or from a manager, supervisor or confidential employee (Tr. 21, 167). The anonymous letter in substantial part related to racial statements, conduct and innuendos concerning Respondent's Division of Advice (hereinafter referred to as "Advice") and G.C. Hunter personally (Res. Exh. 1).

2. After receipt of the anonymous letter, G.C. Hunter summoned Respondent's EEO Director, Barbara T. Gainey, to his office at about 2 p.m. on November 7th, (Tr. 144). G.C. Hunter, ". . . asked me [Gainey] to investigate the allegations contained in the letter . . .", and, "Give him a report on my investigation." (Tr. 144, 167).

3. Thereafter, over a period of several weeks, from November 9 to December 15, 1990 (Tr. 236, 237)[4], EEO Director Gainey interviewed some 41 employees in Advice, including supervisors, professionals and clericals (Tr. 189-190, 236-237). Each non-targeted employee was given not less than 24 hours notice of the intended interview except those in legal research who were located on the same floor - the 11th floor - as Ms. Gainey (Tr. 198). Seventeen of the employees interviewed were professionals represented by the Union and of the seventeen professionals, thirteen were not targets of the investigation; i.e., were not alleged to have engaged in EEO misconduct (Stipulation; Tr. 183). The

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3/ The signed Stipulation is attached to the front of General Counsel's formal Documents (G.C. Exh. 1(a)-1(e)).

4/ Ms. Gainey stated that there was a "big gap" between the interviews of November 9 and the other interviews, which she resumed at the end of November, because she had to wrap up another case (Tr. 237).

anonymous letter named only two bargaining unit employees[5/], the names of the other bargaining unit employees who became targeted employees surfaced during Ms. Gainey's investigation (Tr. 33, 190).

4. On November 9, 1990, Ms. Gainey began by interviewing supervisors and managers of Advice (Tr. 146) and the confidential secretaries to those managers and supervisors (Tr. 146). The first bargaining unit employee who was a targeted employee, Mr. Z, was interviewed on November 28, 1990. Until Mr. Z told Ms. Gainey his position and grade level, she had believed Mr. Z was a manager or supervisor (Tr. 147); but, when she realized he, one of the targeted employees, was a bargaining unit employee, she asked if he wanted Union representation and obtained a Union representative, Ms. Jacqueline Young, Steward in Advice (Tr. 25) and a member of the Union's Executive Board (Tr. 125), for him before proceeding with the examination (Tr. 148). The interview of Mr. Z was conducted in Ms. Gainey's office (Tr. 147), as were the interviews of each of the other bargaining unit employees, except Ms. Young whose personal interview was conducted by telephone (Tr. 33) and a follow-up interview of bargaining unit employee Jayme Sophir which was also conducted by telephone (Tr. 72), although the initial interview of Ms. Sophir had been conducted in Ms. Gainey's office (Tr. 66, 67).

5. Ms. Young testified that before she was called to represent Mr. Z, a unit employee on November 28, 1990, had come to her very upset, and told her that she had just been interviewed by Ms. Gainey concerning an anonymous letter (Tr. 26). Ms. Young immediately went to Ms. Jane Clark, Assistant General Counsel, Advice, and asked if she knew what was going on (Tr. 26) and told Ms. Clark that she, ". . . as Union Steward want to be advised and want to be present" (Tr. 27) if any unit employees are implicated.

5/ The parties stipulated that,

> "It [the anonymous letter] . . . aside from the General Counsel's name and Ms. Gainey's name mentioned 8 others by name. Six (6) of those named are supervisors and/or managers and only two (2) are professional employees represented by the NLRBPA Union. Only one of the two named unit employees was interviewed as one (Employee X) refused to . . . be interviewed." (Stipulation).

Ms. Clark did not know about the interviews but, in Ms. Young's presence, called Ms. Gainey. Ms. Young testified that,

> "A She [Ms. Clark] picked up the phone and called Barbara Gainey when I was in the room . . . [and] asked Barbara Gainey whether unit employees were implicated in the letter. And I was told, no, that there were no unit employees mentioned in the letter.6/ I said, fine, I don't need to know anymore, and that was it." (Tr. 27).

When Ms. Gainey called Ms. Young later that day, at about 10:15 a.m. (Tr. 151), to come to her office, Ms. Young promptly went from her office on the eighth floor to Ms. Gainey's office on the eleventh floor where she found Employee Z sitting there, obviously very upset (Tr. 28). Ms. Young stated that Ms. Gainey, ". . . proceeded to tell me that this employee (Employee Z) had been implicated in the letter. . . ." (Tr. 28), and that Ms. Gainey then related from the anonymous letter certain statements attributed to Employee Z (Tr. 28).

Ms. Gainey testified when Ms. Young arrived she [Gainey], ". . . told her about the contents of the anonymous letter . . . I told her that Employee Z had been accused of making a racial slur and that I was affording him Union representation." (Tr. 148; see, also, Tr. 149-150). Ms. Gainey stated that Ms. Young asked for a break so that she could talk to Mr. Z (Tr. 148). After meeting privately with Mr. Z, Ms. Young returned to Ms. Gainey's office and told Ms. Gainey that Mr. Z was very upset and she had told him to take the rest of the day off and asked if the interview could be re-scheduled for the next day, to which Ms. Gainey agreed (Tr. 148-149).7/

At the time Ms. Gainey told Ms. Young about Mr. Z, she also told Ms. Young: (a) the names of the three targeted

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6/ As noted above, until Mr. Z told Ms. Gainey his grade and position she had believed that Mr. Z, as well as the other employees named in the anonymous letter, were managers or supervisors.

7/ Employee Z was interviewed the following day, November 29, 1990, with Ms. Young present as his representative (Tr. 154).

unit employees other than Mr. Z[8/] (Tr. 183, 191); and (b) that she would be interviewing other bargaining unit employees in Advice, i.e., non-targeted unit employees (Tr. 191), and each non-targeted unit employee had at least a 24 hour notice (Tr. 198). Ms. Young had testified to the same effect (Tr. 31). Indeed she stated,

> ". . . she [Ms. Gainey] told me that she was going to interview almost 100 percent of the people in Advice. She did not interview - I know that because I asked - two of the brand new people or the relatively new people." (Tr. 59).

Ms. Young provided Ms. Gainey with a list of the unit employees (Tr. 59).

6. Ms. Young testified,

> ". . . I remember telling her any employees who were being implicated I'm going to speak with them and I want to know their names.
>
> "Q Did you at that time, talk to her about whether they could have Union representation, if they were implicated?
>
> "A I don't think that was an issue frankly.
>
> "Q Okay. And for all those three interviews, you came . . . in when those employees came to be interviewed?
>
> "A Yes.
>
> "Q And there was no question about you being present for the entire interview of those employees?

8/ Employee Z was mentioned in the anonymous letter (Tr. 148-150, 190), as was Employee X who declined to be interviewed (Stipulation). Mr. Holtzman asked, ". . . The three who were referred to this morning as the 'cookie matter' came to your attention subsequent to the letter" (Tr. 190), to which Ms. Gainey replied, "That's right." (Tr. 190; see, also Tr. 31, 32). Whether there is a discrepancy is of no significance as there is no dispute that each targeted employee was, in fact, accorded Union representation.

"A No.

"Q And that was because, again, they were charged or being alleged in having been engaged in some conduct?

"A I don't know what her view is, but my view was that I would be there if people were being implicated.

"Q Again, I assume that was because of the Weingarten aspect of the case.

"A I don't know whether Weingarten is in the federal sector, but if people were being implicated I wanted to be there." (Tr. 50-51).

7. Mr. John Mantz, who is in the Legal Research Branch of Advice (Tr. 108), is the Steward for Legal Research and was not a target. When Ms. Gainey initially interviewed him, he stated that he perceived three elements to the anonymous letter: "The one was the racial slurs and within that the professional and clerical relationships, and the general questions about the General Counsel's competence and the drinking. . . ." (Tr. 116, 192). Because he was questioned about Employee X (Tr. 192), who had a grievance pending and whom he represented (Tr. 109, 110), Mr. Mantz requested Union representation[9/] and brought Mr. Andrew Brinker, Division of Enforcement Litigation and then President of the Union, to the interview. (Tr. 114, 122). Mr. Mantz stated,

". . . our purpose was, the Union's purpose was that we had gone along thinking that this -- aware of -- that something was going on and thinking that it didn't involve us and when I -- after I had my interview, was the first time that the Union (Executive Committee, if you will) was aware that the questioning had gone to

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9/ Mr. Mantz stated that the "second" interview, at which Mr. Brinker was present, took place, ". . . maybe two or three days later, one day later -- a reasonable (sic) short time afterward. . . ." (Tr. 114). On the other hand, Ms. Gainey testified that there was, in reality, a single meeting; that Mr. Mantz had left, gone out, and, within minutes, returned with Mr. Brinker and the interview continued in the presence of Mr. Brinker (Tr. 172-173). Again, it is unnecessary to resolve this conflict.

unit people and unit people were targets of the investigation. Because prior to that, I think, the hierarchy in the Union believed that unit people were not targets of the investigation so, therefore, they didn't need to know about it. . . ." (Tr. 123).

8. Ms. Gainey essentially followed a formal agenda in conducting the interviews by following the allegations in the anonymous letter, quoting from it, and asking the employees the same questions (Tr. 182); she took notes of the interviews (Res. Exh 2; Tr. 170-182); and the interviews lasted from 15 minutes to about an hour (Tr. 32, 35, 68, 74, 97, 111, 128, 154, 227). Ms. Gainey, as Director of EEO, is a high level official of Respondent (Tr. 143); employees were instructed by a person in Ms. Gainey's office, or by Ms. Gainey personally, to report to her office (Tr. 66-67, 91, 109, 127, 198); and the employees considered the interviews to be mandatory (Tr. 78, 87, 111, 127), although Ms. Gainey asserted they were voluntary (Tr. 182). As General Counsel states (General Counsel's Brief, p. 4), and as the record shows, Ms. Gainey questioned employees about criticism of G.C. Hunter; competency of G.C. Hunter; professional and clerical staff relations; race relations and problems in Advice; racial discrimination in Advice; part-time employment; allegations of racial epithets; employees' drinking problems; improved training for secretaries and attorneys; and, until ordered to cease (Tr. 201), about delays in case processing by G.C. Hunter (Tr. 33-34, 35, 37-38, 72-73, 74, 76, 116, 127-128, 132, 133, 136, 148, 149-150, 167-168, 174-175, 180, 188, 229-232). No management official other than Ms. Gainey was present during the interviews.

9. Ms. Gainey testified, fully in agreement with Ms. Young, inter alia, as follows:

". . . I told Ms. Jackie Young on November 28th that I would be interviewing PA Bargaining Unit members.

. . .

"A I told her because I thought she would indicate whether or not she was interested in being there. She only indicated that she was interested in being present during the interviews with the four people who had been targeted." (Tr. 194).

. . .

". . . I told her [Ms. Young] that I would be interviewing other Bargaining Unit people and she just said, as far as I can recall, okay. That she wanted to be there for the people who had been accused of making racial slurs and jokes." (Tr. 248).

CONCLUSIONS

There is no dispute that Respondent's Director of EEO conducted an investigation pursuant to which she examined some 41 employees of the Division of Advice, i.e., that she examined virtually all employees of Advice including supervisors, professionals and clericals. Of the 41 employees examined, or interviewed, seventeen were professional employees represented by the Union and four of these bargaining unit employees were alleged to have engaged in misconduct, i.e., were named or identified targets of the investigation, and each of the four targeted employees was, in accordance with § 14(a)(2)(B) of the Statute, afforded Union representation; indeed, at least one non-targeted employee who requested Union representation was also permitted to have Union representation.

A. Interviews Were Formal Discussions

The case does not involve any allegation that § 14(a)(2)(B)[10/] of the Statute was violated. Whether or not any non-targeted employee might have demanded Union

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10/ "(2) An exclusive representative . . . 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." (5 U.S.C. § 7114(a)(2)(B)).

representation pursuant to § 14(a)(2)(B) of the Statute, this case turns on the assertion that the examination of non-targeted employees constituted formal discussions, pursuant to § 14(a)(2)(A) of the Statute, at which the exclusive representative was entitled to the opportunity to be represented. Section 14(a)(2)(A) of the Statute provides:

> "(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at --
>
> "(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general conditions of employment. . . ." (5 U.S.C. § 7114(a)(2)(A)).

The right accorded the exclusive representative under § 14(a)(2)(A) is a right given wholly to the exclusive representative[11/]; however, the exclusive representative's right attaches only if the following elements exist:

> ". . . (1) there must be a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more unit employees or their representatives; (4) concerning any grievance or any personnel policy or practice or other general condition of employment." U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution (Ray Brook, New York), 29 FLRA 584, 588-589 (1987), aff'd sub nom. American Federation of Government Employees, Local 3882 v. FLRA, 865 F.2d 1283 (D.C. Cir. 1989); Veterans Administration, Washington, D.C. and VA Medical Center, Brockton Division, Brockton, Massachusetts, 37 FLRA 747, 753 (1990) (hereinafter referred to as "VA Brockton").

11/ By contrast, the right of representation under § 14(a)(2)(B) is the employee's right if, and when, the employee reasonably believes that an examination may result in disciplinary action against the employee, and the Union's right, under § 14(a)(2)(B), is both derivative and conditional. Norfolk Naval Shipyard, Portsmouth, Virginia, 35 FLRA 1069, 1073 (1990).

The Authority has consistently held that all four elements must exist for the union's right under § 14(a)(2)(A) to attach. Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 29 FLRA 594, 597 (1987) (hereinafter referred to as "McClellan AFB").

Respondent, although it recognizes that the concept - that, ". . . a union's right to representation at fact gathering interviews . . . depends solely on meeting the requirements of section 7114(a)(2)(B) and cannot be considered under . . . section 7114(a)(2)(A). . . ." (McClellan AFB, supra, 29 FLRA at 600) - which initially had been adopted by the Authority in Department of Health and Human Services, Social Security Administration, 18 FLRA 42 (1985), but which specifically had been rejected by the Authority in McClellan AFB, supra, nevertheless continues to assert that,

> ". . . fact gathering meetings - interviews may not be 'formal discussions' . . . . "(Respondent's Brief, p. 10).

Respondent additionally contends that,

> ". . . this was nothing more than a lawfully authorized EEO fact gathering investigation to determine and monitor whether the Agency's EEO program was effectively working in the face of the EEO Title VII type allegations contained in the anonymous letter which was not a 'complaint' . . . ." (Respondent's Brief, p. 14),

and further asserts that,

> ". . . the Union had no interest to further [by being present at the meeting]. . ." (Respondent's Brief, p. 23).

In addition, Respondent asserts that not all elements necessary to constitute a "formal discussion" within the meaning of § 14(a)(2)(A) were present, specifically, that: (1) there was no discussion (Respondent's Brief, p. 14); (2) the meetings [interviews] were not "formal" (Respondent's Brief, p. 16); and (3) the interviews did not concern a grievance or any personnel policy or other general condition of employment (Respondent's Brief, p. 16).

I do not agree with Respondent's analysis of the interrelation of subsections (A) and (B) of § 14(a)(2) and/or Respondent's interpretation of the Authority's decisions with respect to § 14(a)(2)(A). The Authority has made it clear that whether an encounter is a formal discussion depends on whether all elements of § 14(a)(2)(A) are present, McClellan AFB, supra, U.S. Department of Labor, Office of the Assistant Secretary For Administration and Management, Chicago, Illinois, 32 FLRA 465, 470, 472 (1988); Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 35 FLRA 1230, 1239-1241 (1990); Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 39 FLRA 999, 1012 (1991). It is immaterial whether the encounter is, or is not, an examination of an employee within the meaning of § 14(a)(2)(B), or, as stated by the Authority,

> ". . . that a union's right to representation at fact gathering interviews conducted in preparation for third-party hearings depends solely on meeting the requirement of section 7114(a)(2)(B) and cannot be considered under the provision of section 7114(a)(2)(A), we reject. . . ." (McClellan AFB, supra, 29 FLRA at 600).

If it were assumed that non-targeted employees were entitled to representation pursuant to § 14(a)(2)(B) of the Statute, an assumption contrary to fact[12/]; nevertheless, the same encounter could constitute a "formal discussion" if all of the elements of § 14(a)(2)(A) were present. Does it matter under which subsection the union is entitled to be represented? Yes, there may be two significant differences. At the outset, the Union's right under 14(a)(2)(A) is, of course, the Union's right which is wholly independent of any employee's control, whereas, the Union's right under 14(a)(2)(B) exists only if the employee reasonably believes the examination may result in disciplinary against him or her and the employee requests representation. In addition, as the Charging Party points out (Charging Party's Brief, pp. 14-17), if the encounter is

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12/ Nothing in the record shows that any non-targeted employee had any reasonable belief that the examination of him or her might result in disciplinary action against him or her. Consequently, as to non-targeted employees it is highly questionable that any employee would have been entitled to representation pursuant to § 14(a)(2)(B).

a formal discussion within the meaning of 14(a)(2)(A), the union must be given appropriate and timely advance notice, McClellan AFB, supra, 29 FLRA at 604, et seq.

It is immaterial that management's unilateral "fact gathering" under other circumstances is permitted, e.g., Department of Health and Human Services, Social Security Administration, 19 FLRA 415 (1985); Department of Defense, Office of Dependent Schools, 19 FLRA 762 (1985). Nor does the decision of the Council in National Aeronautics and Space Administration (NASA), Washington, D.C. and Lyndon B. Johnson Space Center (NASA), Houston, Texas, FLRC No. 74A-95, 3 FLRC 618 (1975), support Respondent's assertion that the "fact gathering" involved herein may not constitute a formal discussion (Respondent's Brief, pp. 10-11). First, although, like the present case, the agency's EEO Director was involved, the case is factually distinguishable from the present case. The Assistant Secretary had found that the meetings were formal discussions within the meaning of § 10(e) of Executive Order 11491 and that the agency (NASA) violated the Order by conducting meetings with employees without giving the union the opportunity to be represented. (A/SLMR No. 457, 4 A/SLMR 807 (1974)). It could not be gainsaid that the meetings involved discussions of personnel policies and practices or other matters affecting general working conditions, which, pursuant to § 10(e), were formal discussions; but the Council stated that,

> "The language of . . . section 10(e) . . . makes clear that it is not the intent of the Order to grant to an exclusive representative a right to be represented in every discussion between agency management and employees. . . ." (3 FLRC at 621).

Accordingly, the Council held that discussions whereby management sought to evaluate the effectiveness of an agency-wide program which existed totally apart from the collective bargaining relationship were deemed not "formal discussions." The Council made clear that this applied only where management does not, inter alia, ". . . seek . . . complaints . . . deal with specific employee grievances. . . ." (3 FLRC at 622). Here, of course Respondent's EEO Director did seek complaints and did deal with specific employee complaints.

Second, there are subtle but important differences between the language, of § 10(e) of the Executive Order and § 14(a)(2)(A) of the Statute, e.g., § 14(a)(2)(A) says "any formal discussion", which plainly show that Congress in

enacting the Statute did not endorse the Council's limitation on "formal discussion" depending on, inter alia, ". . . the content of the discussion, or the actual conduct of agency management. . . ." (3 FLRC at 623). Rather, Congress pointedly rejected any such limitation; stated that the exclusive representative "shall be given the opportunity to be represented at - (A) any formal discussion. . . ." (§ 14(a)(2)(A)); and the legislative history further shows a quite different and more narrow limitation.

> ". . . The compromise inserts the word 'formal' before discussions merely in order to make clear that this subsection does not require that an exclusive representative be present during highly personal, informal meetings such as counseling sessions regarding performance. . . ." Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, 96th Cong., 1st Sess, Comm. Print No. 96-7, (Sub. Comm. on Postal Personnel and Modernization of the Committee on Post Office and Civil Service, House of Representatives) p. 957; see, also, pp. 933 and 926 (hereinafter referred to as "Legislative History").

Third, although the Authority initially recognized a "fact gathering" exception for the interview of bargaining unit employees in preparation for third party litigation, Internal Revenue Service and Brookhaven Service Center (Brookhaven), 9 FLRA 930 (1982), following the reversal and remand of Bureau of Governmental Financial Operations, Headquarters, 13 FLRA 27 (1983), which had followed Brookhaven, 774 F.2d 1181 (D.C. Cir. 1985), the Authority ceased recognition of this exception, Bureau of Governmental Financial Operations, Headquarters (on remand), 21 FLRA 512 (1986) and since consistently has held that meetings between management and bargaining unit employees, and specifically fact gathering interviews, are formal discussions if the elements of § 14(a)(2)(A) are met, Sacramento AFB, supra; Department of the Air Force, F.E. Warren Air Force Base, Cheyenne, Wyoming, 31 FLRA 541 (1988); (hereinafter, "F.E. Warren"); Department of the Air Force, Sacramento Air Logistics Command, McClellan Air Force Base, California, 38 FLRA 732, 733-734 (1990). The elements of 14(a)(2)(A) as applicable to the present case are considered hereinafter:

(i) There were discussions

Ms. Gainey interviewed seventeen bargaining unit employees. Respondent states,

"While the Agency does not take issue with the Authority's prior holdings that a 'discussion' is synonymous with a 'meeting' and that there is not even a need for an actual discussion or dialogue, [footnote omitted] the Agency submits that under the circumstances of this case the 'discussion' element has not been met. . . ." (Respondent's Brief p. 14).

Respondent's thought process in asserting that the "'discussion' element has not been met" escapes me. Whatever else may be said there is no doubt, and no dispute, that Ms. Gainey personally met with sixteen of the bargaining unit employees, the seventeenth - Ms. Young - was interviewed by Ms. Gainey by telephone - and that she had at least one follow-up interview, with Ms. Sophir, which she conducted by telephone. Ms. Gainey asked questions and the interviewees responded. The meetings lasted from 15 minutes to an hour (Tr. 32, 35, 68, 74, 97, 111, 128, 154, 227). Clearly, these interviews constituted discussions. Sacramento AFB, supra; F.E. Warren, supra; Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 38 FLRA 594 (1990); Veterans Administration Medical Center, Long Beach, California, 41 FLRA No. 106, 41 FLRA 1370 (1991).

(ii) The discussions were formal.

The Authority, in Department of Health and Human Services, Social Security Administration, Bureau of Field Operations, San Francisco, California, 10 FLRA 115 (1982), set forth considerations of the "formality" of discussions 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; or (8) the manner in which the meetings were conducted (i.e., whether the employee's identity and comments were noted or transcribed). . . ." (10 FLRA at 118).

Subsequently, in Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 14 FLRA 475 (1984), the Authority emphasized that,

> ". . . The foregoing list [set forth above] was not intended to be exhaustive. Other factors may be identified and applied as appropriate in a particular case. Thus, is determining formality, the Authority will consider the totality of the facts and circumstances presented." (14 FLRA at 477).

To like effect, see also: U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, Chicago, Illinois, 32 FLRA 465, 470-471 (1988); Veterans Administration Medical Center, Long Beach, California, supra, 41 FLRA at 1380, 1398-1399.

Here, the interviews were conducted by Respondent's Director of Equal Employment Opportunity. The Director, Ms. Gainey, is not a first level supervisor of any bargaining unit employee, but is a high level management official who reports to the General Counsel, Chairman and Members of Respondent National Labor Relations Board. The initial interview of each bargaining unit employee, except Ms. Young who was interviewed by telephone, was conducted in Ms. Gainey's office. No management official other than Ms. Gainey was present; however, Ms. Gainey took notes and identified each employee's comments. Each interview lasted from 15 minutes to an hour. Each employee to be interviewed was notified about 24 hours in advance and Ms. Gainey essentially followed a fixed agenda, or format, by tracking the anonymous letter and quoting from it and by asking the same questions (Tr. 182-183). As additional allegations surfaced during her investigation, Ms. Gainey broadened her inquiry to include the "new" allegations and, in at least one instance, conducted a follow-up interview to explore allegations brought to light during her investigation. Either a clerical employee in Ms. Gainey's office, or Ms. Gainey herself, called each employee to set up "a meeting to discuss an EEO matter "(Tr. 67); the employees believed attendance was mandatory (Tr. 78, 87, 97, 111, 127); and Ms. Gainey never advised employees that participation was voluntary; but neither did she tell any employee that the interviews were mandatory (Tr. 182). One targeted unit employee declined to be interviewed (Employee X) (Stipulation) and, so far as the record shows, no other employee, whether a supervisor, manager, non-unit employee, or unit employee refused to be interviewed. Moreover, virtually every employee of Advice was interviewed by the

Director of EEO including supervisors and non-unit employees, and the interviews involved highly sensitive matters such as: race relations in Advice, criticism of the General Counsel, and allegations of sexual discrimination. The totality of the record plainly demonstrates that the discussions were formal in nature.

(iii) The discussions were between a representative of the agency and one or more unit employees

Obviously, the discussions were between a representative of the agency, Ms. Gainey, Respondent's Director of EEO, and one or more unit employees, the seventeen unit employees interviewed (one targeted employee, Employee Z, was interviewed and one targeted employee, Employee X, declined to be interviewed; however the Union, as Employee X's representative, met with Ms. Gainey.) Although only X and Z were mentioned in the anonymous letter, three other unit employees became targets of the investigation (Tr. 190) and each targeted unit employee interviewed was accorded representation).

(iv) The formal discussions concerned "any grievance or any personnel policy or practice or other general condition of employment" within the meaning of § 14(a)(2)(A) of the Statute.

Respondent asserts,

> ". . . the interviews did not concern a grievance as none had been filed or had even arisen nor did it involve any type of formal proceedings . . . the unsigned and undated letter . . . was anonymous. Therefore, it can not legally be a grievance. . . ." (Respondent's Brief, p. 16).

Respondent cites and relies, inter alia, on: Nuclear Regulatory Commission, 29 FLRA 660 (1987) (Member Fraizer concurring in part and dissenting in part, 29 FLRA at 667-670) [". . . the EEO complaint was filed by an employee who was not in the unit . . . at the time of the events giving rise to the complaint or at the time of the filing of the complaint . . . we find that the meeting . . . was not one in which the Union had a right to be represented under section 7114(a)(2)(A) . . . Moreover, we find that the

meeting . . . did not concern 'any personnel policy or practices or other general condition of employment within the meaning of section 7114(a)(2)(A). The legislative history . . . makes it clear that the term 'general' . . . is intended to limit a union's right to representation to those formal discussions 'which concern conditions of employment affecting employees in the unit generally,'" (29 FLRA at 663); U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution (Ray Brook, New York), supra, [". . . the oral reply meeting . . . did not concern a 'grievance' within the meaning of section 7114(a)(2)(A) . . . No final decision had been made by the agency regarding the proposed action . . . In the absence of any final action by the agency as of the time the meeting was held, the employee had no basis for filing, and had not filed, an appeal . . . Moreover, no grievance under a contractual grievance procedure was involved. . . ." (29 FLRA at 591); and, American Federation of Government Employees, Council 214, 38 FLRA 309 (1990) [". . . meetings concerning last chance agreements do not constitute formal discussions under section 7114(a)(2)(A). . . ." (38 FLRA at 331)].

Charging Party asserts that,

> ". . . The anonymous letter itself was a 'grievance' within the meaning of the Statute. There is no dispute that it was from an 'employee' and . . . 5 U.S.C. 7103(a)(9) defines 'grievance' as any complaint by any employee concerning any matter relating to the employment of the employee.' The Authority has made plain that the definition of 'grievance' is a broad one . . . [citing F.E. Warren, supra]. The Statute does not require the grievance to be in a particular form or to be submitted through a negotiated agreement. The complaint in this case was concerning what the employee thought was racial discrimination or insensitivity in the Division of Advice. It was a 'grievance' and . . . representational rights would accord so long as the discussions were 'formal'". (Charging Party's Brief, p. 11).

Whether the formal discussions conducted by Ms. Gainey concerned a "grievance" within the meaning of § 14(a)(2)(A) is an interesting question, but one which is unnecessary to decide and, I specifically do not decide.

The Statute is clear that the union's right to be represented attaches either to any formal discussion concerning any grievance or to any formal discussion concerning conditions of employment affecting employees in the unit generally.[13/] Nor has there ever been the slightest question as to the separate and distinct duality of the right. See, for example: Department of Health, Education and Welfare, Region IV, Atlanta, Georgia and Department of Health and Human Services Region IV, Atlanta, Georgia, 5 FLRA 458 (1981); Social Security Administration, Baltimore, Maryland, 18 FLRA 249 (1985). I fully agree with General Counsel (General Counsel's Brief, pp. 9-10) and the Charging Party (Charging Party's Brief, pp. 11-12) that the discussions initiated by Ms. Gainey concerned personnel policies, practices or other general conditions of employment.

Of course, a discussion which concerns only a few specific unit employees may not constitute a "formal discussion" because it does not involve conditions of employment affecting employees in the unit generally," United States Government Printing Office, Public Documents Distribution Center, Pueblo, Colorado, 17 FLRA 927, 929 (1985); but, here, Ms. Gainey interrogated virtually all employees of Advice, excepting only those newly hired, about a wide range of matters which affected conditions of employment of all employees in the unit. Thus, she questioned targeted unit employees about racial statements alleged to have been made by them and non-targeted employees as to whether they had heard any such statements (Tr. 182-183); she questioned all Unit employees about criticism of General Counsel Hunter and his competency; about delays in case processing by General Counsel Hunter, until she was ordered to stop; about race relations in Advice; about racial discrimination in Advice; about the policy and practice in Advice concerning drinking problems; about training unit

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13/ ". . . By inserting the word 'general' before 'conditions of employment', the substitute limits the right of representation to those formal discussions (other than grievance discussions) which concern conditions of employment affecting employees in the unit generally." Legislative History, supra, p. 926.

employees in race relations; and about part-time employment.[14/] In addition, during her investigation, an allegation of sex discrimination in Advice surfaced and Mr. Gainey broadened her questioning to include this allegation. Matters involving race and discrimination have long been held to involve general conditions of employment. Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604, 615-617 (1980), enf'd sub nom. Department of Defense, Army-Air Force Exchange Service v. FLRA, et al., 659 F.2d 1140 (D.C. Cir. 1981), cert, denied, 455 U.S. 945 (1982); Department of Health and Human Services, Social Security Administration, 26 FLRA 865 (1987). I further agree with the Charging Party that,

> "The right to work in a non-discriminatory working environment is a right that is guaranteed to federal employees by EEOC regulations, 29 CFR Part 1613, and by the amended Civil Rights Act of 1964, 42 USC 2000e, et seq. A discussion concerning discrimination in the office is as much a discussion concerning employment practices, policies, or general conditions of employment as would be, for example, a discussion concerning union picketing, as to which the Authority observed was a formal discussion. . . ." [Citing F.E. Warren, supra]. (Charging Party's Brief, p. 12).

I am aware that the Authority, in U.S. Government Printing Office, 23 FLRA 35 (1986), held that,

> ". . . any employee is entitled to elect to pursue a complaint of discrimination pursuant to and under the regulations of the EEOC . . . These regulations provide for an informal adjustment process [footnote omitted]. The regulations of the EEOC also provide that at any stage in the presentation of an EEO complaint, 'the complainant shall have the right to be accompanied, represented and advised by a representative of his own choosing,' [footnote omitted] [29 C.F.R. § 1613.214(b)(1)]. Nowhere in those regulations is there any provision for the exclusive representative's presence, unless

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14/ For reasons well stated by General Counsel (General Counsel's Brief, p. 5 n.1) I credit the testimony of Ms. Sophir.

the exclusive representative is the complainant's designated representative. . . ." (23 FLRA at 38-39 (1986) (Emphasis supplied).

I am further aware that section 1613.213 of the EEOC Regulations further provides that,

"(c) The agency shall assure that full cooperation is proved to the Equal Employment Opportunity Counselor in the performance of his duties under this section.

"(d) The Equal Employment Opportunity Counselor shall be free from restraint, interference, coercion, discrimination, or reprisal in connection with the performance of his duties under this section." (29 C.F.R. § 1613.213 (c) and (d)).

See, also, 29 C.F.R. Subpart F [§ 1613.601, et seq.].

Aside from whether the anonymous letter constituted a complaint within the meaning of 29 C.F.R. § 1613.214(a)(1) ["An agency shall require that a complaint . . . be signed by the complainant. . . ." (Emphasis supplied)] and/or whether the anonymous letter complied sufficiently to invoke the precomplaint processing provisions of 29 C.F.R. § 1613.213, it is plain that Ms. Gainey did not proceed in accordance with the precomplaint processing procedures, but, rather, at the direction of General Counsel Hunter, embarked upon a much different and broader inquiry which, for the reasons set forth above, did concern general conditions of employment. For example, however laudable the objective, her investigation of drinking problems had nothing to do with discrimination, it having been alleged that obnoxious conduct by a black alcoholic was tolerated because obnoxious conduct by a white alcoholic had been tolerated, but rather with conditions of employment generally. Similarly, her investigation of case processing, subsequently ordered stopped, had nothing to do with employment discrimination. Nor is it any answer that she did not, as she stated, ". . . discuss with anyone the stressful working conditions in the Division of Advice "(Tr. 195), inasmuch as she questioned employees about a wide range of matters which, by their nature, would create stressful working conditions, such as use of profanity in the workplace, racial relations, inept supervision, etc.

Accordingly, having found that the interviews met all elements of § 14(a)(2)(A) of the Statute, they were formal

discussions and the Union was entitled to the opportunity to be represented at the discussions.

B. Union Waived Its Right To Be Present

As noted above, the exclusive representative is entitled to reasonable prior notice of a formal discussion. McClellan AFB, supra, 29 FLRA at 604-606. It is conceivable that an examination, at which the union is present pursuant to 14(a)(2)(B), at the same time constitutes a formal discussion, and it is further conceivable that a violation of 16(a)(1) and (8) might be established if circumstances showed that the union, although present to represent the employee, nevertheless, did not have adequate time to select the representative of its choice for the formal discussion. Certainly, the record here shows no basis for any such violation. Two unit employees were mentioned in the anonymous letter. Employee X declined to be interviewed. Employee Z was called to Ms. Gainey's office on November 28, 1990; Ms. Young was called to come to Ms. Gainey's office to represent Z; and after conferring privately with Z, Ms. Young asked that the examination be rescheduled for the following day, which was done. Even if it were assumed that the examination of Z were also a formal discussion, the Union, through Ms. Young, Steward in Advice and member of the Union's Executive Board, had adequate time to select its representative for the formal discussion. As to the other three unit employees involved in the Cookie incident (Tr. 32), Ms. Young stated that Ms. Gainey gave her the names of the three employees she wanted to interview (Tr. 49), but the record is wholly ambiguous as to the time sequence. Nevertheless, the record does not show, or even suggest, that the Union did not have adequate time to select its representative if the interviews of these three employees were, also, formal discussions. Consequently, as the Union was present to represent employees examined pursuant to § 14(a)(2)(B), waiver considerations are limited to non-targeted unit employees.

Ms. Gainey interviewed the first non-targeted unit employee on November 28, 1990. Ms. Young very credibly testified that the employee had come to her, very upset, and told her that she had just been interviewed by Ms. Gainey concerning an anonymous letter; that she [Ms. Young] immediately went to Ms. Jane Clark, Assistant General Counsel, Advice, and asked Ms. Clark what was going on. Ms. Clark did not know but, in Ms. Young's presence, called Ms. Gainey. Ms. Young testified that,

"A She [Ms. Clark] . . . asked Barbara Gainey whether unit employees were implicated in the letter. And I was told, no, that there were no unit employees mentioned in the letter. I said, fine, I don't need to know anymore, and that was it." (Tr. 27).

For reasons set forth above, the interview of this first unit employee, whom I shall refer to as "Employee A", was a formal discussion and Respondent failed to give the Union an opportunity to be represented. The Union, prior to the formal discussion, scarcely could have waived its right to be present since it was not even aware of the discussion until after the fact; however, after Ms. Young learned of the discussion she went to Assistant General Counsel Clark and asked what was going on. Ms. Clark did not know but in Ms. Young's presence called Ms. Gainey. Ms. Clark then told Ms. Young that no unit employees were mentioned in the anonymous letter, about which Employee A had been interviewed by Ms. Gainey, and Ms. Young stated, ". . . I was told, no, that there were no unit employees mentioned in the letter. I said, fine, I don't need to know anymore, and that was it." (Tr. 27)(Emphasis supplied).

It is obvious that, after being told that no unit employee was mentioned in the anonymous letter, Ms. Young dismissed any further interest in the interview of Employee A -- ("I said, fine, I don't need to know anymore, and that was it") - and, by inference, indicated that she, as Union Steward, had no interest in the interview of unit employees not implicated; i.e., not mentioned in the anonymous letter. Even if Ms. Young's statement were not deemed a waiver of the Union's right to be present at the interview of Employee A, it would not effectuate the purposes of the Statute to find a violation of §§ 16(a)(1) or (8) with respect thereto inasmuch as Ms. Young told Ms. Clark she had no further interest in the interview of Employee A -- "I don't need to know anymore, and that was it."

Although Ms. Young by the above statement also inferred that she was not interested in the interview of any non-implicated unit employee, the Union's waiver as to the interview of other non-targeted unit employees is by no means predicated merely on such inference. Indeed, it might be questioned that Ms. Young was fully informed at this point so that she could make a truly informed determination.

At the time Ms. Gainey spoke to Ms. Clark she believed that all employees mentioned in the anonymous letter, including Employees X and Z, were supervisors. When Employee Z told Ms. Gainey his position and grade level,

recognizing that he was a bargaining unit employee and not a supervisor, Ms. Gainey immediately stopped the interview and asked him if he wanted representation, and, when he said that he did, she called Ms. Young, the Union Steward for Advice. When Ms. Young arrived, about 10:15 a.m., Ms. Gainey told her about the contents of the anonymous letter and that Employee Z had been implicated in the letter; i.e., that the letter asserted that Z had made certain statements (Tr. 28, 148). Ms. Young asked for a break to speak to Mr. Z privately and when Mr. Z and Ms. Young returned, Ms. Young told Ms. Gainey that Z was very upset and she had told him to take the rest of the day off and asked that the interview be re-scheduled for the following day (Tr. 148-149).

At this point, Ms. Gainey told Ms. Young the names of targeted employees other than Mr. Z[15/] and that she would be

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15/ Ms. Gainey said four (Tr. 190, 194). Clearly, one of the targeted unit employees was X (Tr. 183). If there were three targeted unit employees involved in the "cookie matter" (Tr. 190), then, necessarily, there were five targeted unit employees.

Ms. Young was uncertain whether Ms. Gainey gave her the names of the three employees she wanted to interview relative to the Cookie incident on November 28 or whether it was later (Tr. 49) but thought it was later (Tr. 49). While I found Ms. Young a very credible witness in most respects, her recollection of the chronology of events was uncertain and changeable. For example, she was positive that Employee A came to her on November 28; that she went to Ms. Clark on the 28th; and that she was called to Ms. Gainey's office to represent Employee Z on the 28 (Tr. 27-28). Later, she said Z was not interviewed until near the end (Tr. 38).

As Ms. Gainey had begun interviewing non-unit employees on November 9, it is as probable that the Cookie incident had surfaced prior to November 28 as later. Accordingly, I shall adopt Ms. Gainey's testimony that she told Ms. Young the names of the unit employees involved in the Cookie incident on November 28. In reality, it matters very little since there is no dispute whatever that Ms. Young was given the names of these targeted employees.

It is further clear that Ms. Gainey dredged up additional allegations during her investigation. For example, the allegation directed at Ms. Young because secretaries had not been invited to a luncheon for a departing law student (Tr. 33-35).

interviewing non-targeted bargaining unit employees (TR.191). Indeed, Ms. Young testified that,

> ". . . she [Ms. Gainey] told me that she was going to interview almost 100 percent of the people in Advice. She did not interview -- I know that because I asked -- two of the brand new people or the relatively new people." (Tr. 59).

Moreover, Ms. Young provided Ms. Gainey with a list of the unit employees (Tr. 59) and commented,

> ". . . lest you make a mistake and interview somebody without my being present, this is the list of our unit employees." (Tr. 60).

With full knowledge that Ms. Gainey was going to interview "almost 100 percent of the people in Advice"; with full knowledge of the purpose of the interviews; having furnished Ms. Gainey a list of unit employees; and with full knowledge of named "targeted employees" [implicated employees] on the one hand and "non-targeted employees" [non-implicated employees] on the other hand, Ms. Young told Ms. Gainey,

> ". . . I remember telling her any employees who were implicated I'm going to speak with them and I want to know their names.
>
> . . .
>
> "A I don't know what her view is, but my view was that I would be there if people were being implicated. . . ." (Tr. 50).

Ms. Gainey further credibly testified, as follows:

> "A . . .I told Ms. Jackie Young on November the 28th that I would be interviewing PA Bargaining Unit members.
>
> . . .
>
> "A I told her because I thought she would indicate whether or not she was interested in being there. She only indicated that she was interested in being present during the interviews with the four people who had been targeted." (Tr. 194).
>
> . . .

"A . . . She said she wanted to be there for the targeted ones . . . (Tr. 247).

. . .

"A . . . I told her that I would be interviewing other Bargaining Unit people and she just said, as far as I can recall, okay. That she wanted to be there for the people who had been accused of making racial slurs and jokes." (Tr. 248).

Ms. Young was given the names of all targeted unit employees in advance[16/] and she stated, "With Employee Z, he was already there. With the other employees, I think I went down with them." (Tr. 36, 37-38).

Mr. Mantz, Steward for Legal Research Branch, was, according to Mr. Mantz, interviewed sometime in the middle of December (Tr. 108). He was not a target. Ms. Gainey told him about the anonymous letter including the drinking allegation[17/], as Mr. Mantz confirmed[18/]; but Ms. Gainey told Mr. Mantz that she wanted to talk to him about Employee X (Tr. 109, 110, 192). Mr. Mantz was representing Employee X in a pending grievance and requested Union representation and brought in Mr. Andrew Brinker, then President of the Union. Mr. Mantz stated,

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16/ Except Employee Z and herself. As to her own interview, Ms. Gainey called and interviewed her by phone. There was no advance notice that Ms. Young had become a target (Tr. 33-35); however, Ms. Young did not request representation and there is no assertion that she believed her examination might result in disciplinary action against her.

17/ It is interesting that on November 28, Ms. Gainey stated that she had not told Ms. Young about the drinking allegation, i.e., did not discuss page 2 of Res. Exh. 1 (Tr. 151).

18/ He stated that he perceived three elements to the anonymous letter, "The one was the racial slurs and within that the professional and clerical relationships, and the general questions about the General Counsel's competence and the drinking. . . ." (Tr. 116).

". . . our purpose was, the Union's purpose was that we had gone along thinking that this -- aware of -- that something was going on and thinking that it didn't involve us and when I -- after I had my interview, was the first time that the Union (Executive Committee, if you will) was aware that the questioning had gone to unit people and unit people were targets of the investigation. Because prior to that, I think,the hierarchy in the Union believed that unit people were not targets of the investigation so, therefore, they didn't need to know about it. . . ." (Tr. 123).19/ (Emphasis supplied).

Although Mr. Mantz was grossly in error in asserting that the Union did not know until mid-December, when he was interviewed, that unit employees were targets of the investigation, error which Mr. Mantz conceded ("communication between the Union President and the Steward in Advice [Ms. Young] about what was going on") and which is firmly shown by the record; nevertheless, Mr. Mantz emphasized, as Ms. Young had also, that if unit employees were not targets of the investigation, the Union didn't need to know about the interviews.

It is well settled, as the Authority has stated, that a union's waiver of a statutory right must be clear and unmistakable. Department of Health and Human Services, Health Care Financing Administration, 39 FLRA 120, 129 (1991). Although it is true that Respondent did not give the Union a schedule of the specific times that non-targeted unit employees would be interviewed, there is no dispute whatever that the Union was given notice that non-targeted unit employees were going to be interviewed. I find that with full knowledge and informed judgment the Union clearly and unmistakable waived its right to be present at the interview of non-targeted unit employees. First, the Union, through Ms. Young, learned on November 28, 1990, that unit

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19/ Mr. Mantz further stated,

". . . I was not privy to the early -- apparently there was some communication between the Union President and the Steward in Advice [Ms. Young] about what was going on and up until -- my interview, I don't think anyone was aware that unit people were targets of the investigation. . . ." (Tr. 122-123).

employees were being interviewed by Ms. Gainey when Employee A came to Ms. Young, very upset, and told her she had just been interviewed by Ms. Gainey about an anonymous letter. Ms. Young immediately went to Assistant General Counsel Clark, but, when told that no unit employees were mentioned in the anonymous letter, told Ms. Clark "I don't need to know anymore" and, nothwithstanding that Employee A was upset, had no further interest or concern about A's interview.

Second, later on the same day, November 28, Ms. Young was called to Ms. Gainey's office because Employee Z, a target, was a unit employee and had requested representation. To be sure, Z was so distraught - Ms. Young even described him as hysterical (Tr. 42) - that after meeting with him privately Ms. Young told him to take the rest of the day off and had his interview rescheduled for the following day. Ms. Gainey told Ms. Young about the allegations in the anonymous letter and specifically, Ms. Gainey told Ms. Young: (a) the names of the four or five targeted unit employees; and (b) that she was going to interview "almost 100 percent of the people in Advice." With notice that both targeted and non-targeted unit employees were going to be interviewed, Ms. Young told Mr. Gainey she wanted to know the names of any employees who were implicated [targeted] and she would be there if people were implicated [targeted]. She was given the names of the targeted employees and was told in advance when these employees were to be interviewed and, except for Mr. Z, accompanied each to the interview.20/

With notice that non-targeted unit employees were to be interviewed, Ms. Young quite intentionally did not ask to be informed of non-targeted employee interviews, for the reason that the Union was interested only in being present for the interview of any targeted [implicated] unit employees. This was shown by Ms. Young's statement to Ms. Clark; by her statement to Ms. Gainey on November 28; and by Mr. Mantz's testimony.

Reduced to the simplest terms, Ms. Gainey told Ms. Young, in effect: "I am going to interview employee

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20/ Of course, she also accompanied Employee Z to his interview on November 29, 1990 (Tr. 154).

No. 1, who is implicated by the anonymous letter, and employee No. 2 who is not an implicated employee." Ms. Young says, in effect, "I want to be present at the interview of employee No. 1." Ms. Young is notified and is present at the interview of employee No. 1. General Counsel asserts, "Young had no reason to believe that Gainey was holding formal discussions with unit employees who were not targets. "(General Counsel's Brief, p. 13). This is simply not true. Ms. Young knew about Employee A; Ms. Gainey told Ms. Young she was going to interview "almost 100 percent of the people in Advice"; and Ms. Gainey told Ms. Young that only four [or five] of the people in Advice were targeted [implicated] employees. General Counsel asserts that, "Even Gainey testified that neither Young nor Mantz ever told her that they had no interest in representing or did not want to be present at non-target professional unit employees interviews." (General Counsel's Brief, p. 13). Literally, it is true, Ms. Young did not say "I do not want to be present at the interview of non-targeted employee [i.e., in my simplified example, "I do not want to be present at the interview of employee No. 2 "]; but in reality, Ms. Young, by saying only that, "I want to be present at the interview of employee No. 1", did convey to Ms. Gainey her disinterest in the interview of employee No. 2 [i.e., the non-targeted employees]. Of course, for the Union to exercise its § 14(a)(2)(A) right, it must know of the formal discussion; Respondent informed Ms. Young of the interviews of non-targeted unit employees; and Ms. Young disclaimed interest by ignoring the interviews of non-targeted employees because, as she had told Ms. Clark, "I don't need to know . . ." and as Mr. Mantz stated, ". . . they [the Union] didn't need to know about it . . .", i.e., the interview of non-targeted employees. From the circumstances, the record shows that the Union clearly and unmistakably waived its § 14(a)(2)(A) right to be present at the interview of non-targeted unit employees. If there were any doubt, and I discern none, the fact that Ms. Young, as well as Messrs. Mantz and Brinker, was not only a lawyer, but a lawyer especially attuned to the nuances of labor relations, must be borne in mind. She, and Mr. Mantz fully understood the meaning and impact of their statements.

Accordingly, as I find that the Union clearly and unmistakably waived its § 14(a)(2)(A) right to be present at the interview of non-target unit employees, I recommend that the Authority adopt the following:

ORDER

The Complaint in Case No. 3-CA-10395 be, and the same is hereby, dismissed.

William B Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: March 19, 1992
Washington, DC