

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

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UNITED STATES DEPARTMENT OF
JUSTICE, WASHINGTON, D.C. AND
IMMIGRATION AND NATURALIZATION
SERVICE, NORTHERN REGION, TWIN
CITIES, MINNESOTA AND OFFICE
OF INSPECTOR GENERAL,
WASHINGTON, D.C. AND OFFICE OF
PROFESSIONAL RESPONSIBILITY,
WASHINGTON, D.C.

Respondents

and

Case Nos. 7-CA-00683
7-CA-10291

NATIONAL BORDER PATROL COUNCIL,
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Charging Party

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SERVICE, NORTHERN REGION, TWIN
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Respondent

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Case No. 7-CA-10373

NATIONAL BORDER PATROL COUNCIL,
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Charging Party

Scott David Cooper
Counsel for Respondents

Jerry W. Gillies
Representative of the Charging Party

Michael Farley
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The consolidated unfair labor practice complaint alleges that Respondents violated section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1), by requiring a Union representative to divulge information provided by an employee during the course of Union representation (Case No. 7-CA-10291) and, separately, by requiring the employee to reveal the contents of discussions he had with the Union representative (Case No. 7-CA-00683). The complaint also alleges that Respondents violated section 7114(a)(2)(B), 7116(a)(1) and (8) when an agent of Respondents told the employee's Union representative during an examination in connection with an investigation that he could not advise the employee at all and refused to allow the employee and the Union representative to confer privately outside the room where the questioning occurred. (Case No. 7-CA-00683). Finally, the consolidated complaint alleges that Respondent INS violated section 7114(b)(4), 7116(a)(1), (5) and (8) by failing and refusing to provide certain data requested by the Union. (Case No. 7-CA-10373).

Respondents denied the alleged violations.

A hearing was held in Kalispell, Montana. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The United States Department of Justice, Washington, D.C. (DOJ) is an executive department. The Immigration and Naturalization Service (INS), the Office of Inspector General (OIG), and the Office of Professional Responsibility (OPR) are separate primary national subdivisions or components of DOJ. Each, including DOJ, is an "agency" as defined in the Statute.

The National Border Patrol Council, American Federation of Government Employees, AFL-CIO (the Union) is the exclusive representative of an appropriate unit of employees of INS, including United States Border Patrol agents within INS, Northern Region, Twin Cities, Minnesota.

In early 1990 OIG received from certain INS employees allegations of misconduct by Border Patrol Agent (BPA) Jason Wood, Plentywood, Montana. OIG assigned Edward L. Nelson to investigate the charges. Nelson is Assistant Chief Patrol Agent, INS, U.S. Border Patrol, Spokane, Washington. He has a collateral duty as an investigator for OIG.

Pursuant to a memorandum of understanding between OPR and OIG, OIG conducts investigations pertaining to attorneys, criminal investigators, and law enforcement personnel for OPR, which has the statutory responsibility for such investigations. (Respondent's (R) Ex. 2; 5 U.S.C. Appendix 3 § 8D(b)(2)).

Such investigations were handled by bureau level internal affairs divisions such as OPR/INS until 1989 when the bureau level units were eliminated and their functions were transferred to OIG. (Tr. 2 at 52-53; 5 U.S.C. Appendix 3 § 9I.) In lieu of a formal transfer of OIG personnel to OPR at that time, as authorized by the legislation, the memorandum of understanding provided that OIG would utilize personnel and resources of the former bureau level investigative offices to perform the investigations under the direction and control of OPR. (5 U.S.C. Appendix 3; R. Ex. 2; Tr. 2 at 52-53).

Nelson previously had a collateral duty as an investigator for OPR/INS. (Tr. 2 at 52-53). Although he is an INS employee and continues to receive pay from INS, he is under the control and supervision of OIG while performing collateral duties as an investigator for OIG. INS can not control his investigations in any way. (Tr. 2 at 57). See 28 C.F.R. § 0.39d(d) (1990).

During the course of Nelson's investigation of BPA Wood, Nelson learned that Wood had a conversation with BPA Jerry Gillies. (Tr. 2 at 159-60). Nelson knew that Gillies is a regional vice president of the Union. Gillies, as a Union representative, had previously dealt with Nelson. (Tr. 2 at 161-62).

On July 16, 1990 Nelson discussed with Assistant United States Attorney (AUSA) Claus Richter, U.S. Attorney's Office, Billings, Montana, facts Nelson had developed which could lead to a possible prosecution of BPA Wood for theft of government property. Based on their discussion, Richter advised Nelson that there was insufficient evidence to prove that ammunition sold by BPA Wood was government property. Richter asked Nelson who else Wood might have contacted. Nelson advised Richter of Wood's conversation with Union representative Gillies. AUSA Richter was not aware of an FLRA administrative law judge decision concerning the privilege of a Union representative to retain the confidentiality of conversations with an employee during protected activity. He was of the opinion at that time that conversations between a Union representative and an employee were not privileged as far as the federal criminal system is concerned. AUSA Richter requested Nelson to interview Gillies to determine if Wood had said anything to Gillies concerning the origin or sale of the ammunition. (Tr. 1 at 197-200, 214; Tr. 2 at 72-73). Nelson testified that he would not have interviewed Gillies had he not been requested to do so by AUSA Richter. (Tr. 2 at 73).

The Wood-Gillies Conferences

The record reflects that BPA Wood in Plentywood, Montana telephoned Union representative Gillies in Kalispell, Montana in January 1990 and on July 15 and 16, 1990. Wood discussed with Gillies problems Wood was having with his supervisor and, on July 15 and 16, 1990, furnished Gillies details concerning possible allegations of misconduct that could be made against him relating to the sale of ammunition, gambling, indebtedness, falsification of time and attendance records, use of alcohol, an extramarital affair, and a possible unauthorized investigation Wood had conducted concerning Nelson after Wood learned that Nelson was conducting an investigation of him. Wood sought Gillies' advice as a Union representative regarding Nelson's identity and concerning how he should conduct himself in view of the allegations made against him. Gillies advised Wood that Nelson was a collateral OPR/OIG investigator and

advised Wood of his rights and of the procedures that management would follow in the investigative examination. Later Gillies alerted other Union officials to Wood's need of Union assistance and arranged with a management official for a Union representative, BPA William Hagan, who was much nearer in distance, to be designated as Wood's representative at an investigative examination of Wood to be held on July 18, 1990. Gillies also spoke with Wood's wife about what her response could be if she were questioned about Wood. (Tr. 1 at 72-96, 216-227).

The Gillies Interview

On July 17, 1990, pursuant to the request of AUSA Richter and in furtherance of the OIG investigation of Wood, Mr. Nelson interviewed Union Representative Gillies by telephone. (Tr. 1 at 96). Howard Russell Mendenhall, Special Agent, OIG, Chicago was also introduced and was a participant by telephone. (Tr. 1 at 100). Nelson read to Gillies from an INS Form G-809 (G.C. Ex. 2), which included the identification of Nelson as an INS officer representing the Regional Commissioner. (Tr. 1 at 96-97). Nelson used forms with the INS heading in this interview and in his subsequent interview with BPA Wood pursuant to OIG policy because new forms with the OIG heading were not yet available. (Tr. 2 at 61). Gillies knew that Nelson was an OIG/OPR collateral investigator. (Tr. 1 at 77, 85).

Nelson told Gillies that he was required to provide information in connection with an investigation of BPA Wood for selling government ammunition. Gillies responded that he would do so if required, but, as a Union official, he would prefer not, as all the information he had received regarding Mr. Wood was obtained as his Union representative, and he felt such information was privileged.^{1/} Both Mr. Nelson and Mr. Mendenhall stated that there was no privileged information between a Union officer and a bargaining unit member; that privileged communication existed only between a lawyer and client. Gillies was advised that if he refused to answer any questions he could be subject to revocation of his security clearance as well as disciplinary action up to and including removal. (Tr. 97-101; G.C. Ex. 2).

^{1/} The day before, July 16, 1990, Nelson had received notice that BPA William Hagen would be Wood's Union representative at Wood's interview to be held on July 18, 1991. (Tr. 74-75).

Nelson then placed Gillies under oath and questioned him about Wood's selling of ammunition, as well as his knowledge of Wood's gambling, indebtedness, possible falsification of time and attendance records, and Wood's investigation of Nelson. (Tr. 1 at 103-106). The questions required Gillies to reveal information provided by Wood to Gillies in his capacity as a Union representative during their conversations on July 15 and 16, 1990.

As set forth below, the notice of proposed removal issued to Wood on November 19, 1990 contained, in part, information furnished by Gillies to Nelson concerning his conversations with Wood. (G.C. Ex. 3 at 3).

Prosecution Declined

Following the telephone interview of Mr. Gillies, Mr. Nelson and Mr. Yeukim, OIG, telephonically reported the results to AUSA Richter. Richter reviewed the evidence and declined prosecution of Wood on the charge of theft of government property. Nelson mentioned that Wood would be interviewed as part of the administrative process. AUSA Richter indicated that if Wood lied during the interview, strong consideration would be given to prosecuting Wood for false statement to a government official. (Tr. 1 at 200-202; Tr. 2 at 75-76). The U.S. Attorney's office is only concerned with the prosecution of criminal violations and has no control over an agency's pursuit of an administrative investigation or penalties. (Tr. 1 at 207-208).

The Wood Examination

On July 18, 1990 Mr. Nelson conducted an investigative examination of BPA Wood. As noted, BPA Wood designated BPA William Hagen as his Union representative. Respondents acknowledge that Mr. Wood had a reasonable fear that the interview could result in discipline and asked for representation. The interview was tape recorded and later transcribed.^{2/}

^{2/} Based on all the evidence received regarding the accuracy and completeness of the transcripts of the Wood interview, I conclude that the transcript, with some corrections made by the witnesses at the hearing, is the best evidence of what was said during the examination regarding the conversations with Mr. Gillies and Mr. Hagen's request for a private conference.

Nelson identified himself as an INS officer representing the Regional Commissioner and told Wood that he was expected to give testimony concerning certain allegations of misconduct. Wood was informed that no criminal proceedings would be instituted against him based on the alleged misconduct, but any statement he made could be used against him in administrative disciplinary proceedings. He was informed that any refusal to answer could subject him to revocation of any security clearance as well as disciplinary action up to and including removal from the Service. He was also advised that any false statement could subject him to criminal prosecution on that account.

The following exchange relating to Mr. Wood's conversations with Union representative Gillies took place:

Nelson: And then what did you do [to find out who I was]?

Wood: What did I do? I believe I contacted Jerry Gillies.

Nelson: What did you say to Jerry Gillies?

Wood: I told him I suspected that there was an OPR Investigator in town and I'd need a union man. . . . I also told him that based on what I had observed the past week I was the subject of the investigation.

Nelson: And did you tell him why you thought you were subject to an investigation?

Wood: I don't recall. I've had numerous conversations with Mr. Gillies about problems I'd had with the PAIC and threats made against me by him and that I believe that may be a reason why I was under investigation.

. . . .

Nelson: Okay. Besides Agent Bassett and Agent Burns, after you found out who I was did you talk to anybody else?

Wood: Jerry Gillies, Union Representative.

Nelson: . . . [Y]ou talked to Agent Gillies in part in finding out who I was, is that correct?

Wood: Yes, sir.

Nelson: And how did that conversation go?

Wood: When I told him I believed I was the subject of an investigation and your name was Ed Nelson, Mr. Gillies told me, "Yes he works in Spokane. He's collateral duty with OPR."

Nelson: At that time did you indicate to him that you might be the subject of the investigation, or you thought you might be?

Wood: Yes, sir, I believe I told him that, and Mr. Gillies was aware of that, we'd discussed this before, that I thought I was, might be, the subject of the investigator from previous threats made by the PAIC. (R. Ex. 1 at 16, 18).

The following exchange related to Mr. Hagen's request to speak to Mr. Wood outside the presence of Mr. Nelson:

Hagen: May I speak for a minute?

Nelson: I would prefer not, you can go ahead and talk to him in here but your position as a Union Rep is to make sure that everything is according to the rules that I do here and I can't allow any private conferences.

Hagen: Oh, I'm not allowed to, I understood that I was.

Nelson: No, if you want me to reword a question, if you showed a lack of understanding to the question you can advise me that you would like [me] to reword it for you but other than that the Union Representative can not advise the individual at all and if you think that anything that I am doing is not according to procedures, you can advise me of that.

Hagen: I understood that I was told that if anything came to light that I was entitled to meet privately.

Nelson: I'm sorry you were misinformed . . . (R. Ex. 1 at 24).

Nelson admitted that he did not otherwise allow Hagen to speak on the record during his interview. Hagen did identify himself as Wood's representative. According to Nelson, he would have allowed Hagen to clarify a question, point out a procedural error, make a statement at the conclusion of the interview, and speak to Wood in his presence. (Tr. 2 at 101-02). Hagen testified that he did object once or twice to questions, but these are not reflected in the transcript. (Tr. 1 at 270, 276).

Hagen made the request to speak to Wood in private during Nelson's questioning of Wood concerning gambling. Hagen wanted to remind Wood that a supervisor had also been involved in gambling and had provided Wood with money to pursue his (Wood's) gambling. Hagen, however, was uncertain whether Wood would want this fact to be brought out, and he desired to discuss it with Wood in private before it became a part of Nelson's record. (Tr. 1 at 267-68).

According to Hagen, there were additional occasions during the meeting when he wanted to speak briefly with Wood in private. One occasion in particular involved Nelson's questioning of Wood about seeing another woman while Wood was separated from his wife. Hagen detected that Nelson was assuming that this other woman was married, when that wasn't the case. Hagen believed that the woman's single status might mitigate the impropriety perceived by Nelson, and he wanted to discuss this point with Wood before placing it on the record. Nelson, however, had prohibited private conferences, so this fact was never clarified. (Tr. 1 at 269-70).

There were two breaks during the interview, but Nelson stayed close by Wood and Hagen, so there was no opportunity for a private conference during the breaks. (Tr. 1 at 244-45).

Nelson prohibited Hagen and Wood from having private conferences in accordance with specific guidance he received from OIG prior to the interview. (Tr. 2 at 184). Nelson had previously allowed a Union representative to have "a multitude" of private conferences during a examination of some other employees and found it "a bad policy to allow." (Tr. 2 at 163-64).

As noted infra, the notice to remove Wood charged, in part, that he had falsified, misstated, exaggerated, or concealed material facts in his interview under oath with Mr. Nelson on July 18, 1990. (G.C. Ex. 3).

Proposed Removal Of Wood

Nelson prepared his report on August 28, 1990. He forwarded it and the complete file to Hugo Kryger, an INS regional staff investigator and a collateral OIG coordinator in the Regional Office of INS. (Tr. 2 at 128, 177). OPR/OIG subsequently provided what it deemed relevant (Nelson's report less the exhibits) to Respondent INS for an assessment of disciplinary action. (Tr. 2 at 219, 245-46).

By letter dated November 19, 1990 Respondent INS proposed to remove Wood from his position for the alleged offenses of theft of government property; falsification, misstatement, or exaggeration of material fact in connection with employment or any record; falsification, misstatement, exaggeration, or concealment of material fact in connection with investigation or other proper proceeding; and conduct unbecoming an officer. The lengthy notice detailed various alleged facts to support the proposal which, according to the notice, were documented in OIG report SBO-0-95. The notice set forth observations of Wood and the results of interviews of various named and certain unnamed individuals which it stated were corroborated by Nelson's notes. The notice set forth a digest of the pertinent information from each individual. The notice also relied on information provided to Nelson by Wood during his examination on July 19, 1990. The notice also included statements made by Wood to Union representative Gillies and furnished by Gillies to Nelson on July 17, 1990. (Tr. 1 at 107-08; G.C. Ex. 3).

Wood requested the Union's assistance in challenging the action. At that point, the Union was prepared to assist Wood in preparing an oral or written reply to the proposed action. The Union also anticipated the prospect of representing Wood before an arbitrator, the Merit Systems Protection Board, or any other available forum in the event the removal action was pursued by management. (Tr. 1 at 108-09; 121).

The Document Requests

On November 21 and 26, 1990 the Union notified INS that it had been designated to act on behalf of Wood in his pending proposed adverse action. The Union stated that "[i]n order to properly respond to the allegations" it was requesting documents pursuant to section 7114(b)(4) of the Statute. The Union requested: (1) the entire OIG investigative file (SBO-0-95), including but not limited to

all investigative notes and recordings and transcriptions of all interviews; (2) all proposal and decision notices for disciplinary and/or adverse action cases within the INS, Northern Region, from January 1, 1985, to the present for offenses similar to those alleged against Wood; and (3) any and all other material relevant to the Wood case, whether or not relied upon by the Agency; (4) the statutory and regulatory authority for OIG to investigate INS employees; (5) any agreements between OIG and INS relating to such investigations; and (6) INS guidelines for OIG investigations of INS employees. (G.C. Ex. 4 and 5).

On December 6, 1990 Respondent INS delivered to the Union a copy of the August 28, 1990 OIG Report of Investigation by Edward L. Nelson, file number SBO-0-95, less certain exhibits to the report. The Respondent INS forwarding letter stated, in part:

I have enclosed the material relied upon in preparing the proposed adverse action. This material constitutes the Office of Professional Responsibility (OPR) investigative file SBO-0-95 which comprises the adverse action file maintained by this agency. The material relied upon is considered the only relevant material following proposed disciplinary action. This is consistent with government-wide regulation. (G.C. Ex. 7).

Following the delivery of the report, Gillies commented to management representatives that all of the requested documents had not been provided. Gillies stated that management had failed to provide the tape recordings of Nelson's interviews, the proposal/decision notices, the investigative manual, and the statutory/regulatory authority requested by the Union. Gillies informed the management representatives that the proposal/decision notices would be used as a basis of comparison to determine whether Wood was being treated in a fair and equitable manner relative to other employees and that the Union would accept the proposal/decision notices in a sanitized form. At no time did any management representative advise the Union that the data requested did not exist, was not maintained by INS, or would be burdensome to produce. Gillies advised the management representatives that he would review the information provided and remain in contact with them. (Tr. 1 at 139-144).

On December 13, 1990 the Union sent a third information request to Respondent INS. The Union requested (1) the tapes and transcripts of six interviews summarized in Nelson's report; (2) a copy of the bank records listed as exhibits to the report; (3) supporting affidavits requesting all subpoenas, and (4) all investigator's notes in spiral notepads. (G.C. Ex, 8; Tr. 1 at 144-45).

Shortly after the Union submitted its data request to management, Gillies discovered that management had withheld from release at least four additional items which were listed as exhibits to Nelson's report. These were: (1) a memorandum from the Assistant Chief Patrol Agent to the Deputy Chief Patrol Agent re Wood; (2) a memorandum from the Deputy Chief Patrol Agent to the Office of Inspector General re Wood; (3) a complaint form re gambling by Wood; and (4) a complaint form re sale of ammunition. Gillies believed that these were covered by his original request for the entire OIG investigative file. (Tr. 1 at 153-55; G.C. Ex. 10).

During late December 1990 or early January 1991 INS replied, in part, as follows:

In response to your letter of December 13, 1990, your request for additional information beyond that already provided cannot be granted pursuant to 5 Code of Federal Regulations (CFR) 752.404(b) and the Federal Personnel Manual (FPM), Subchapter 3-3d which give the employee the right to review the material which is relied upon to support the reasons for actions given in the notice. It is my determination that your reference to 5 U.S.C. 7114(b)(4) is not appropriate.

Since receipt of this refusal, there has been no further discussion between the Union and management concerning the data requests, and the additional items requested, described above, have not been provided to the Union. (Tr. 1 at 158-59).

Wood, with the assistance of the Union, made his reply to the notice of proposed removal in January 1991. Upon receipt of an employee's reply to a proposed notice of disciplinary action, management normally makes its decision in approximately 30 days.

During March 1991, INS reduced Wood's proposed removal to a five-day suspension, which he served. The Union, through Gillies, continued to represent Wood by immediately

challenging the suspension action and pursuing the grievance, without intervening steps, directly to arbitration pursuant to the collective bargaining agreement. The arbitration hearing in Wood's case was pending as of the time of the hearing in this case. (Tr. 1 at 162-164).

Additional Findings Concerning Document Requests

1. All proposed and decision notices for disciplinary and/or adverse actions within Northern Region of the I&NS from January 1, 1985 to the present for the following or similar specifications, theft of government property, misappropriation of government property, falsification in connection with government records, falsification or misstatement in connection with an investigation and conduct unbecoming an officer.

The Union advised Respondent INS that the proposed and decision notices requested for offenses similar to those allegedly committed by BPA Wood would provide the Union with a basis for comparison to determine whether Wood had been treated in a fair and equitable manner as compared with other employees who had committed similar offenses (Tr. 1 at 125-27; 140-41).

Respondent INS does not maintain any proposed or decision letters issued prior to November 1987, but acknowledges that it maintains such documents issued after that date. (Tr. 2 at 224). They are available in about 475 files which could be secured by one person working eight hours a day for a little more than 2 weeks. (Tr. 2 at 281-82). As noted, the Union advised Respondent that it would accept the documents in sanitized form, without the names of individuals being included. (Tr. 1 at 137, 141).

2. Copies of all Statutory and Regulatory Authority for the Office of Inspector General, Department of Justice, to conduct investigations on Immigration and Naturalization Service employees.

By this request the Union was attempting to discover whether OIG had authority to investigate INS employees and, therefore, whether Nelson's investigation of Wood was legitimate. (Tr. 1 at 128-29).

According to Respondent INS' supervisory personnel specialist, the statutory and regulatory information requested by the Union is maintained by Respondent INS in

the library of its Regional Counsel. It is accessible to the Personnel and Labor Relations Office. (Tr. 2 at 226-27; 260-61).

3. Copies of all memorandums and agreements entered into and made by the Immigration and Naturalization Service between the Office of Inspector General, Department of Justice, for authority to conduct investigations on Immigration and Naturalization Service Employees.

The Union sought this data to determine whether INS had any control or guidelines with respect to OIG investigations of INS employees and, therefore, whether proper procedures were followed in Wood's case. (Tr. 1 at 130-31).

No such memoranda/agreements exist between INS and DOJ, OIG. (Tr. 1 at 8-9; Tr. 2 at 228). Respondent INS never advised the Union of this fact. (Tr. 1 at 131-32).

4. Copies of all Immigration and Naturalization Service internal guidelines, instructions, and standard operating procedure manual for Office of Inspector General Investigators regarding investigations of Immigration and Naturalization Service Employees.

By this request, the Union expected to receive the INS guidelines for how OIG/OPR investigators were to conduct investigations of INS employees. The Union wanted this information in order to ensure that the investigation of Wood had been conducted in a legal and proper manner and in accordance with approved procedures and methods. The Union believed that a failure to comply with established investigative procedures might provide a basis for the Union to challenge the action against Wood. (Tr. 1 at 132-33).

According to Edward Nelson, prior to April 1989, INS had developed a manual which established methods and procedures to be followed by the INS/OPR investigators in pursuing investigations of INS employees. Since April 1989, when OIG took over the investigative function of INS/OPR, no new OIG manual has ever been developed. Instead, OIG investigators make use of the old INS/OPR manual in pursuing investigations of INS employees. This INS/OPR manual, currently in use by OIG investigators, would be in the possession of Nelson and Hugo Kryger, INS employees and OIG collateral representatives. (Tr. 1 at 135; Tr. 2 at 137-39; 199).

5. The entire OIG investigative file (SBO-0-95) including investigative notes, tape recordings of interviews, and bank records with supporting affidavits.

6. Any and all other material relevant to the case, regardless of whether it was relied upon by the agency in support of the adverse action.

The Union requested "the entire OIG investigative file (SBO-0-95)" to discover the factual basis for the proposed action against Wood in order to respond to the proposed removal action and to prepare, if necessary, a challenge to any subsequent action by management against Wood. (Tr. 1 at 121). The Union's request for "any and all other material relevant to the case, regardless of whether or not relied upon" was designed to secure all relevant information not specifically described in the Union's other requests so that the Union would not be surprised with previously undisclosed information during an appeal of any action taken against Wood. (Tr. 1 at 127).

An OIG investigative or case file consists of a folder with a number on it. It is divided into two sides. On one side is placed the investigator's report of the investigation undertaken. The report contains the findings, a synopsis of the facts developed, to substantiate or disprove the allegations. Some of the exhibits that substantiate the statements in the report are placed behind the report. (Tr. 2 at 58-59, 144).

All other documents gathered by the investigator are placed on the other side of the case file. (Tr. 2 at 58). The documents may or may not be relevant to the case. They may include allegations received about other individuals during the investigation which are not relevant to the case, as well as the identities of confidential sources and investigative techniques used in the case. (Tr. 2 at 63, 67, 145). In this case, Nelson's investigative notes (not in spiral notepads), the tape recordings of six interviews, and copies of the affidavits requesting subpoenas for bank records were placed in the file, but were not made exhibits to the report.

OIG does not release copies of its files to anyone outside of OPR or OIG. (Tr. 2 at 64, 206). It does release copies of the report of investigation with attached exhibits to agencies upon request. (Tr. 2 at 63, 206). OIG does not necessarily release all exhibits to a report, but only those

OIG deems relevant for an assessment by the agency of possible disciplinary actions. (Tr. 2 at 63-64; 177-78; 245-46).

In this case OIG released to INS the investigative report without the accompanying exhibits, but with a list of the missing exhibits. Upon the Union's request for the "entire file," the report with only the list of exhibits was furnished by INS. In transmitting the report to the Union, INS erroneously referred to the report as the "OPR investigative file," and thereafter there was considerable confusion on the part of both INS and the Union as to the correct designation of "report" and "file" until the matter was clarified through testimony at the hearing. (G.C. Ex. 4-8; Tr. 2 at 221).

The following items regarding Wood were exhibits to the OIG report and are contained in the OIG file, but were not furnished by OIG/OPR to INS or the Union:

1. Memo from Assistant Chief Patrol Agent (ACPA) to Deputy Chief Patrol Agent (DCPA) re Wood, dated 5-31-90. (Exhibit 1 to OIG report).
2. Memo from DCPA to OIG re Wood, dated 6-7-90. (Exhibit 2 to OIG report).
3. Complaint form re gambling by Wood dated 6-6-90. (Exhibit 3 to OIG report).
4. Complaint form re sale of ammunition dated 6-8-90. (Exhibit 4 to OIG report).
5. Personal bank records re Wood received from Montana National Bank (Exhibits 61 and 64 to OIG report) (G.C. Ex. 9(a), 9(b), 10; Tr. 154).

The memorandum from the ACPA to the DCPA was a document dated May 31, 1990, signed by ACPA Glen Schroeder (Wood's supervisor) and contained hearsay allegations of potential misconduct by Wood while off-duty. (Tr. 2 at 116-17). The memorandum from the DCPA to OIG was a document dated June 7, 1990, from Theodore V. Denning, DCPA, to an OIG office in Chicago, Illinois. (G.C. Ex. 16). This memorandum was a cover sheet to the memo between Schroeder, ACPA, and Denning, DCPA, described above, and through this document Denning requested the initiation of the investigation of Wood. (Tr. 2 at 123-24). The complaint forms concerning gambling and the sale of ammunition by Wood were apparently

the original allegations against Wood. The Union wanted the memoranda and complaint forms, described above, in order to discover the original basis for the initiation of management's investigation of Wood, which led to the subsequent proposed removal. The Union believed this information would allow the Union to make an independent determination concerning the accuracy and completeness of the facts relied on by management to pursue its action against Wood. (Tr. 1 at 154-56).

The Union requested the bank records relied upon by management inasmuch as management had alleged that Wood was indebted and had missed house payment. The Union anticipated using the same records to disprove the allegations. (Tr. 1 at 148). The other documents come within the Union's request for the OIG file and other relevant material.

INS made no specific effort to obtain the bank records from OPR/OIG as it understood from previous responses that nothing additional would be provided. (Tr. 2 at 231-32).

The following items regarding Wood are contained in the OIG file, but were not made exhibits to the OIG report and were not furnished to INS or the Union:

1. Investigator's notes
2. Tape recordings of the interviews of Wood and five witnesses.
3. Copies of the written affidavits made for subpoenas to Montana National Bank and Security Pacific Bank, Plentywood, Montana for bank records re Wood.

The Union requested all investigative notes. Nelson's notes were used to write the investigative report and were referred to in the INS notice of proposed removal. They contain certain observations of Wood and the results of certain interviews. The Union wanted to test whether the notes accurately reflected what Nelson had put in his report and to compare the notes with what witnesses told the Union they had said to Nelson. The Union also believed the notes might contain exculpatory information. (Tr. 1 at 152). The Union also wanted the tape recordings of the six interviews conducted by Nelson and any transcriptions to determine whether any exculpatory information might exist and be useful in the representation of Wood. (Tr. 1 at 147). The Union wanted the affidavits for the subpoenas of Wood's bank

records to determine whether the subpoenas had been issued properly and for a valid purpose. (Tr. 1 at 150-51).

INS personnel made telephonic inquiries of the collateral OIG coordinator and DOJ headquarters to ascertain whether the entire OIG investigative file, including investigative notes and tape recordings of interviews, could be obtained. INS was orally informed that OIG/OPR would not release any additional information other than that already provided (the OIG report). (Tr. 2 at 220-21; 232-34, 238, 240, 248-52; 258-60).

Discussion, Conclusion, And Recommendations

Alleged Failure to Comply with Section 7114(a)(2)(B)
(Case No. 7-CA-00683)

Section 7114(a)(2) provides:

An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--

. . . .

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

(1) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(2) the employee requests representation.

The examination of Wood was conducted by Nelson under the direction of Respondents OIG and OPR. Thus, he was a "representative of the agency" under section 7114(a)(2)(B). In Department of Defense, Defense Criminal Investigative Service, 28 FLRA 1145 (1987), aff'd sub nom. DCIS v. FLRA, 855 F.2d 93, 100 (1988), the court found that the degree of supervision exercised by agency management over investigators is irrelevant when the investigators are employees of the same agency and their purpose when conducting interviews is to solicit information concerning possible misconduct on the part of agency employees in

connection with their work. Here the collateral OIG/OPR investigator was employed by the same parent agency, DOJ, as is Wood, and was questioning Wood regarding possible misconduct in connection with his work. The record establishes that the information secured by OIG/OPR was referred for disciplinary action to Respondent INS, where the employee's collective bargaining unit is located.

Respondents admit that Mr. Wood reasonably believed that the examination could result in discipline and asked for representation. Wood was represented by Union representative Hagen. Respondents assert that Hagen was accorded all the rights available to a union representative under NLRB v. Weingarten, Inc., 420 U.S. 251 (1975), as it has been adopted by the Authority, and, therefore, Mr. Nelson was free to insist that Wood answer his questions without first conferring with Union representative Hagen in private.

The record, as set forth in more detail above, reveals that when Union representative Hagen asked for a private conference with Wood, OIG/OPR Investigator Nelson told Hagen that other than asking for a clarification of a question, or pointing out a procedural error, he could not advise Wood at all. Nelson stated that Hagen could speak to Wood in the room, but he and Wood could not have "any private conferences." Nelson refused to allow Hagen and Wood to confer privately outside of the room where the questioning occurred.

In United States Department of Justice, Bureau of Prisons, Safford, Arizona, 35 FLRA 431, 438-40 (1990) the Authority reviewed the provision, purposes, and benefits of section 7114(a)(2)(B), as follows, and held that by directing a union representative to remain silent the agency violated section 7116(a)(1) and (8):

Section 7114(a)(2)(B) provides that an exclusive representative of an appropriate unit shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the agency in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action and the employee requests representation. The purpose of section 7114(a)(2)(B) is to create representational rights for Federal employees similar to the rights provided by the National Labor Relations Board (NLRB) in interpreting the

National Labor Relations Act (NLRA). See 124 Cong. Rec. 29184 (1978), reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, H.R. Comm. Print No. 7, 96th Cong., 1st Sess. 926 (1979) (Legislative History), where Congressman Udall explained that the purpose of the House bill provisions which led to enactment of section 7114(a)(2)(B) was to reflect the Supreme Court's decision in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975) (Weingarten).

Under Weingarten, the right to representation at an examination is intended to benefit an employee who is called into a meeting with his or her employer in connection with an investigation as well as to benefit the employer and the union. See Wireman, Union Representation at Investigatory Interviews: The Subsequent Development of Weingarten, 28 Cleveland State L. Rev. 127, 129-31 (1979). In particular, representation at an investigatory interview promotes a more equitable balance of power between labor and management. See Weingarten, 420 U.S. at 261-62, where the Court noted that "[r]equiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the [National Labor Relations] Act was designed to eliminate[.]" Such representation also contributes to preventing unjust discipline and unwarranted grievances. In Weingarten the Court noted that "[a] single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." Id. at 262-63. In such circumstances, the Court concluded that "[a] knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview." Id. at 263. In support of its conclusion that representation could be beneficial to the employer as well as the employee, the Court quoted from an arbitrator's award that described the representation process as contemplating "that the steward will exercise his responsibility and authority to discourage grievances where the action on the part of management appears to be justified." Id. at 262-63 n.7.

In view of the legislative history underlying section 7114(a)(2)(B), cited above, we conclude that the purposes underlying the Weingarten right in the private sector--promoting a more equitable balance of power and preventing unjust disciplinary actions and unwarranted grievances--also apply to the right to representation created by section 7114(a)(2)(B). These purposes are consistent with the overall purposes and policies of the Statute set forth in section 7101. That is, they effectuate "the right of employees to organize, . . . and participate through labor organizations . . . in decisions which affect them . . . [which] safeguards the public interest, . . . contributes to the effective conduct of public business, and . . . facilitates and encourages the amicable settlements of disputes [.]". Insofar as representation at examinations promotes a more equitable balance of power between management and labor, we believe that this is consistent with the intent of Congress in passing the Civil Service Reform Act (CSRA), Pub. L. 95-454, of which the Statute constitutes title VII. See Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 107 (1983) in which the Court noted, "[i]n passing the Civil Service Reform Act, Congress unquestionably intended to strengthen the position of federal unions and to make the collective-bargaining process a more effective instrument of the public interest[.]"

The purposes underlying section 7114(a)(2)(B) and the benefits intended for the various parties cannot be achieved if the union representative is prohibited from taking an active role in assisting an employee in presenting facts at an examination. Consequently, under section 7114(a)(2)(B) representation includes the right of the Union representative to take an "active part" in the defense of the employee. Federal Aviation Administration, St. Louis Tower, Bridgeton, Missouri, 6 FLRA 678, 678-79, n.2 (1981); NLRB v. Texaco, Inc., 659 F.2d 124 (9th Cir. 1981).

In U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas, 42 FLRA 834, 840 (1991), the Authority stated, "The Authority has long held that for the right of representation to be meaningful, the representative must have complete

freedom to assist, and consult with, the employee," citing U.S. Customs Service, Region VII, Los Angeles, California, 5 FLRA 297, 306 (1981) (Customs). In Customs the Authority found a violation where the representative's active participation was limited to a "practice" interview, he was admonished not to speak out or make statements during the subsequent taped interview, and was only allowed to volunteer additional information at the end of the taped interview.

The statement of OIG/OPR Investigator Nelson to Union representative Hagen that other than asking for clarification of a question, or pointing out a procedural error, he could not advise the employee at all, clearly interfered with the Union representative's ability to take an active part in assisting the employee to elicit and present facts as contemplated by the Statute. The Union representative obviously could not "assist the employer by eliciting favorable facts" and render the other assistance to the employer and employee as envisioned by the Supreme Court in Weingarten. Even if the representative could have made a statement at the end of the examination, this would not have been sufficient as the Authority has held that representation during an examination should not be restricted to a portion of it. Customs Service, supra, 5 FLRA at 307. The fact that the representative may have objected on one or two occasions to the investigator's questions is also immaterial. An agency can not impose an unduly restrictive limitation on a union representative and later escape responsibility by taking advantage of, or finding fault with, the representative's conduct under the circumstances. Department of the Air Force, Office of Special Investigations, McChord Air Force Base, Tacoma, Washington, Case No. 9-CA-80368, 87 ALJDR (1990).

With regard to determining whether the Statute was separately violated when OIG/OPR Investigator Nelson prohibited the Union representative and the employee from having a private conference during the examination, the Supreme Court declared in Weingarten that the presence of the Union representative "need not transform the interview into an adversary contest," 420 U.S. at 263, and the Authority has held that a union's representational rights under section 7114(a)(2)(B) may not interfere with an employer's legitimate interest and prerogative in achieving the objective of the examination or compromise the integrity of the employer's investigation. Federal Aviation Administration, New England Region, Burlington, Massachusetts, 35 FLRA 645, 652 (1990).

There is no indication in the record that a brief conference between the Union representative and the employee outside the hearing of the investigator would have been unduly disruptive, would have interfered with the objective of the examination, or would have compromised the integrity of the investigation. Indeed, based on the Union representative's purpose in wanting two brief conferences, the knowledgeable union representative could have assisted the investigator "by eliciting favorable facts." Therefore, I conclude that the full rights of representation under the Statute were not granted in this respect.

By the conduct of OIG/OPR Investigator Nelson described above, Respondents OIG and OPR failed to comply with section 7114(a)(2)(B) of the Statute and thereby committed an unfair labor practice in violation of section 7116(a)(1) and (8) of the Statute, as alleged.

There is no evidence in the record that Respondent DOJ, Washington, D.C. or Respondent INS were responsible for these violations. Therefore, it is recommended that such allegations as to these Respondents be dismissed.

Nelson's Questioning Of Union Representative Gillies (Case No. 7-CA-10291)

The record reflects that Investigators Nelson and Mendenhall, acting on behalf of OIG/OPR and at the specific request of the Assistant U.S. Attorney, in order to develop evidence against BPA Wood for a criminal prosecution, required Union representative Gillies, under threat of discipline, to divulge certain information. The information was provided by Wood to Gillies in his role as an agent and representative of the Union and during the course of Gillies' furnishing representation and advice to Wood concerning a potential investigative examination and disciplinary proceeding.

Section 7116(a)(1) of the Statute provides that it shall be an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise of any right provided by the Statute. Consistent with the findings and purpose of Congress as set forth in section 7101, section 7102 of the Statute sets forth certain employee rights including the right to form, join, or assist any labor organization freely and without fear of penalty or reprisal and that each employee shall be protected in the exercise of such right. Such right includes the right to act for a labor organization in the capacity of a

representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees. The exclusive representative, pursuant to section 7114(a)(1), "is entitled to act for, and negotiate collective bargaining agreements covering all employees in the unit." The right of the exclusive representative to act for all unit employees also includes the right, pursuant to section 7121(b)(3), to present and process grievances on its own behalf or on behalf of any employee in the unit. Section 7103(a)(9) defines "grievance" to include any complaint "by any employee concerning any matter relating to the employment of the employee" or "by any labor organization concerning any matter relating to the employment of any employee." Section 7114(a)(2)(B) also requires that an exclusive representative shall be given the opportunity to be represented at ". . . any examination of an employee in the unit by a representative of the agency in connection with an investigation if . . . the employee reasonably believes that the examination may result in disciplinary action against the employee; and . . . the employee requests representation."

Wood contacted Gillies on July 15 and 16, 1990 because all indications were that Wood was the subject of an on-going investigation for possible misconduct, he would be interviewed during the investigation and potentially disciplined, and he wanted the help and assistance of the Union. Wood spoke candidly to Gillies about his conduct. In response, Gillies advised Wood of his rights and of the procedures that management would follow. Gillies also alerted other Union officials to Wood's need for assistance and contacted a management representative to arrange for a Union representative who was close by to represent Wood at his investigative examination.

The conversations between Gillies and Wood constituted protected activity. Gillies was not Wood's designated representative for the subsequent investigative examination, but he was clearly acting for and on behalf of a unit employee and was engaged in protected representational activity at this earlier stage. Although no formal grievance had been filed, Wood was the subject of an investigation, was potentially subject to an investigative examination and discipline, and was making preliminary inquiries of the Union representative regarding the established personnel policies, practices, and procedures which might assist him. Gillies so advised Wood and

arranged for his representation at the investigative examination. He was clearly exercising his section 7102 right to assist, act for, and present the views of a labor organization. Cf. Department of the Treasury, Internal Revenue Service, Louisville District, 11 FLRA 290, 297-98 (1983).

Under the Authority's decision in U.S. Department of the Treasury, Customs Service, Washington, D.C., 38 FLRA 1300 (1991) (Customs Service), Nelson's intrusion into the confidential communications between Gillies and Wood represented an infringement on the Union's right and duty under the Statute to represent employees and the correlative right of each employees to be represented. Gillies did not waive the privilege to retain the confidentiality of these conversations by his efforts to coordinate Wood's request for representation with other Union representatives and no overriding need for the information was established. A reasonable belief that the information could result in criminal charges being brought does not by itself establish such an extraordinary need for an agency investigator to extract such information. Customs Service, supra. The fact that Nelson questioned Gillies at the direction of an Assistant United States Attorney does not change this determination. Cf. Department of Justice, INS, U.S. Border Patrol, El Paso, Texas, 36 FLRA 41, 50 (1990), remanded on other grounds, sub nom. Dept of Justice, INS v. FLRA, 939 F.2d 1170 (5th Cir. 1991), decision on remand, 42 FLRA 834 (1991).

It is concluded that Respondents OPR and OIG violated section 7116(a)(1) of the Statute by requiring a representative of the Union to disclose, under threat of disciplinary action, the content or substance of statements made by an employee to that Union representative during the course of protected representational activity.

There is no evidence that either Respondent Department of Justice, Washington, D.C. or Respondent INS were responsible for the alleged violation. Therefore, it is recommended that the allegation that these two Respondents violated section 7116(a)(1) of the Statute in this regard be dismissed.

Nelson's Questioning Of Employee Wood Concerning His Conversation With Union Representative Gillies (Case No. 7-CA-00683

The record reflects that Nelson, acting on behalf of OIG/OPR, asked employee Wood what he told Union

representative Gillies in a conversation on July 15 or 16, 1990. As noted above, during the conversation that was the subject of Nelson's inquiry, Wood provided information to Gillies in his role as an agent and representative of the Union. In turn, Gillies furnished advice to Wood as to Nelson's identity and concerning the potential and actual investigative examination. Wood was required to respond to all questions posed by Nelson under threat of disciplinary action.

Nelson's questions violated section 7116(a)(1) of the Statute by interfering with Wood's right to assist the Union and to seek Union representation. As found by the Authority in Customs Service, an employee must be free to make full and frank disclosure to his or her representative in order that the employee have adequate advice and representation. "[T]he rights of employees to be represented by their labor organizations in disciplinary proceedings would be seriously weakened if the confidentiality of their conversations with union representatives could easily be violated." 38 FLRA at 1308-09.

As was the case with the questioning of Gillies as to his conversation with Wood, no overriding need for this information was established. However, I agree with Counsel for General Counsel who acknowledges that "an employee remains obliged to account for his actions in response to questions by management despite any coincidental report of those some actions to a Union representative. . . . Management, however, must avoid the temptation of trying to simply elicit confessions or admissions from an employee concerning alleged misconduct by demanding to know what an employee told his Union representative." (General Counsel's Brief at 33-34).

It is concluded that Respondent OPR and OIG violated section 7116(a)(1) of the Statute by requiring employee Wood to divulge the content of statements made by Wood to a Union representative during the course of protected representational activity.

There is no evidence that either Respondent Department of Justice, Washington, D.C. or Respondent INS were responsible for the alleged violation. Therefore, it is recommended that the allegation that these two Respondents violated section 7116(a)(1) of the Statute in this respect be dismissed.

Information Request (Case No. 7-CA-10373)

Under section 7114(a) of the Statute, a labor organization which as been accorded exclusive recognition is entitled to "act for, and negotiate collective bargaining agreements" covering all employees in the unit. Section 7114(b)(4) of the Statute provides that an agency shall, upon request, furnish the exclusive representative, to the extent not prohibited by law, data which is normally maintained in the regular course of business; which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining.

Normally Maintained

Respondent INS normally maintains in the regular course of business the following documents requested by the Union: proposed and decision notices for similar disciplinary and/or adverse actions issued after November 1987, statutory and regulatory authority for OIG to investigate INS employees, and an INS manual regarding investigations of INS employees.

The following documents requested by the Union are in the custody of OPR/OIG: the entire OIG investigative file, including investigative notes, tape recordings of interviews, copies of written requests/affidavits for subpoenas for bank records, and exhibits to the OIG report, including bank records of Wood, two memoranda dated May 31, 1990 and June 7, 1990, and two complaint forms dated June 6, 1990 and June 8, 1990.

Although the entire OIG investigative file is never released, copies of the report of investigation and exhibits deemed relevant by OPR/OIG are released to agencies upon request. Since INS could request OPR/OIG, which are different components of its parent agency, DOJ, for the above documents included within the Union's request (with the exception of the entire file), they are within the control of the agency and are normally maintained within the meaning of section 7114(b)(4). U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Silver Spring, Maryland, 38 FLRA 120, 128-29 (1990) (NWS), application for enforcement filed sub nom. FLRA v. U.S. Department of Commerce, National Weather

Service, Silver Spring, Maryland, No. 91-1175 (D.C. Cir. April 12, 1991). (Authority rejected respondent's claim that requested information was not normally maintained because it was maintained in a different component of agency).

Reasonably Available

The above information in the custody of INS is reasonably available. INS concedes that the proposed and decision notices for similar disciplinary and/or adverse actions are reasonably available. (Brief of Respondent INS at 52). The statutory and regulatory authority to investigate INS employees is accessible or obtainable from the library of Respondent's Regional Counsel. The INS manual regarding investigations of INS employees is in the possession of Respondent's employees. Thus, this information is obtainable by means which are not extreme or excessive.

The above information in the custody of OPR/OIG, with the exception of the entire OIG file, is also reasonably available since it may be requested by INS of another DOJ component. NWS, 38 FLRA at 129-30.

Necessary

The Union requested the information "in order to properly respond to the allegations." The Union's immediate purpose in requesting the data was to assist Wood in responding to the proposed removal action. In addition, recognizing that an adverse decision was likely to follow the proposal, the Union requested the data to prepare for the pursuit of a grievance following management's decision. As noted, Wood's proposed removal was subsequently reduced to a suspension which was the subject of a scheduled grievance arbitration at the time of the hearing.

"It is well established that under section 7114(b)(4) of the Statute, a union is entitled to information that is necessary to enable it to carry out effectively its representational functions and responsibilities. Information requested by a union is necessary, within the meaning of section 7114(b)(4) of the Statute, if it would be useful to the union in the investigation, evaluation and/or presentation of a potential or actual grievance." U.S. Department of Labor, Washington, D.C., 39 FLRA 531, 537 (1991), petition for review filed sub nom. U.S. Department of Labor, Washington, D.C. v. FLRA, No. 91-1174 (D.C. Cir. April 11, 1991) (DOL).

The "proposed" nature of the action against Wood at the time of the Union's data requests did not remove the Union's entitlement to necessary data to access the strengths or weakness of a potential grievance and perform its other representational duties in the context of the full range of union responsibilities. Department of Housing and Urban Development, San Francisco, California, 40 FLRA 1116, 1121-22 (1991) (HUD); U.S. Department of Treasury, Internal Revenue Service, Washington, D.C., 40 FLRA 1070, 1083 (1991); U.S. Department of Treasury, Internal Revenue Service, Washington, D.C., 40 FLRA 303 (1991).

The data in the possession of INS is necessary. The proposed and decision notices for similar disciplinary and/or adverse actions issued after November 1987 would provide the Union with a basis for comparison to determine whether Wood had been treated in a fair and equitable manner, as compared with other employees who had committed similar offenses: Internal Revenue Service, Washington, D.C. and IRS, Salt Lake City, Utah, 40 FLRA 303 (1991); DOL, supra, 39 FLRA at 538; Internal Revenue Service, Western Region, San Francisco, California, 9 FLRA 480 (1982).

The statutory and regulatory authority for OIG to investigate INS employees would allow the Union to discover whether the OIG had the authority to investigate Wood and the scope of that authority. Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, 38 FLRA 3 (1990) (Copies of a Chapter of the Federal Personnel Manual and the Federal Employees Compensation Act, the controlling law in the area, found necessary to enable union to discuss, understand and negotiate over management's proposed instruction.) The INS manual regarding investigations of INS employees would allow the Union to determine whether the investigation of Wood had been conducted in accordance with approved methods and procedures and is necessary with the exception discussed below.

With regard to the data in the possession of OPR/OIG, the entire OPR/OIG file is not necessary, but the remaining documents, being certain contents of that file, are necessary within the meaning of section 7114(b)(4) with the exception discussed below. The request for the entire OPR/OIG file is too broad and includes allegations received about other individuals not relevant to the case. The request for Nelson's investigative notes is necessary with the exception discussed below. Nelson's notes were used to write the investigative report and were referred to in INS' notice of proposed removal. Nelson's notes contain

surveillance observations of Wood and the statements obtained during certain interviews conducted regarding Wood. The Union needed the notes to test whether the notes accurately reflected what Nelson attributed to individuals in the report and to compare the notes with what witnesses told the Union they had said to Nelson. The Union also needed to examine the notes for any exculpatory material.

With the exception discussed below, the tape recordings of the six interviews conducted by Nelson and any transcriptions of them were also necessary to enable the Union to verify the completeness and accuracy of the report and determine whether any exculpatory information might exist and be useful in the representation of Wood. U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, 26 FLRA 943 (1987).

The request for copies of the supporting affidavits requesting subpoenas for bank records and the bank records themselves received regarding Wood were necessary for the Union to assess management's allegations that Wood was in debt from gambling and had missed house payments. The two memoranda and two complaint forms, listed as exhibits to Nelson's report, pertained to the basis for the initiation of the allegations and investigation of Wood, and came within the Union's request for all relevant material. See HUD, Supra, 40 FLRA at 1122, (Union's request for "any and all material regarding the notice of proposed removal" held sufficient under the Statute.) The documents were necessary for a full understanding of the charges against the employee and for the Union to assess the completeness and accuracy of the evidence which formed the basis for the charges with the exception discussed below.

The record reveals that at least some portions of these records, that is, the INS manual, the investigative notes, tapes, affidavits regarding bank records, one memorandum, and two complaint forms, contain the names of confidential sources, techniques, and derogatory information about other employees not connected with Wood's case. The Union has not shown that disclosure of these data in an unsanitized format is necessary and that disclosure in a sanitized format would not serve its representational purpose. Therefore, it is concluded that disclosure of these records in an unsanitized form is not necessary, and, the Union should be provided reasonably segregable portions of these records after deletion of portions which are listed in 5 U.S.C. § 552(b)(7).

As held by the Authority in U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas, 37 FLRA 1310, 1325 (1990), petition for review filed sub nom. U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas v. FLRA, No. 90-4960 (5th Cir. Dec. 28, 1990) (Border Patrol), the determination that this information may be provided in a sanitized form does not privilege the Respondent to over-sanitize the documents, and any disputes over sanitization should be resolved during compliance proceedings.

Whether Data Is Prohibited By Law From Disclosure

Respondent INS contends that release of the requested proposed and decision notices for similar disciplinary and/or adverse actions issued after November 1987 is prohibited by the Privacy Act, 5 U.S.C. § 522a. (Respondent's Brief at 60). The Union advised INS that it would accept the proposed and decision notices in a sanitized format. Therefore, it is not necessary to decide in this case whether disclosure of the requested proposed and decision notices in an unsanitized form would be prohibited by law within the meaning of section 7114(b)(4). Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 39 FLRA 298, 310 (1991).

5 C.F.R. § 752.404(b) and (c) (1991) do not prohibit the release of the data ordered disclosed herein, but, to the contrary, prohibits agencies from using "material that cannot be disclosed to the employee [or] his or her representative or designated physician" and, gives an employee the "right to review the material which is relied on to support the reasons for action gives in the notice." It is clear from the notice of proposed removal that the investigator's notes, records of the interviews conducted, bank records, memoranda, and complaints were used to prepare the investigative report relied upon by INS.

Whether The Requested Information Constitutes Guidance, Advice, Counsel Or Training For Management Officials Or Supervisors Relation To Collective Bargaining

There is no evidence that the requested information constitutes guidance, advice, or counsel relating to collective bargaining within the meaning of section 7114(b)(4)(C) of the Statute as interpreted by the Authority in National Labor Relations Board, 38 FLRA 506 (1990),

petition for review filed sub nom. National Labor Relations Board v. FLRA, No. 91-1044 (D.C. Cir. Jan 24, 1991).

Failure to Comply with Section 7114(b)(4)

Respondent INS was required by section 7114(b)(4) of the Statute to furnish the following information in response to the Union's request: (1) the proposed and decision notices for similar disciplinary and/or adverse actions issued after November 1987 in a sanitized form; (2) the statutory (and regulatory if any exists) authority for OIG to investigate INS employees; (3) the INS manual regarding investigations of INS employees in a sanitized form; (4) investigative notes in a sanitized form; (5) tape recordings and transcripts, if available, of six interviews in a sanitized form; (6) affidavits/requests for subpoenas for bank records in a sanitized form; (7) bank records re Wood received from Montana State Bank; (8) memorandum re Wood dated May 31, 1990 in a sanitized form; (9) memorandum re Wood dated June 7, 1990, and (10) two complaint forms re Wood dated June 6, 1990 and June 8, 1990 in a sanitized form. The failure of Respondent INS to furnish the information violated section 7116(a)(1), (5) and (8) of the Statute.

The fact that some of the information may be supplied in a sanitized form does not relieve the Respondent of its violation of the Statute. Respondent INS refused to provide the Union with copies of the requested information and did not indicate to the Union that it was refusing to do so because the Union requested unsanitized information nor did it ever offer to provide the information in any form. Border Patrol, 37 FLRA at 1324-25.

Respondent's earlier efforts to obtain some of the above information in the possession of OPR/OIG, namely the investigative notes and tape recordings, also does not preclude the finding of a violation. The requests were not made in good faith since, at the time the requests were made, INS was of the opinion, and continues to assert, that section 7114(b)(4) did not apply and that all of the requested information is irrelevant. The Union was so advised. INS also initially confused the distinction between an OIG/OPR report and an OIG/OPR file.

Failure To Advise The Union That Certain Data Did Not Exist

Counsel for the General Counsel claims that Respondent INS's failure to advise, in response to the Union's request, that there were no memoranda/agreements between INS and OIG governing the investigation of INS employees, also breached

INS's obligation under section 7114(b)(4) and violated section 7116(a)(1), (5), and (8) of the Statute. INS responds that the failure to advise the Union that these documents did not exist was not specifically placed in issue in the complaint, was not embraced by the general allegations that INS failed to provide the information and failed to comply with section 7114(b)(4), and, therefore, INS did not have sufficient notice of this subject to raise a defense.

In Veterans Administration, Washington, D.C., and Veterans Administration Regional Office, Buffalo, New York, 28 FLRA 260 (1987) an agency was likewise charged only with a failure to furnish requested information. The evidence showed that some of the information was reasonably available and that other items did not exist or were not reasonably available. The agency had merely responded that no action had been taken on the requests because no grievance had been filed. The Authority held that under section 7114(b)(4) of the Statute the agency was required not only to provide the union with copies of the information under section 7114(b)(4) that were reasonably available, but also to properly respond to the union's requests for the information that did not exist or was not reasonably available. To remedy the violation the Authority's remedial order required the agency, in part, to cease and desist from failing or refusing to inform the union, where appropriate, that information requested did not exist or was not reasonably available.

Accordingly, the failure of Respondent INS to advise the Union that the documents did not exist was subsumed within the general allegations that Respondent failed to provide the information and failed to comply with section 7114(b)(4). Respondent, therefore, had sufficient notice to prepare a defense. The record establishes that Respondent INS violated section 7116(a)(1), (5), and (8) of the Statute by its failure to comply with section 7114(b)(4) by not advising the Union that there were no memoranda/agreements between INS and OIG governing investigations of INS employees. See also Social Security Administration, 39 FLRA 650, 656-57 (1991) (collecting cases).

No Violation Of Section 7114(b)(4) By DOJ

The United States Department of Justice, Washington, D.C., was dismissed as a party in Case No. 7-CA-10373 at the hearing. There was no allegation in the complaint, or evidence at the hearing, that DOJ, Washington, D.C., was

ever requested to furnish, or failed to furnish, data pursuant to section 7114(b)(4). (Tr. 2 at 32-42).

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, it is hereby ordered:

A. The United State Department of Justice, Office of the Inspector General, and the United State Department of Justice, Office of Professional Responsibility, shall:

1. Cease and desist from:

(a) Requiring any bargaining unit employee of the Immigration and Naturalization Service, United States Border Patrol, to take part in an examination in connection with an investigation without allowing the exclusive representative of such employee to actively assist, and consult with, such employee, where representation has been requested by the employee and the employee reasonably believes that the examination may result in disciplinary action against him or her.

(b) Requiring an employee, who is a representative of the National Border Patrol Council, American Federation of Government Employees, AFL-CIO (Union), to disclose, under threat of disciplinary action, the content or substance of any statement made by an employee to such Union representative in the course of an actual or potential disciplinary proceeding or other protected representational activity.

(c) Requiring an employee to disclose, under threat of disciplinary action, the content or substance of any statement made by the employee to a Union representative in the course of an actual or potential disciplinary proceeding or other protected representational activity.

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

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

(a) On request of the Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota, repeat the examination of Senior Border Patrol Agent Jason Wood that occurred on July 18, 1990, at which he was denied his right to active Union representation. In repeating the examination, afford Wood his statutory right to active Union representation. Furnish the results of such examination to the Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota.

(b) Post at all locations within the United States Immigration Service, United States Border Patrol, where bargaining unit employees represented by the National Border Patrol Council, American Federation of Government Employees, AFL-CIO are located, copies of the attached Notice (Appendix A) on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Inspector General, United States Department of Justice, and the Director, Office of Professional Responsibility, United States Department of Justice, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Denver 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 herewith.

B. The Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the Union with data requested on November 21, 26, and December 13, 1990, including: proposal/decision notices issued after November 1987 in a sanitized form; statutory/regulatory authority for OIG to conduct investigations of INS employees, INS manual regarding investigations of INS employees in a sanitized form; investigator's notes in a sanitized form; six taped interviews/transcripts in a sanitized form; Wood's bank

records; affidavits requesting subpoenas ordering release of Wood's bank records in a sanitized form; memorandum re Wood dated May 31, 1990 in a sanitized form; memorandum re Wood dated June 7, 1990; and two complaint forms re Wood dated June 6, 1990 and June 8, 1990 in a sanitized form.

(b) Failing and refusing to inform the Union that certain data requested on November 21, 26 and December 13, 1990, did not exist.

(c) In any like or related manner, failing or refusing to furnish to the Union, upon request, data which is normally maintained in the regular course of business, which is reasonable available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining, and which is not prohibited by law from release.

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

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

(a) Upon the request of the National Border Patrol Council, American Federation of Government Employees, AFL-CIO, and Senior Border Patrol Agent Jason Wood, request the United States Department of Justice, Office of Professional Responsibility and/or the Office of the Inspector General to repeat the examination of Jason Wood that occurred on July 18, 1990 at which he was denied his right to active Union representation. After receiving the results of such examination, reconsider any disciplinary action taken against Mr. Wood and/or the retention in Mr. Wood's personnel records of information obtained during the July 18, 1990 examination. On reconsideration of the disciplinary action, as appropriate, make Mr. Wood whole for any losses suffered to the extent consistent with the decision upon reconsideration and, if relevant, afford him whatever grievance and appeal rights are due under any relevant collective bargaining agreement, law, or regulation.

(b) Furnish the Union with data requested on November 21, 26, and December 13, 1990, including:

proposal/decision notices issued after November 1987 in a sanitized form; statutory/regulatory authority for OIG to conduct investigations of INS employees; INS manual regarding investigations of INS employees in a sanitized form; investigator's notes in a sanitized form; six taped interviews/transcripts in a sanitized form; Wood's bank records; affidavits requesting subpoenas ordering release of Wood's bank records in a sanitized form; memorandum re Wood dated May 31, 1990 in a sanitized form; memorandum re Wood dated June 7, 1990; and two complaint forms re Wood dated June 6, 1990 and June 8, 1990 in a sanitized form. To the extent some of the data is not in the custody of INS, Northern Region, make good faith requests of OPR/OIG or any other appropriate source for the release of such necessary data.

(c) Otherwise furnish to the Union, upon request, data which is normally maintained in the regular course of business, which is reasonable available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining, and which is not prohibited by law from release.

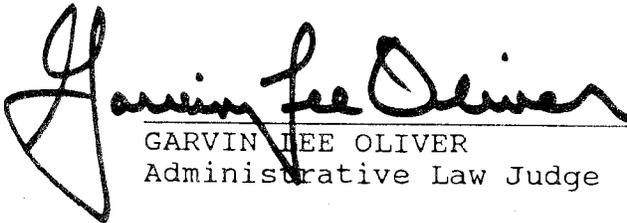
(d) Post at its facilities copies of the attached Notice (Appendix B) on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Commissioner, Northern Region, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Denver 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 herewith.

All of the allegations against the United States Department of Justice, Washington, D.C. are dismissed, and the remaining allegations against the Immigration and

Naturalization Service, Northern Region, Twin Cities,
Minnesota are dismissed.

Issued, January 31, 1992, Washington, DC



GARVIN LEE OLIVER
Administrative Law Judge

Appendix A

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 ALL EMPLOYEES THAT:

WE WILL NOT require any bargaining unit employee of the Immigration and Naturalization Service, United States Border Patrol, to take part in an examination in connection with an investigation without allowing the exclusive representative of such employee to actively assist, and consult with, such employee, where representation has been requested by the employee and the employee reasonably believes that the examination may result in disciplinary action against him or her.

WE WILL NOT require an employee, who is a representative of the National Border Patrol Council, American Federation of Government Employees, AFL-CIO (Union), to disclose, under threat of disciplinary action, the content or substance of any statement made by an employee to such Union representative in the course of an actual or potential disciplinary proceeding or other protected representational activity.

WE WILL NOT require an employee to disclose, under threat of disciplinary action, the content or substance of any statement made by the employee to a Union representative in the course of an actual or potential disciplinary proceeding or other protected representational activity.

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, upon request of the Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota, repeat the examination of Senior Border Patrol Agent Jason Wood that occurred on July 18, 1990, at which he was denied his right to active Union representation. In repeating the examination, we will afford Wood his statutory right to

active Union representation. We will furnish the result of such examination to the Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota.

Inspector General
U.S. Department of Justice

Director, Office of Professional
Responsibility, U.S. Department
of Justice

Dated: _____

Dated: _____

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, Denver Regional Office, whose address is: 1244 Boulevard, Suite 100, Denver, Colorado 80204, and whose telephone number is: (303) 844-5224

Appendix B

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 fail and refuse to furnish the National Border Patrol Council, American Federation of Government Employees, AFL-CIO (Union) with data requested on November 21, 26, and December 13, 1990, including: proposal/decision notices issued after November 1987 in a sanitized form; statutory/regulatory authority for OIG to conduct investigations of INS employees; INS manual regarding investigations of INS employees in a sanitized form; investigator's notes in a sanitized form; six taped interviews/transcripts in a sanitized form; Jason Wood's bank records; affidavits requesting subpoenas ordering release of Wood's bank records in a sanitized form; memorandum re Wood dated May 31, 1990 in a sanitized form; memorandum re Wood dated June 7, 1990; and two complaint forms re Wood dated June 6, 1990 and June 8, 1990 in a sanitized form.

WE WILL NOT fail and refuse to inform the Union that certain data requested on November 21, 26 and December 13, 1990, did not exist.

WE WILL NOT in any like or related manner, fail or refuse to furnish to the Union, upon request, data which is normally maintained in the regular course of business, which is reasonable available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining, and which is not prohibited by law from release.

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

WE WILL, upon the request of the National Border Patrol Council, American Federation of Government Employees, AFL-CIO, and Senior Border Patrol Agent Jason Wood, request the United States Department of Justice, Office of Professional Responsibility and/or the Office of the Inspector General to repeat the examination of Jason Wood that occurred on July 18, 1990 at which he was denied his right to active Union representation. After receiving the results of such examination, we will reconsider any disciplinary action taken against Mr. Wood and/or the retention in Mr. Wood's personnel records of information obtained during the July 18, 1990 examination. On reconsideration of the disciplinary action, as appropriate, we will make Mr. Wood whole for any losses suffered to the extent consistent with the decision upon reconsideration and, if relevant, afford him whatever grievance and appeal rights are due under any relevant collective bargaining agreement, law, or regulation.

WE WILL furnish the Union with data requested on November 21, 26, and December 13, 1990, including: proposal/decision notices issued after November 1987 in a sanitized form; statutory/regulatory authority for OIG to conduct investigations of INS employees; INS manual regarding investigations of INS employees in a sanitized form; investigator's notes in a sanitized form; six taped interviews/transcripts in a sanitized form; Wood's bank records; affidavits requesting subpoenas ordering release of Wood's bank records in a sanitized form; memorandum re Wood dated May 31, 1990 in a sanitized form; memorandum re Wood dated June 7, 1990; and two complaint forms re Wood dated June 6, 1990 and June 8, 1990 in a sanitized form. To the extent some of the data is not in the custody of INS, Northern Region, we will make good faith requests of OPR/OIG or any other appropriate source for the release of such necessary data.

WE WILL otherwise furnish to the Union, upon request, data which is normally maintained in the regular course of business, which is reasonable available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to

collective bargaining, and which is not prohibited by law from release.

Activity

Dated: _____

By: _____
Signature

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, Denver Regional Office, whose address is: 1244 Boulevard, Suite 100, Denver, Colorado 80204, and whose telephone number is: (303) 844-5224