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, OFFICE OF THE INSPECTOR GENERAL WASHINGTON, D.C.<br><br>Respondent | |
| and | Case No. 6-CA-10109 |
| AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, IMMIGRATION AND NATURALIZATION SERVICE COUNCIL, LOCAL 1210, EL PASO, TEXAS<br><br>Charging Party | |

Scott David Cooper, Esquire
For Respondent

Ms. Socorro Simmons
For the Charging Party

Julie Garnett Griffin, 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, narrowly, whether an employee may be denied representation when examined as a witness, the employee having been examined previously as a subject and was provided representation. For reasons fully set forth hereinafter, I find that by denying representation Respondent failed to comply with § 14(a)(2)(B) of the Statute and thereby violated §§ 16(a)(1) and (8) of the Statute.

This case was initiated by a charge filed on October 31, 1990 (G.C. Exh. 1(a)). The Complaint and Notice of Hearing issued on April 23, 1991 (G.C. Exh. 1(d)), and set the hearing for June 13, 1991. By Order dated June 7, 1991 (G.C. Exh. 1(h)), on motion of the General Counsel, for good cause shown, the hearing was rescheduled for August 20, 1991. By Order dated July 26, 1991 (G.C. Exh. 1(j)), on motion of the Charging Party, for good cause shown, the hearing was further rescheduled for September 27, 1991, and by Order dated September 18, 1991 (G.C. Exh. 1(l)), on motion of the General Counsel, for good cause shown, was rescheduled for December 12, 1991, pursuant to which a hearing was duly held on December 12, 1991, in El Paso, Texas, 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 Respondent exercised. At the conclusion of the hearing, January 31, 1992, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, on motion of the General Counsel, for good cause shown[2/], to February 14, 1992.

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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)(B) will be referred, to simply, as, "§ 14(a)(2)(B)".

2/ General Counsel stated, in part,

> ". . . The court reporting contractor is producing a new transcript due to significant and substantial errors in the original." (Motion To Extend Time For Filing Briefs).

The original transcript was received in this Office on January 8, 1992. The "Corrected Copy" of the transcript was

(continued...)

Respondent and General Counsel each timely mailed an excellent brief, received on, or before, February 18, 1992, which have been carefully considered.

On June 4, 1991, Respondent United States Immigration and Naturalization Service, El Paso, Texas, filed a Motion To Dismiss the Complaint as to it (G.C. Exh. 1(m)). General Counsel filed no response to Respondent's Motion To Dismiss until October 4, 1991. By Order dated October 7, 1991 (G.C. Exh. 1(a)), the Regional Director, pursuant to §§ 2423.19(k) and 2423.22(b) of the Regulations (5 C.F.R. §§ 2423.19(k) and 2423.22(b)), referred Respondent's Motion and General Counsel's Opposition to the Chief Administrative Law Judge who, by Order dated October 10, 1991 (G.C. Exh. 1(p)), denied, without prejudice to renewal at hearing, the Motion to Dismiss. On October 11, 1991, Respondent Immigration and Naturalization Service (INS) filed a Motion to Strike General Counsel's Opposition which was granted because not timely filed; the Order of October 10, 1991, because based, in part, upon arguments in General Counsel's Opposition, was revoked; and Respondent's Motion To Dismiss as to INS was again denied, but without prejudice to renewal at hearing.

At the end of General Counsel's case in chief, Respondent renewed its Motion To Dismiss as to INS (Tr. 108) and Respondent's Motion was granted (Tr. 112). Accordingly, INS was dismissed as a party. General Counsel's Brief, at pages 7-10, urges that this ruling be reconsidered and reversed. After careful consideration, General Counsel's arguments are rejected and the dismissal of INS is affirmed. U.S. Patent and Trademark Office, 45 FLRA No. 83, 45 FLRA 886 (1992). INS was not responsible for interfering with the rights of its employees; and the Inspector General was not an agent of INS. But the Department of Justice, Office of the Inspector General, is a party; jurisdiction is conceded; and any violation by the Office of the Inspector General can be remedied directly.

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2/ (...continued)
received in this Office on February 10, 1992. The original transcript consisted of 108 pages; the corrected transcript consists of 157 pages. All references herein will be to the Corrected Copy.

The court reporting contractor failed to supply the exhibits, which were furnished by the Regional Office and received on August 27, 1992.

Upon the basis of the entire record, I make the following findings and conclusions:

FINDINGS

1. The American Federation of Government Employees, AFL-CIO, Immigration and Naturalization Service Council (hereinafter "Council") is the recognized exclusive representative of a nationwide consolidated unit of employees appropriate for collective bargaining, including those employees assigned to the El Paso District, El Paso, Texas, except those professionals assigned to Border Patrol Sectors and those excluded from coverage by the Statute.

2. The Council and the United States Immigration and Naturalization Service (hereinafter "INS") are parties to a collective bargaining agreement covering the employees of INS' El Paso District.

3. The American Federation of Government Employees AFL-CIO, Immigration and Naturalization Council, Local 1210, El Paso, Texas (hereinafter "Union") is a constituent part of the Council for the representation of employees in INS' El Paso District.

4. On October 17, 1990, Mr. Hector Vega, an INS Immigration Examiner at El Paso (Tr. 84, 85), was served with a Notice To Appear before Special Agent Robert Mellado of the Office of the Inspector General (hereinafter "IG") to answer questions concerning allegations that,

> ". . . you improperly associated with persons . . . with business before the Immigration and Naturalization Service (INS); on 6/22/90, you accepted gratuities from persons with business before the INS; on 1/5/87, you improperly adjudicated an application submitted to the INS." (G.C. Exh. 2)

The Notice To Appear, Form G-792 (3-15-83), specifically noted that his appearance was requested as:

> "A SUBJECT of the allegation(s)." (G.C. Exh. 2)[3/].

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3/ Originally, the investigation into Mr. Vega's conduct was for both criminal and administrative purposes; but by the (continued...)

5. Mr. Vega contacted Ms. Socorro Simmons, a Special Agent at INS and also President of the Union, and asked her to represent him during the interview. Ms. Simmons agreed (Tr. 30, 88). On the morning of October 19, 1990, Mr. Vega and Ms. Simmons arrived at the IG offices and waited to be called for the interview. Mr. Mellado called them into the interview and another IG Special Agent, Mr. Nicholas Gallado, also entered the room and was present during the interview (Tr. 32, 40). At the outset, Mr. Mellado told Mr. Vega and Ms. Simmons that the interview would be conducted in two phases (Tr. 44, 114); that in the first phase, he, Vega, would be the subject of the investigation and he would be entitled to Union representation. However, during the second phase, he would be interviewed as a witness about possible misconduct of other individuals and he would not be entitled to Union representation (Tr. 44, 114-115, 116).

6. During phase one of his interview, Mr. Vega was, indeed, represented by Ms. Simmons. The Union had no objection concerning the representation afforded; Special Agent Mellado sat at a typewriter and took down Mr. Vega's answers (Tr. 45); and at the conclusion of the questioning, Mr. Vega was given a typed statement to review and sign. Mr. Vega and Ms. Simmons reviewed the statement and Mr. Vega signed it (Tr. 46).

In the course of the phase one interview, Ms. Simmons testified that Mr. Vega was asked, "Were you ever directed by your supervisor to take the actions that you took on the applications?" (Tr. 70), to which he had respond, "No." (Tr. 70). She emphasized," . . . if I remember correctly -- he was asked that one general question." (Tr. 71) (See, also, Respondent Exh. 1). Nevertheless, counsel for Respondent, Mr. Cooper, asked Ms. Simmons if, during phase one, it had been established, ". . . that Mr. Vega, in fact, had no knowledge of anyone who committed any misconduct and therefore he could not have . . . been guilty of not turning these people in", to which she responded, "Yes, sir." (Tr. 71). Moreover, Mr. Vega conceded that during phase one he had stated that he was not aware of anyone who had committed any misconduct (Tr. 99). Consequently, while the

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3/ (...continued)
time of this notification, the U.S. Attorney had declined prosecution (Tr. 44, 117-118). Accordingly, Mr. Vega was informed that the interview was solely for administrative purposes (Tr. 44).

precise question or questions asked may be uncertain, there is no dispute, as General Counsel concedes (General Counsel's Brief, p. 4), "An issue covered in this phase of the interview was also Vega's knowledge of misconduct of others."

7. After a break following completion of the phase one interview, Mr. Vega was called for the phase two interview. Ms. Simmons told the Special Agents that she did have the right to be present during the second phase (Tr. 48), but Mr. Gallado said, "It is our policy not to allow Union representatives to be present when we are interviewing witness", (Tr. 48-49) and when she continued to sit there, Mr. Mellado told her, "You have to leave" (Tr. 49), at which point she left under protest (Tr. 49). Mr. Vega requested that Ms. Simmons be present for the phase two examination (Tr. 90, 105, 119).

8. Mr. Vega was interviewed in phase two, which was not recorded (Tr. 133), without his Union representative; but early in the interview,[4/] Mr. Mellado, realizing that one of his questions might relate to Mr. Vega's conduct, called Ms. Simmons back into the room and asked Mr. Vega one question. Mr. Vega responded and Ms. Simmons stated, "This is the very reason I need to be in here" (Tr. 49), but Mr. Mellado told her she, ". . . still had to leave" (Tr. 49) and she again left the room.

Mr. Mellado stated that in the phase two examination he sought to develop possible investigative leads; that he had a particular management official in mind; and that he was trying to avoid having the Union representative present while he asked questions about possible misconduct by a management official (Tr. 121, 123, 129, 130).

9. As to the phase two examination, Mr. Vega testified on direct examination, in part, as follows:

> "A Well after Ms. Simmons was kicked out, it was just Mr. Mellado, Mr. Gallado and myself in the room. And they started asking me question (sic), and they opened -- at one point they opened a file of an alien.

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4/ Although Mr. Vega at one point indicated that Ms. Simmons had been called back more than once (Tr. 101), Ms. Simmons' testimony shows only a single instance (Tr. 49) and Mr. Mellado was quite emphatic that it occurred only one time (Tr. 132).

"Q Had you had any idea before the date of the interview that you were not going to be allowed Union representation that day?

"A None whatsoever. I had no idea that this was going to happen."[5/]

"Q And what kinds of questions did they ask when your Union representative was no longer present?

"A As far as I can recall, it seems to me that they were egging on me (sic) -- that they were asking me if I had been directed by my supervisor or supervisors to adjudicate

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5/ Respondent has adopted a Kalkines type warning [Kalkines v. United States, 473 F.2d 1391, 1393 (Ct. Cl. 1973); see, also, Veterans Administration Medical Center, Long Beach, California, 41 FLRA 1370, 1403 (1991)] on its Form G-793 (Rev. 8-8-84) N (G.C. Exh. 7) which provides, in pertinent part, as follows:

> "As an employee of the U.S. Immigration and Naturalization Service, you are required to answer all questions narrowly related to your employment . . . Any statement you make at this time . . . will not be used against you in a criminal proceeding . . . However, your statement in this matter can be used against you in an administrative disciplinary proceeding. If you willfully make a false statement in the course of this interview and/or statement, you may be subject to criminal prosecution on that account. Also, should you refuse to answer any questions . . . this may subject you to revocation of any security clearance you may hold as well as to disciplinary action up to and including removal from the Service." (Emphasis supplied)

Form G-793 further provides:

> "You have the right to be represented today by the Union pursuant to Article 30(C)(1) of the Agreement between this Service and the American Federation of Government Employees . . ." (Emphasis supplied)

any petitions that possibly were not properly submitted or had been improperly adjudicated; or they were questionable is what I am trying to say.

"Q Umm hmm.

"A The question was asked of me several times . . .

. . .

"Q What was your impression as far as what could happen with respect to you during your -- during this part of the interview?

"A To that point it was kind of an insult to my intelligence. Because when I was asked a question several times -- the same question -- it means that if I had knowledge and I had not reported it, I did not report any misconduct by my supervisors then I would be just as guilty as they were if I had not reported it. So, so why was the question being asked over and over again?

"Q So did you feel you needed Union representation?

"A Oh, definitely.

"Q Why?

"A I felt it all of the time. I have always felt that when you talk to Internal Affairs or OIG -- whatever you want to call it -- definitely. They are not there for the social hour. You need representation at all times. . . ." (Tr. 91-93).

On cross examination, Mr. Vega testified, in part, as follows:

"Q Now, when the -- you said you were explained that the second interview was going to be about conduct of others rather than conduct of you -- what did you think at that time was going to be discussed?

"A . . . I had no idea.

. . .

"A As I said before -- it was a complete surprise to me.

"Q . . . Did you disbelieve them when they said that your conduct was not going to be discussed?

. . .

"A Oh, yes. Definitely. (Tr. 98-99)

. . .

"Q So given that they were the same questions -- can you explain to me why you felt you might have been subject to disciplinary action for answering?

. . .

"A That they were kind of hoping, that OIG was kind of hoping that I would finger somebody in order to save myself. . . .

"No, I think that they were actually hoping that I would give them more information on somebody else.

"Q But you knew that that was not going to happen. Correct?

"A But maybe hoping -- maybe I had forgotten something and I would tell them.

. . .

"A I felt threatened.

"Q Why?

"A As I said before -- every time that they ask you a question -- especially if they want an interview. Especially at the point that they have a Union representative removed from the office -- there is something drastically

wrong. It's only natural. What could they possibly be up to? Surely, they are not going to offer me a cup of coffee. (Tr. 100-101).

10. The "Operations Instructions", an administrative policy manual of INS, provides, inter alia, as follows:

> "(3) All allegations of misconduct under this instruction should be reported immediately . . .
>
> > (i) FAILURE TO REPORT. Failing to report or delay in reporting allegations in compliance with this operations instruction may result in disciplinary action against employees." (Operating Instructions, 287.10(h)(3); G.C. Exh. 4; Tr. 53, 54)

This Operating Instruction applies to all INS employees (Tr. 53, 54).

11. In addition to the reference on Form G-793 to the right of representation by the Union, n.5 supra, Mr. Vega was also given a Form G-790, signed by Mr. Mellado, which stated,

> "In accordance with the Agreements between the Immigration and Naturalization Service and the American Federation of Government Employees (National Border Patrol Council and the National Immigration and Naturalization Service Council), you are hereby advised that you have the right to be represented at the proposed interview by the Union. . . . (G.C. Exh. 6)(Emphasis supplied)

12. The parties stipulated that,

> "If OIG sustains an allegation it forwards a portion of the investigative file necessary to support a disciplinary action based on the sustained allegation to INS and INS may rely on those documents to initiate disciplinary action." (Tr. 66).[6/]

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6/ The allegations about which Mr. Vega was to be examined were:

(continued...)

6/ (...continued)

> ". . . you improperly associated with persons . . . with business before the Immigration and Naturalization Service (INS); on 6/22/90, you accepted gratuities from persons with business before the INS; on 1/5/87, you improperly adjudicated an application submitted to the INS." (G.C. Exh. 2)

Further, the Notice To Appear (Form G-792; G.C. Exh. 2) was marked to show that Mr. Vega's appearance was requested as, "A SUBJECT".

From this Respondent asserts,

> ". . . Since there was no allegation against Mr. Vega as a witness . . . no information attained in the second interview regarding Mr. Vega could have been forwarded to INS and no discipline against Mr. Vega could have resulted. Thus, the inescapable conclusion from the parties' stipulation in this case is that Mr. Vega, when questioned by OIG as a witness had no reasonable basis to fear discipline." (Respondent's Brief, p. 9).

Reasonable minds could disagree. For example, improper adjudication could, indeed, include direction by a superior, and Mr. Vega during his examination as a subject was, in fact, questioned about misconduct of others (Tr. 99). Several assumptions would seem possible, for example: First, if, during examination as a witness, evidence had been adduced of misconduct of others, as part and parcel of the allegation of improper adjudication, both the "fact" of misconduct of others and the "fact" that Mr. Vega had not reported the misconduct could be sustained allegations in accordance with the stipulation. Second, since Mr. Vega was examined as a witness without notice, the purported limitations to the "allegations" set forth in the "Notice To Appear", for examination as a subject, are inapplicable. Third, if the IG finds evidence of a violation, whether in the course of the examination of an employee as a witness or as a subject, or otherwise obtains such evidence, the IG would be obligated to report the perceived violation regardless as to whether the violation involved malfeasance or nonfeasance.

(continued...)

CONCLUSIONS

Section 14(a)(2)(B) provides:

> "(2) 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 --
>
> "(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)).

There is no dispute that Respondent examined Mr. Vega as a witness without permitting him to have requested Union representation -- indeed, that it ordered Mr. Vega's representative to leave. Respondent's defense is that Mr. Vega had no reasonable grounds to believe that his examination as a witness concerning misconduct of others could result in disciplinary action against him. General Counsel asserts, to the contrary, that Mr. Vega reasonably

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6/ (...continued)

But, even more important, we are concerned only with the reasonable belief of an employee confronted with such an examination. Mr. Vega testified that he reasonably believed the examination might result in disciplinary action against him. He was not given immunity from disciplinary action. To the contrary, the only notice given to him was that any ". . . statement . . . can be used against you in an administrative disciplinary proceeding." (G.C. Exh. 7).

believed that disciplinary action could result from his examination as a witness concerning misconduct of others.[7/]

Determination of whether belief is reasonable within the meaning of § 14(a)(2)(B) rests solely on objective factors, Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina, 32 FLRA 222, 229 (1988). The purely subjective fear of Mr. Vega of discipline as the result of any question by a person from IG, no matter what the question or the circumstances (Tr. 103), does not constitute reasonable belief and has been given no consideration. On the other hand, the objective factors shown were, inter alia: (a) Mr. Vega's awareness of the agency's requirement that misconduct be reported and possible disciplinary action for failure to do so; (b) the exclusion of his representative from his examination as a witness; (c) the stated policy, initially by Special Agent Mellado (Tr. 44, 114-115, 116) and later by Special Agent Gallado (Tr. 48-49), that Union representation was not allowed during the interview of witnesses; (d) the absence of notice that he was to be examined as a witness, i.e., his only "Notice To Appear" was General Counsel Exhibit 2, at which his appearance was requested as a subject; (e) Mr. Vega had been informed, both on Form G-793 (G.C. Exh. 7) and Form G-790 (G.C. Exh. 6), that ". . . you have the right to be represented at the proposed interview . . ." (G.C. Exh. 6) and, "You have the right to be represented today by the Union . . ." (G.C. Exh. 7); nevertheless, his Union representative was compelled to leave; (f) Mr. Vega was questioned in a coercive manner, e.g., he was examined in tandem by two Special Agents about a serious matter of misconduct; at one point they opened a file of an alien; and they asked the same questions over and over; (g) Mr. Vega had been given a Kalkines type warning that his statement could be used against him in an administrative disciplinary proceeding (G.C. Exh. 7) and he was given no immunity from disciplinary action for his examination as a witness. Indeed, he was told only that in phase two he was no longer considered as a subject, he was then considered as a witness, "We are now

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7/ There is no allegation of a § 14(a)(2)(A) violation in this case and I express no opinion as to whether such an examination was, or could have been, a formal discussion, within the meaning of § 14(a)(2)(A), at which the Union would have been entitled to notice and the opportunity to be represented. See, National Labor Relations Board, 46 FLRA No. 14, 46 FLRA 107 (1992); Veterans Administration Medical Center, Long Beach, California, 41 FLRA 1370 (1991).

looking for possible misconduct by other individuals" (Tr. 116), but Mr. Vega well knew that if he had knowledge of misconduct of others and had not reported it he was as guilty as they were (Tr. 92, 100); (h) the questions in phase two were repetitive of questions asked in phase one.

Under the circumstances, a reasonable person would conclude that disciplinary action might result from the interview because the objective factors demonstrate such danger. Indeed, it seems to me that any INS employee interviewed by the IG as a witness concerning possible misconduct of others, without more, has reasonable grounds to believe that disciplinary action may result from the examination. The fact that the IG is then looking for possible misconduct by others provides the witness with no solace whatever because, if the witness is found to have knowledge of the misconduct of another but did not report it, the witness may be subject to discipline - not because he engaged in misconduct, but because he failed to report misconduct; and examinations of witnesses, or "third parties", frequently, if not invariably, move from examination as a witness to confrontation as a subject. A case markedly similar is Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Hartford District Office, 4 FLRA 237 (1980) (hereinafter IRS), enforced sub nom. Internal Revenue Service v. FLRA, 671 F.2d 560 (D.C. Cir. 1982). There, IRS employee A received a telephone call from an irate taxpayer who complained of the release of confidential information by IRS employee B. A dutifully reported the telephone conversation to his supervisor; an investigation was begun; and, in due course, A was instructed to appear before Inspectors from the IRS Inspection Service. A informed his supervisor who told him he could not have representation, because it was a "third-party interview" and he, A, was not the subject of the investigation. Nevertheless, A appeared at the interview with his representative, but the two Inspectors again told A he could not have a union representative present, "because it was a third-party interview" and A was not the subject of the investigation. A's representative objected to his exclusion. A was first questioned about the telephone call but the interrogation segued to an inquisition of A. Judge Arrigo, whose decision was adopted by the Authority, in finding a violation of §§ 16(a)(1) and (8) stated, in part, as follows:

> "While . . . [A] might not have been the person the Inspectors considered as the subject of the investigation at the time of his interview, his control of the taxpayer's file

> placed him in a critical position whereby, his conduct, if improper, could have rendered him liable to disciplinary action. True, if . . . [A's] improper conduct was found to have been the source of disclosure to the primary person under investigation [B], further interrogation of . . . [A] would not have proceeded without giving him an opportunity to be represented. But at that point . . . [A's] action would have already been part of the Inspectors' store of information which would have been used in furtherance of any investigation specifically involving . . . [A]." (4 FLRA at 250-251).

The Court, in granting enforcement, stated, in part, as follows:

> ". . . [A] could not be assured that he would not be subject to discipline as the result of the interview. In this context, the statements of the inspectors that . . . [A] is not the subject of the interview, and that the interview was aimed at another party, could not eliminate the risk that . . . [A] might be placed in jeopardy as a consequence of something he said to them . . Nor was this a 'run-of-the-mill' shop floor conversation in which the employee could not reasonably fear some adverse consequences . . . The interview was held in a separate building away from . . . [A's] usual workplace, under oath, and was conducted by two trained investigators. On this record, we find there is substantial evidence to support the FLRA's determination that . . . [A] could have reasonably feared discipline as a consequence of the interview and consequently that he was entitled to have a union representative present at the interview." (671 F.2d at 563-564).

What was said in IRS, supra, is applicable here. While it does not appear that Mr. Vega was placed under oath in his examination as a witness and, accordingly, might not have been subject to prosecution for perjury, nevertheless, he had no less reason to fear that his examination as a witness might result in discipline than the employee [A] in IRS, supra.

Respondent has advanced various arguments as to why Mr. Vega could have had no reasonable fear that his examination as a witness might result in disciplinary action against him, each of which has been carefully considered and found wholly unpersuasive. For example, Respondent asserts, ". . . the parties have stipulated that the only information that OIG could have forwarded to INS in this case is that which would have been necessary to support a 'sustained allegation' that formed the basis of the investigation . . . Since there (sic) no 'allegation' against Mr. Vega as a witness . . . no information obtained in the second interview regarding Mr. Vega could have been be (sic) forwarded to INS and no discipline against Mr. Vega could have resulted. Thus, the inescapable conclusion from the parties' stipulation in this case is that Mr. Vega . . . had no reasonable basis to fear discipline." (Respondent's Brief, p. 9) (Emphasis in original) At the outset, the fallacy of this argument is that Mr. Vega was given no such information. He was told only that in phase two he was no longer considered a subject, he was considered as a witness, "We are now looking for possible misconduct by other individuals" (Tr. 116). A reasonable person could, indeed must, have believed that the examination would be as broad as the interrogators' interest in the possible misconduct of others. As noted in footnote 6, above, it is debatable, in any event, whether failure to report was included in the allegation of improper adjudication so that evidence of such could have been submitted as a sustained allegation; that since Mr. Vega was given no notice to appear as a witness, his examination as a witness was limited only by the interest of the IG's interrogation in exploring the possible misconduct of others; etc. Finally, assuming that Respondent is wholly correct and that improper conduct on the part of Mr. Vega in failing to report misconduct could not have been submitted as a sustained allegation without notice, as well stated by Judge Arrigo in IRS, supra, his,

. . .

> ". . . action would have already been part of the Inspectors' store of information which would have been used in furtherance of any investigation specifically involving . . . " [the employee] (4 FLRA at 251).

Further, by way of example, Respondent asserts that because, in his examination as a subject, Mr. Vega had already said ". . . he had no incriminating information to give, nothing he could have said . . . could have resulted in

discipline." (Respondent's Brief, pp. 14-15) (Emphasis in original). If Respondent believed Mr. Vega's statement that he was not aware of anyone who had committed any misconduct (Tr. 99), it would not have sought to interrogate him further about the possible misconduct of others. The fact that they did proceed would convince a reasonable person that his disclaimer of knowledge was not believed and a reasonable person could believe that his examination as a witness might result in disciplinary action against him. As Mr. Vega stated, ". . . maybe I had forgotten something. . . ." (Tr. 100) and further, ". . . What could they possibly be up to? Surely, they are not going to offer me a cup of coffee." (Tr. 101)

The desire of the IG to interview witnesses privately without the presence of Union representation about possible misconduct of fellow employees and/or supervisors is understandable and may readably be achieved by granting the witness immunity from disciplinary action, U.S. Immigration and Naturalization Service, San Diego, California, 15 FLRA 383, 388, 389, 393 (1984), for as Judge Naimark, whose decision was adopted by the Authority, stated,

> ". . . the grant of immunity . . . was sufficient to dispel any reasonable fear of disciplinary action . . ." (id. at 395).

Here, of course, Respondent granted Mr. Vega no immunity and because a reasonable employee examined about the misconduct of others, where failure to report such misconduct is, itself, a ground for discipline, could reasonably believe that the examination might result in disciplinary action against him, Respondent, by denying Mr. Vega requested representation, as provided by § 14(b)(2)(B), violated §§ 16(a)(1) and (8) of the Statute.

Finally, Respondent asserts that IG, ". . . personnel are not representatives of the agency as defined by 5 U.S.C. § 7114(a)(2)(B)." (Respondent's Brief, p. 6). I do not agree. The Department of Justice has many sub-divisions including the Immigration and Naturalization Service (INS) and the Office of Inspector General (IG). Certainly, the Department of Justice is an "agency" within the meaning of §§ 3(a)(3) and 14(a)(2) of the Statute. As the investigative arm of the Department of Justice, the IG conducted an investigation of allegations of misconduct involving INS employees. The interview by the IG of employees of INS constituted examinations in connection with an investigation within the meaning of § 14(a)(2)(B) of the Statute at which

the employees were entitled to union representation upon request. The IG recognized the employee's right to representation under § 14(a)(2)(B) when he was examined as a subject but, erroneously as I have found, denied his right to representation when he was examined as a witness. Although the IG was not the employing entity of the employee, it could not act in such a manner as to unlawfully interfere with the employee's statutory right notwithstanding its autonomy to institute or terminate an investigation. The IG is a party and there is no question concerning the authority of either INS or the Department of Justice, itself, to order the IG to do anything. The IG unlawfully denied an employee representation pursuant to § 14(b)(2)(B) of the Statute and thereby violated §§ 16(a)(1) and (8) of Statute. Department of Defense, Defense Criminal Investigative Service, Defense Logistics Agency and Defense Contract Administration Services Region, New York, 28 FLRA 1145, 1149 (1987), enforced sub nom., Defense Criminal Investigative Service (DCIS), Department of Defense (DOD) v. FLRA, 855 F.2d 93, 98-99, 100, 101 (3d Cir. 1988).

Accordingly, having found that Respondent violated §§ 16(a)(1) and (8) of the Statute, it is recommended that the Authority adopt the following:

ORDER[8/]

Pursuant to § 2423.29 of the Rules and Regulations 5 C.F.R. § 2423.29, and § 18 of the Statute, 5 U.S.C. § 7118, the Authority hereby orders that the United States Department of Justice, Office of Inspector General, Washington, D.C., shall:

1. Cease and desist from:

(a) Interfering with the right of employees of the Immigration and Naturalization Service represented by

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8/ Although the examination in question involved an employee in El Paso, Texas, the stated unlawful policy of the IG, that representation was not allowed in the examination of employees as witnesses, applied to the whole of the bargaining unit, i.e., the nationwide consolidated unit, and, accordingly, to eliminate the unlawful policy to all affected employees the Order must encompass the entire bargaining unit and posting, in order to effectuate the purposes and policies of the Statute, must be nationwide at all locations of the Immigration and Naturalization Service.

the American Federation of Government Employee, AFL-CIO, Immigration and Naturalization Service Council (hereinafter "Council") to union representation at examinations in connection with investigations.

(b) Requiring Mr. Hector Vega, or any other bargaining unit employee of the Immigration and Naturalization Service, to take part in any examination in connection with an investigation, whether as a subject or as a witness, without Union representation when such representation has been requested by the employee and the employee reasonably believes that the examination might result in disciplinary action against the employee.

(c) In any like or related manner interfering with, restraining or coercing employees of the Immigration and Naturalization Service represented by the Council, in the exercise of their rights assured by the Statute.

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

(a) Post at all locations of the Immigration and Naturalization Service copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Inspector General, United States Department of Justice, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees of the Immigration and Naturalization Service are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to § 2423.30 of the Regulations, 5 C.F.R. § 2423.30, notify the Regional Director, Dallas Region, Federal Labor Relations Authority, Suite 926, 525 Griffin Street, Dallas, Texas 75202-1906, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 17, 1992
Washington, DC

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 OF THE

IMMIGRATION AND NATURALIZATION SERVICE THAT:

WE WILL NOT REQUIRE Mr. Hector Vega, or any other bargaining unit employee of the Immigration and Naturalization Service, represented by the American Federation of Government Employees, AFL-CIO, Immigration and Naturalization Service Council, to take part in any examination in connection with an investigation, whether as a subject or as a witness, without Union representation when said representation has been requested by the employee and the employee reasonably believes that the examination might result in disciplinary action against the employee.

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

WE WILL in any examination in connection with an investigation of any employee or the Immigration and Naturalization Service, whether as a subject or as a witness, where the employee has not been granted immunity from administrative discipline, permit the employee, upon request, to have Union representation.

Inspector General
United States Department of Justice

Dated: _____ By: _____
Inspector General