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

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| FOOD AND DRUG ADMINISTRATION,<br>NEWARK DISTRICT OFFICE,<br>WEST ORANGE, NEW JERSEY<br><br>Respondent<br><br>and<br><br>AMERICAN FEDERATION OF<br>GOVERNMENT EMPLOYEES,<br>AFL-CIO, LOCAL 242<br><br>Charging Party | Case Nos. 2-CA-10068<br>2-CA-10083<br>12-CA-10204<br>12-CA-10271 |

Andrew Rudyk
Robert Nitche
For Respondent

David Tobias
For Charging Party

Peter F. Dow, Esq.
For General Counsel of the FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

## DECISION

### Statement of the Case

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

Charges were filed and amended in this case by American Federation of Government Employees, AFL-CIO (AFGE), Council 242 (AFGE Council 242 and Council), against Food and Drug Administration, Newark District Office, West Orange, New Jersey (Newark DO). Pursuant to these charges, as amended, the Acting Regional Director for the Boston Regional Office of the FLRA issued an Amended Consolidated Complaint and Notice of Hearing, alleging that Newark DO violated section 7116(a) (1), (2), (5) and (8) of the Statute. Newark DO filed an Answer denying it had violated the Statute.

A hearing in this matter was conducted before the undersigned in New York City, New York. Newark DO, AFGE Council 242, and the General Counsel of the FLRA were represented and afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were filed and have been fully considered.

Prior to reconvening the subject hearing the General Counsel of the FLRA filed a Motion to Further Amend the Complaint. This motion sought to add an additional alleged violation of the Statute in Case No. BY-CA-20318. The charge in this case was filed after the hearing in the subject case had adjourned the first time. At the reconvened hearing in the subject case the Motion was denied because the matters sought to be litigated were new and not so intertwined with the facts in the subject case to justify adding these new issues and requiring Newark DO to prepare to defend these new matters and to seek additional time to adequately prepare this defense.

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

## Findings of Fact

AFGE Council 242 is the exclusive collective bargaining representative for a consolidated unit of employees of the Food and Drug Administration, including the employees in the Newark DO and its two resident posts, in Camden and North Brunswick, New Jersey. AFGE Local 3445 is a constituent of AFGE Council 242 and is the Council's agent for representing unit employees who are located in the Newark DO and its two resident posts. The Newark DO is part of the Food and Drug Administration's Mid-Atlantic Region. There have been administrative reorganizations within the Food and Drug Administration since the Council was first certified as the collective bargaining representative. The employees in the Newark DO have always remained in the unit represented by the Council. With respect to the Newark DO, the unit included all professional and nonprofessional employees, excluding management officials, supervisors, confidential employees, employees engaged in personnel work in other than a purely clerical capacity, and employees engaged in administering the Statute.

At all material times Charlotte Crowley-Harris[1] was a Secretary (Typing) GS 318-5 in the Administrative Management Branch (AMB) in the Newark DO. The title of her job was, apparently, Secretary to the Administrative Officer. At all material times the Newark DO was without a permanent Administrative Officer.

On April 8, 1990, Catherine Williams became the Administrative Specialist in the AMB. Prior to that she had served a 120 day detail as Administrative Assistant in the AMB.[2] Acting Administrative Officers were assigned to the Newark DO for two or so weeks at a time for a total of about three months. When no one was detailed in to act as Administrative Officer, Williams acted as Administrative Officer, supervising the AMB, which had about nine employees in April of 1990. Although she served as acting Administrative Officer, Williams never received a written delegation of the authority normally exercised by an Administrative Officer. At the times of the incidents that are the subject of this case Williams acted as the Administrative Officer and no one else was detailed into the AMB to serve in that capacity.

In early 1990 Crowley-Harris was summoned to the office of Newark DO Director Matthew Lewis. Crowley-Harris asked William Berbaum, AFGE Local 3445 Acting Shop Steward, to represent her at the meeting. Berbaum asked and received permission to use official time to represent Crowley-Harris from his supervisor, Ballard Graham, Supervisor Consumer Safety Officer (SCSO). Berbaum advised Lewis that Crowley-Harris had asked Berbaum to represent her as a union officer. Lewis stated that this was not the type of meeting that required Berbaum's presence. Based on that explanation Berbaum left. Lewis did not tell Berbaum that Crowley-Harris was a confidential employee or was otherwise excluded from the collective bargaining unit and not entitled to union representation.

Shortly before March 7, 1990, Crowley-Harris was again summoned to Lewis' office. Because she felt Williams was going to take some action against Crowley-Harris, she again asked Berbaum to represent her. Berbaum again asked and received permission from Graham to represent Crowley-Harris. When Berbaum and Crowley-Harris arrived at Lewis' office, Lewis, Williams, and Damini Patel, an employee in the unit, were already present. Berbaum informed Lewis that Berbaum was there at the request of Crowley-Harris to be her union representative. Lewis asked Crowley-Harris and Berbaum to be seated. The meeting lasted about 10 to 15 minutes and consisted of Lewis and Williams trying to convince Crowley-Harris to apologize to Patel for an altercation they had. Crowley-Harris refused. Neither Lewis nor Williams objected to Berbaum's presence as Crowley-Harris' union representative and they did not state that Crowley-Harris was excluded from the collective bargaining unit.

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[1]Crowley-Harris' name is also referred to in the transcript of the hearing, the briefs and the other documents in this matter, variously as Crowley-Harris, Crowley Harris, etc. She did not testify at the hearing and there is no authoritative way of ascertaining which spelling is correct. In this decision, for the sake of uniformity she is referred to as Crowley-Harris.

[2] Williams had previously been a GS-4 Clerk-Typist in an Investigations Branch in the Newark DO.

On March 7, 1990, AFGE Local 3445 had its election of officers and, among others, Christopher Walker was elected Vice President and Council Vice President, and Barbara Schultz was elected Shop Steward with responsibility of representing the unit employees located in the Newark DO. Schultz was employed in the Newark DO as Consumer Safety Officer, and had been so employed for about four and one half years. Beginning late March or early April Walker also served as Acting President for AFGE Local 3445. On March 29, 1990, AFGE Local 3445 advised Newark DO of the election results including the election of Walker and Schultz.

On April 12, 1990, Crowley-Harris asked Schultz to help Crowley-Harris with her dispute with Patel, which was still an issue with the Newark DO, and concerning other problems Crowley-Harris was having with Williams concerning the use of sick and annual leave. Crowley-Harris felt she was being harassed and wanted to file a grievance. Schultz asked for, and received permission from her supervisor, SCSO Mimi Remache, to use official time to speak to Crowley-Harris about filing a grievance. Schultz did prepare and file a grievance on behalf for Crowley-Harris, as her union representative, on April 12, 1990.

On April 12, 1990, Schultz and Williams encountered each other in a hall and Schultz told Williams to answer the grievance. Williams went into her office and called Lewis and Labor Specialist Robert Nitche at the Regional Personnel Office. Nitche advised Williams that Crowley-Harris was not an employee in the bargaining unit. On April 13, 1990, Williams wrote a letter concerning the grievance and hand delivered it to Schultz. The letter stated that Crowley-Harris was a "Non-Bargaining Employee".

On April 13, 1990, Crowley-Harris set up a three-way conversation among herself, Lewis and Schultz, as Crowley-Harris' witness, to discuss problems Crowley-Harris was having at work. After she explained the problems, Lewis said that he was not going to discuss the problem with the whole world. Schultz then received a telephone call from AFGE Council 242 President James Nelson, who told Schultz that he had just been questioned as to the identity of AFGE Local 3445's new officers. At Nelson's suggestion, notification was again sent to Newark DO listing the new union officials.

On April 20, 1990, Crowley-Harris asked Walker to represent Crowley-Harris regarding continuing problems she was having with Williams. Walker sought and received permission from her supervisor, Remache, to use official time to represent Crowley-Harris at a meeting with Williams.[3]

Walker and Crowley-Harris attended a meeting with Williams in her office in the Newark DO on April 20, 1990, at 9:00 a.m. Williams asked Walker whether she was sure she should be there. Walker responded that she should be there because Crowley-Harris feared she would be mistreated and had asked for representation. The meeting

[3]Remache did not tell Walker that Crowley-Harris was not in the unit, that the union could not represent her, or that she was a confidential employee.

lasted 15 to 20 minutes. During this meeting Williams gave Crowley-Harris a written memorandum instructing her concerning her work and her use of sick leave. Williams asked Crowley-Harris to sign the memorandum, but she refused after a discussion with Walker. Williams became angry and ended the meeting. Walker left the Newark DO. I credit Williams that she was relatively new at dealing with the union, was unsure of herself and could reach no one for guidance. Accordingly, she concluded it was better to let Walker be present at the meeting.

Later on April 20, 1990, Williams again called Crowley-Harris to a meeting in Williams' office. Crowley-Harris asked Schultz to represent her. Crowley-Harris told Schultz about the earlier meeting, which Walker had attended. Schultz obtained approval to use official time to represent Crowley-Harris from SCSO Joanne Givens.

Schultz and Crowley-Harris went to Williams' office and Williams permitted Crowley-Harris to enter, but Williams blocked the doorway and would not let Schultz enter. Williams told Schultz that her presence was not necessary, and, apparently when Schultz said she felt the Statute gave her the right to be there, Williams told her she could not come in. Williams refused to permit Schultz to enter because, earlier, Williams had been advised by Nitche that Crowley-Harris was not a member of the bargaining unit and that every time Williams spoke to Crowley-Harris, Williams did not have to permit the union to be represented. Williams did not advise Schultz of this conversation nor did Williams give these reasons for excluding Schultz from the meeting.

On April 20, 1990, subsequent to the foregoing incident, Givens summoned Schultz to Givens' office. Present were Givens, Remache, and Schultz. Givens and Remache informed Schultz that she would be charged AWOL for the time spent representing Crowley-Harris. Givens and Remache stated that Crowley-Harris was a confidential employee and was not entitled to union representation. In response to Schultz' inquiry as to the basis for this decision, Givens stated that Schultz should trust Givens that Crowley-Harris was a confidential employee. When Schultz asked who else were confidential employees, Givens stated that was for Schultz to find out. Schultz asked which documents she should examine to determine whether an employee was "confidential" and Givens told Schultz to look at the Form 52. Schultz then asked to see Crowley-Harris' Form 52 and was told by Givens that was not necessary. Givens and Remache did not inform Schultz what was meant by the term confidential employee nor did they say which facts made Crowley-Harris a confidential employee. Since this date and incident Schultz has not been involved in representing Crowley-Harris.

Upon returning to the Newark DO on April 20, 1990, at about 5:30 p.m., Walker was called into Remache's office. Remache told Walker that she would be charged AWOL for the time she had spent that morning representing Crowley-Harris. Remache stated that Crowley-Harris was not entitled to union representation. Walker had not been previously advised that Newark DO believed that Crowley-Harris was not entitled to union representation and she protested that Remache had approved the request for official time for representational purposes. Remache told Walker that Walker

should know who she could and could not represent. Remache mentioned that this was the reason that the former AFGE Local 3445 President had resigned and she would see if Walker could take it.

On May 1, 1990, Newark DO denied Crowley-Harris' April 12 grievance stating that Crowley-Harris acted in a confidential capacity to Williams and was, thus, excluded from the unit.

By letter dated May 3, 1990, AFGE Council 242 invoked Article 41 of the collective bargaining agreement, entitled "EMPLOYER AND UNION DISPUTES".[4] The letter raised three issues, two of which are relevant to the subject case. Item 1 was captioned "Clarification of the designation 'Confidential Employee'"and dealt with the union contention that management was misapplying the designation, thereby denying employees rights under the contract. This item specifically referred to Crowley-Harris as being improperly being denied union representation. Item 2. was captioned "Representation Rights" and dealt with the union contention that union officials in the Newark DO were prevented from representing a member of the bargaining unit and such officials were penalized for representing that member of the bargaining unit, namely Crowley-Harris.

Shortly before May 10, 1990, Schultz was anticipating a promotion. She went to the Administration Branch and spoke with Crowley-Harris concerning the status of the paperwork for the promotion. As Schultz and Crowley-Harris spoke Lewis walked by.

At about 9:00 a.m. on May 10, 1990, Givens called Schultz into Givens' office and told Schultz that management was watching her very closely and she should be careful of all her actions. Schultz asked if Givens was referring to the time Lewis saw Crowley-Harris and Schultz talking and Schultz went on to explain the subject of that conversation. Givens stated that she was just warning Schultz that they were watching Schultz.

During the afternoon of May 10, 1990, Schultz was again called into Givens' office. Givens stated that she had previously ordered Schultz not to speak to Crowley-Harris. Givens gave Schultz a document entitled "Written Reminder" and Givens told Schultz that Schultz was not allowed to go over to the Administrative Branch, was not to send notes or telephone Crowley-Harris, and was in no way to communicate with Crowley-Harris. Givens stated that if Schultz continued to speak to Crowley-Harris, Givens would take disciplinary action, adverse action, against Schultz. During the conversation it was mentioned that Lewis had seen Schultz talking to Crowley-Harris. Schultz said she had said she would not represent Crowley-Harris and, Schultz asked if anybody had heard her represent Crowley-Harris. Givens said that no one had heard Schultz, but that Schultz was "perceived guilty".

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[4] The letter was addressed to the Regional Directors of FDA's Northeast Region and Mid-Atlantic Region. This was apparently because the Council officials handling the matter were located in the Northeast Region, but the incidents referred to occurred in the Mid-Atlantic Region.

The "Written Reminder" provided that Schultz was to refrain from dealing with Crowley-Harris anywhere at the work site, any time during the work day. Schultz was also to refrain from contacting Crowley-Harris directly or indirectly, including refraining from using the telephones or "writings". Schultz was directed to refrain from entering the Administrative Branch (AMB) without prior approval and only on official business. Schultz was warned that failure to follow the order may result in "appropriate administrative action" being taken against her.

Employees within the collective bargaining unit work in the AMB and in the Private Safety Assurance Unit (PSAU), which is located adjacent to the AMB. Employee access to the AMB is not restricted by any physical barriers. To go the PSAU one must pass through the AMB. Employees in the Newark DO have always had free access to the AMB on official business and to visit co-workers on personal matters. Schultz was the only Newark DO employee required to get approval before going to the AMB on either official business or to visit an employee there on a personal matter. Schultz is also the only employee in the Newark DO ordered not to speak with another co-worker.

On May 10, 1990, Schultz discussed these incidents with Council 242 Shop Steward David Tobias, who advised Schultz to write to Givens and explain Schultz' reason for talking to Crowley-Harris and the union's position concerning Crowley-Harris' unit status. Accordingly, by letter dated May 10, 1990, Schultz wrote a letter to Givens in which Schultz explained that Crowley-Harris and Schultz were friends and therefore had friendly conversations and that Schultz felt it was harassment of a union official to prohibit her from advising employees on personal matters. Further the letter stated that the union felt that Crowley-Harris was a bargaining unit member.

On May 25, 1990, Council President Nelson wrote a letter to Mid-Atlantic Regional Director Davis stating that he intended to file un unfair labor practice charge (ULP) concerning the denial of union representation to Crowley-Harris by the Newark DO. The letter stated further that the incident occurred on April 20, 1990, when Crowley-Harris was denied union representation by her supervisor, Williams. In the letter Nelson also requested memoranda issued to Crowley-Harris and union officials denying Crowley-Harris union representation, including correspondence to Schultz and Crowley-Harris; memoranda indicating administrative action would be taken against Crowley-Harris, or any other employee, if representation is sought or given; memoranda of "conversation", personal notes of supervisors and managers and other materials used by management to arrive at the conclusion that Crowley-Harris should be denied union representation; copies of Position Descriptions (PDs) of all GS-318 series employees in the Newark DO, including the "optional form 8"; and a list of the actual duty assignments of Crowley-Harris in the last 12 months. Finally, because the collective bargaining agreement provides that the parties shall meet to discuss alleged unfair labor practices, Nelson asked for a meeting on June 5, 1990.

By letter of May 30, 1990, Davis responded to Nelson's May 25, 1990, letter and stated that Davis expected Lewis would respond to Nelson's request within the week. Nelson never received a further response to his request for information.

After an exchange of communications in the Article 41 procedure and failure to resolve the dispute raised in the Article 41 procedure, Nelson sent a letter dated June 7, 1990, to Davis. Nelson stated that both the union and management had a basic disagreement as to the bargaining unit status of Crowley-Harris, a GS-318-5 Secretary (Typing) in the Newark DO. Nelson stated that the Council felt Article 41 provided the best procedure for resolving this dispute and that the filing of ULPs is "counter-productive". Nelson went on to state that the Council's intent in filing a ULP was to right the wrongs it perceived in management's actions. Nelson suggested the Council would suspend filing the ULPs if management delayed the suspension of Crowley-Harris until such time as the FLRA makes a determination of her bargaining unit status; reinstated the AWOL time deducted from union officials who had official time approved to represent Crowley-Harris; and co-operated with the FLRA and the Council in the determination of the bargaining unit status of Crowley-Harris. Nelson stated that the foregoing proposal was made on the understanding that only the FLRA can make a determination of the bargaining unit status of an employee and that the FLRA would agree to make such a determination.

On November 9, 1990, the Council filed the ULP in Case No. 2-CA-10068, which dealt with the May 10, 1990, Written Reminder given to Schultz for attempting to represent Crowley-Harris, and the ULP in Case No. 2-CA-10083, which dealt the refusal to provide the Council with the information requested by Nelson in the May 25, 1990, letter.

Article 41 of the collective bargaining agreement provides a method for resolving disputes between the union and FDA concerning the effect, interpretation or claim of breach of the agreement; or concerning any claimed violation or misapplication of any law or regulation affecting conditions of employment. Article 41 sets forth the procedure for raising and dealing with these disputes and provides that if the dispute is not resolved it may be taken to arbitration. "Article 42. Arbitration", sets forth the arbitration procedures for those disputes not resolved under Article 41 or Article 26, the "Grievance Procedure".

On or about August 24, 1990, representatives of Newark DO and the Council met and settled the Article 41 proceeding by restoring the time to the two employees who had been charged AWOL for trying to represent Crowley-Harris.

In July 1985 Linda Washington began working in the Newark DO as a clerical employee as part of a stay in school program. In 1987 she became a full time clerk-typist assigned to Group IV in the Investigations Branch (IB) of the Newark DO. The IB under the Newark DO was composed of five groups, three located in the Newark DO itself, and one in each of the two resident offices. Each group was headed by an SCSO, also called a Supervisory Investigator, who was the first line supervisor for the group, and the group was composed of a clerk-typist or secretary, and eight or ten employees

who were investigators, inspectors and engineers. These latter employees visit the various facilities regulated by FDA and investigate whether FDA's regulatory programs are being complied with. The investigators, inspectors and engineers are in the collective bargaining unit.

Ballard Graham was the SCSO for Group IV during the time Washington worked in the group. As a first line supervisor Graham prepared the annual appraisals for the employees in Group IV, approved leave requests, recommended promotions, processed grievances at the first step, and could discipline employees in the group. Graham did not engage in collective bargaining meetings with the AFGE Local 3445 or the Council. Graham actually handled very few grievances at the first step and had virtually no other dealings with the shop stewards and other union officials. He had handled one EEO matter in which he was the alleged perpetrator. On occasion Graham served as Acting Director of the IB when the Director of the Investigations Branch (DIB) was absent.

For a time, in early 1987, Shirley Williams was the group secretary. After Shirley Williams left, Washington was the only clerical employee in Group IV.

As a clerk-typist working under Graham's supervision, Washington's duties included answering the telephone, typing the investigators' reports, filing papers relating to the programs administered by the Newark DO, and serving as timekeeper for Group IV. She also typed in the employees' annual appraisals. Washington saw the completed appraisals and filed them. With respect to the preparation of appraisals, I credit Graham's testimony and not Washington's. Graham's version was more consistent with the surrounding circumstances and, in this respect, he was a more forthcoming witness.

Prior to August 1989, Graham attempted to fire Washington as a probationary employee, but the union prevented this by pointing out that Washington had already completed her probationary period.

In August 1989 Washington filed a grievance over a three day suspension proposed by Graham. She was represented in the grievance by AFGE Local 3445 Shop Steward Berbaum and other union officials. The grievance was settled at the third step by an agreement between Lewis and Berbaum.

Before taking either of these actions against Washington, Graham consulted with various management personnel officers.

In January 1990 Washington was promoted from Clerk-Typist, GS-4, to Secretary, GS-5. Washington remained the only clerical employee in Group IV. After the promotion Washington's duties remained the same. Washington was given a performance plan, performance standards, and critical elements during the end of 1989, when she was a clerk-typist, and was not given new ones after her promotion to secretary. The Secretary's PD, which was given to Washington by Graham, was coded by Newark DO as a bargaining unit position. At all times prior to August 14, 1990, Washington had an allotment deducted from her pay for union dues.

On July 19, 1990, Graham gave Washington a draft of a memorandum containing a reprimand for one of the investigators in the group and instructed Washington to type it. This is the only time Graham had ever given Washington any work of this nature. Washington typed the memo and gave it back to Graham.

Later on July 19, 1990, Graham called Washington into his office and accused her of talking about the reprimand memo with other employees of the Newark DO during lunch time. Washington told Graham that she had not told the employees about the memo, they already knew about it.

Graham sought the advise of his supervisor and various personnel and labor-relations advisors, including Nitche, concerning what action he should take.

On August 14, 1990, Graham began an investigation into the July 19, 1990, memo incident. Graham, as Acting DIB that day, called Washington at her desk and asked her to come into his office. When she arrived at Graham's office she found Graham and Givens waiting. Graham informed Washington that he was conducting an investigation into Washington's lunch time conversation on July 19, 1990. Graham told Washington that the FDA standards of conduct obligated her to cooperate in his investigation. Washington inquired why Givens was there and Graham responded that Givens was a supervisor and Graham wanted her there. Washington then stated that she wanted a union representative. Graham told Washington that she was not in the bargaining unit. Washington expressed disbelief and stated that she was in the "union", and that she had been in the "union" for five years and paid her dues. Graham repeated that Washington was not in the "union" and could not have a representative. Washington left the DIB's office to seek a union representative.

Washington went directly to speak to Walker. Washington told Walker what had happened and asked Walker to represent Washington. Walker agreed and asked her supervisor, SCSO Remache, for official time to represent Washington. Remache denied the request and stated that Washington was a confidential secretary and Walker could not represent Washington.

Walker went to Washington's work area and called Nelson. Graham began yelling from the DIB's office for Washington to return. When she failed to do so, Graham came to her desk and ordered her to return. Washington stated that she was waiting for her union representative. Graham repeated that she was not entitled to union representation and that she should return to the DIB's office or leave. Washington stated she was waiting for Walker, who was on the phone with Nelson. Graham ordered Washington to leave or, he said, he would call security to escort her out. Graham appeared agitated to Washington and she feared he would strike her. As Walker finished her phone conversation Graham went to Lewis' office. Graham returned in a short time and ordered Washington to leave immediately.

Washington went to the ladies room where she was upset and crying when Walker joined her. Graham was outside the ladies room and was overheard saying that they were having a union meeting in the ladies room. Remache came into the ladies

room and Walker left, advising Washington to go home. Graham escorted Washington out of the office. He then called her at home that evening and told her to come to work the next day.

On August 15, 1990, Washington reported for work at her usual time. Graham called her into the DIB's office. In the DIB's office Washington encountered Graham and Givens. Graham told Washington to prepare a memo as soon as possible setting forth who was in the cafeteria on July 19 and what was said. The record does not establish that Washington repeated her request for union representation. Graham did not provide her with union representation. Washington left and prepared the requested memo and gave it to Graham.

On August 16, 1990, Graham proposed Washington's removal based in part on Graham's examination of Washington on August 14 and 15, 1990, concerning the July 19, 1990, lunch room incident. Graham relied, at least in part on Washington's request for union representation during the examinations and her attempts to get union assistance. Graham also stated that Washington's actions, while unrepresented, amounted to failure to cooperate in an investigation. Based on Graham's proposal, Washington was removed on September 21, 1990.

Secretaries to SCSOs in the IB had traditionally been in the unit, but as the positions became vacant, Newark DO was filling them and excluding the new secretaries from the unit.

On or about November 26, 1990, Walker, with the help of Schultz, a shop steward for the Council and AFGE Local 3445, filed a grievance concerning Walker's performance appraisal. This grievance was processed through the negotiated grievance procedure and is awaiting arbitration.

On January 2, 1991, Walker designated Mitchell Kastner, a private attorney, to represent her at the second step of her grievance. On January 24, 1991, Elaine Messa, the DIB in the Newark DO, advised Walker that the Newark DO would not recognize the designation of Kastner because he was not a representative of the union. On February 5, 1991, Nelson, on behalf of AFGE Council 242, wrote to Lewis designating Kastner as the Council's representative in the Walker grievance. Newark DO has failed and refused to recognize Kastner's designation.

The Council has nothing in its constitution or by-laws that prevent it from designating an attorney as its representative in a grievance. Although it had never done so before February 5, 1991, it is the Council's policy to permit such a designation of an attorney where the grievance is not detrimental to the unit as a whole, the grievant agrees not to hold the Council liable for errors made by the attorney, and the grievant agrees to pay the attorney. This policy applies to union members and non-members alike.

Article 10 paragraphs 1 and 2 of the collective bargaining agreement provide that the Council can designate officials it deems appropriate, bargaining unit employees can

be designated as Council officials if designated by the Council President, and the Council President must notify the FDA Regional Director in writing of those employees designated as Council officials. Article 10 paragraph 9 of the collective bargaining agreement provides, in part, that national representatives of AFGE can assist the Council in administering the agreement and that non-employee AFGE representatives may assist employees in the preparation of grievances and appeals. It was also provides that the Council shall be responsible to give the Regional Director advance notice and details whenever a non-employee AFGE representative is contemplated. Article 10 paragraph 10 provides that in handling representational duties, except as set forth in Article 26 paragraph 6 of the grievance procedure, the Council will first attempt to use officials from within the component in which the concerned employee is assigned.

Article 26 paragraph 6 provides that an employee has the right to be advised and represented by a Council representative during the process of any grievance. It goes on to provide that the employee may be self represented or be represented by a Council representative, subject to the provisions of section 7114(a)(5) of the Statute. Paragraph 6 then states "The Union representative through Step One of the grievance procedure will be selected from the grievant's work component."

## Discussion and Conclusions of Law

The General Counsel (GC) of the FLRA contends that Newark DO violated section 7116(a)(1) of the Statute on May 10, 1990, when Givens threatened Schultz with reprisal if Schultz, acting in her capacity as union steward, contacted Crowley-Harris or went into the office where that employee worked. This allegation is apparently referring to the conversations between Givens and Schultz on May 10, 1990. At 9:00 a.m., Givens told Schultz that management was watching her very closely and, in response to Schultz' inquiry whether this was referring to the recent incident when Lewis observed Schultz talking to Crowley-Harris, that Givens was warning Schultz that they were watching her. Later that day, when giving Schultz the "Written Reminder", Givens told Schultz that if she continued to speak to Crowley-Harris, Givens would take disciplinary action or adverse action against Schultz. Schultz responded that she had already promised not to represent Crowley-Harris. Givens said that Schultz was perceived as guilty.

The GC of the FLRA argues that Givens' comments constituted a threat of reprisal against Schultz if she continued to engage in conduct, as a union steward, similar to the conduct she had engaged in previously with respect to trying to represent and communicate with Crowley-Harris.

The GC of the FLRA contends that Crowley-Harris was in the unit represented by the Council and AFGE Local 3445, and therefore Schultz had engaged in conduct protected by the Statute when, as a shop steward, she tried to represent Crowley-Harris, and that Schultz could continue to engage in that same protected conduct.

Newark DO argues that the allegation that it violated section 7116(a)(1) by Givens' statements on May 10, 1990, is barred by section 7116(d) of the Statute. Section 7116(d) provides that "issues which can be properly raised under a grievance procedure

may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures."

Newark DO argues that on May 3, 1990, AFGE Council 242 filed a grievance under Article 41 of the collective bargaining agreement which raised the issue of whether Crowley-Harris was a "Confidential Employee" or whether management was misapplying the designation and denying her access to union representation and the issue whether union representatives were properly penalized for representing Crowley-Harris by being charged AWOL for time spent representing her.

The incidents referred to in the Article 41 procedure occurred on April 20, 1990, when both Walker and Schultz attempted to represent Crowley-Harris, after receiving permission from their respective supervisors, and then were charged AWOL for the time each spent attempting to represent Crowley-Harris.

Although Article 41 is not called part of the grievance procedure, it is in fact part of the grievance machinery. It is the procedure provided to permit the union or management to raise and attempt to resolve disputes concerning the interpretation or claim of breach of the collective bargaining agreement and concerning claimed violations or misapplication of law or regulation. Further, if a dispute is not resolved in the Article 41 procedure, the initiating party may invoke arbitration under Article 42. Accordingly, I conclude that resort to Article 41 is an election to use the grievance procedure under section 7116(d) of the Statute.

In the situation presented herein, however, I conclude, under section 7116(d), the Council's resort to Article 41 on May 3, 1990, to resolve the dispute concerning the AWOL charged to Schultz and Walker, and Crowley-Harris being excluded from the unit, did not bar the Council from using the unfair labor practice (ULP) procedures to resolve the dispute presented in the subject case.

Thus, the May 3, 1990, Article 41 procedure was invoked to specifically resolve a dispute concerning events that occurred on April 20, 1990, involving the charge of AWOL, and the dispute over whether Crowley-Harris was a confidential employee or was in the unit. The subject case involves an allegation that statements made on May 10, 1990, constituted a ULP. The alleged ULP occurred seven days after the Article 41 procedure was commenced.

I, therefore, reject the contention that on May 3, 1990, an election was made to use the grievance procedure, and not the ULP procedure, concerning an event that had not yet taken place. Section 7116(d) does not state, and non of the cases cited hold, that once a party elects to use the grievance procedure to resolve a dispute, all future disputes and controversies must be resolved by the grievance procedure. Rather, section 7116(d) merely holds that once an issue is raised under the grievance procedure, that same matter or dispute, cannot be raised as an unfair labor practice.

It could be argued that because Crowley-Harris' status was specifically raised in the Article 41 procedure, section 7116(d) forecloses it from being raised in an unfair

labor practice. I reject this contention. The gravamen of the ULP is not that it was a ULP to deny Crowley-Harris union representation, rather, it is that threatening to punish a union agent for attempting to represent Crowley-Harris was a ULP. It is true that Crowley- Harris' unit status may be important in both cases, but in the latter case the ULP is the treatment of a union representative that occurred after the Article 41 procedure was invoked and after the incidents that were the subject of the Article 41 procedure had occurred.

Similarly the settlement of the Article 41 action resolved only that dispute, primarily the AWOL issues, and nothing else. Any argument that this settlement barred the subject ULP is rejected.

The GC of the FLRA argues that Crowley-Harris was a member of the collective bargaining unit and, thus, Schultz was privileged to represent Crowley-Harris and Schultz should not have been threatened with punishment if she attempted to represent Crowley-Harris in the future.

As part of the certification and recognition process involving the unit in the subject case, the Newark DO and the Council, agreed that the Secretary to the Administrative Officer was excluded from the collective bargaining unit, as a confidential employee. *Department of Health, Education and Welfare, Food and Drug Administration, Newark District, Newark, New Jersey,* 4 A/SLMR 170, n. 6 (1974). Since that certification, there has been no amendment or clarification that included the Secretary to the Administrative Officer in the unit.

"Confidential employee" is defined in section 7103(a)(13) of the Statute as "an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;..."

The record herein establishes that there have been a number of reorganizations in FDA which resulted in various offices being moved to different regions. The record does not establish, however, that there have been any reorganizations within the district offices, or more particularly within the Newark DO, or that resulted in the change of duties and responsibilities of the Administrative Officer or the Secretary to the Administrative Officer. The record also establishes that, although there was no permanent Administrative Officer in the Newark DO during the latter part of 1989 and the first half, or so, of 1990, there were Administrative Officers detailed in for limited periods, and when there was no such detail of an Administrative Officer, Williams served as Acting Administrative Officer, the Branch Chief for the Administrative Branch. When so acting Williams performed the duties of Administrative Officer.

GC of the FLRA argues that because Williams' appointments to be Acting Administrative Officer were not in writing and because the Council was not notified of any delegations of power to Williams, she was not the Acting Administrative Officer.

Williams testimony that when there was no Acting Administrative Officer detailed into the Newark DO, she was the Acting Administrative Officer and Branch Chief, is uncontradicted.

Accordingly, not only was Crowley-Harris' title Secretary to the Administrative Officer at all times relevant, she actually functioned as secretary to an Acting Administrative Officer. The record does not establish that her duties and responsibilities were any different than those of a Secretary to the Administrative Officer at the time of the certification and recognition.

The GC of the FLRA failed to establish that Crowley-Harris' duties and responsibilities were such as to make her position nonconfidential or to include it in the collective bargaining unit. In this regard, Newark DO did not establish that Crowley-Harris' duties and responsibilities were such as to make her a confidential employee and, thereby, exclude her from the unit.

Historically, and pursuant to the parties' agreement, the position of Secretary to the Administrative Officer, Crowley-Harris' position, had been excluded from the certified unit. In the absence of evidence of a substantial change in duties and of evidence that it should be in the unit, I conclude that Crowley-Harris' position is excluded from the collective bargaining unit. *See Department of Health, Education and Welfare, Food and Drug Administration, Newark District, Newark, New Jersey,* 4 A/SLMR 170, n. 6 (1974).

Because Crowley-Harris was not an employee in the unit represented by the Council, she was not entitled to union representation. Accordingly, Schultz' activities in attempting to represent Crowley-Harris were not protected by the Statute.

Givens' statements to Schultz on May 10, 1990, were made because Schultz had attempted, on a number of occasions, to act as Crowley-Harris' union representative and Givens warned Schultz of reprisal if she engaged in this conduct again. Section 7116(a)(1) of the Statute prohibits an agency from interfering with, restraining, or coercing any employee in the exercise of rights protected by the Statute.

I conclude that Givens' statements did not violate section 7116(a)(1) of the Statute because they were directed at Schultz because she had engaged in activities not protected by the Statute, and because they threatened Schultz with reprisal if she again engaged in such unprotected activities. These statements by Givens did not interfere with, restrain, or coerce Schultz in the exercise of any right protected by the Statute.

The GC of the FLRA contends that Newark DO violated section 7116(a)(1) and (2) of the Statute on May 10, 1990, when Givens issued the "Written Reminder" to Schultz.

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

Givens directed this "Written Reminder" to Schultz, as a shop steward, because Schultz had spent time attempting to be Crowley-Harris' union representative and also, allegedly, because Schultz was observed talking to Crowley-Harris about the status of Schultz raise, which management mistakenly thought was a conversation that was part of Schultz representation of Crowley-Harris. The GC of the FLRA contends that the issuance of the "Written Reminder" violated section 7116(a)(2) of the Statute because it was given to Schultz in her capacity as shop steward and because she had engaged in representational activities on behalf of Crowley-Harris and ordered Schultz to cease these representational activities on behalf of Crowley-Harris or face some sort of discipline, or "appropriate administrative action" as the "Written Reminder" expressed it.

As discussed above, section 7116(d) does not bar the processing of the subject ULP, involving incidents on May 10, 1990, because of the earlier pursuit of the Article 41 procedure.

To the extent the "Written Reminder" placed limitations on future conduct on Schultz as a punishment for her having engaged in union representational activities on behalf of Crowley-Harris, I conclude the issuance of the "Written Reminder" did not violate section 7116(a)(2) of the Statute.

As discussed above, Schultz' representational activities on behalf of Crowley-Harris were not activities protected by the Statute because Crowley-Harris was not an employee in the unit represented by the Council. Accordingly, punishing Schultz for engaging in conduct not protected by the Statute does not, by itself, violate section 7116(a)(1) and (2) of the Statute because it does not discourage or encourage membership in the union nor does it interfere with employees exercising rights protected by the Statute.

To the extent the "Written Reminder" placed limitations on Schultz' ability to communicate with Crowley-Harris concerning providing her with union representation, it did not violate section 7116(a)(1) and (2) of the Statute, because, as discussed above, limitations placed on activities not protected by the Statute do not discourage or encourage membership in the union or interfere with employees exercising rights protected by the Statute.

GC of the FLRA argues, in the alternative, that even if, as found above, Crowley-Harris had not been in the unit, because Newark DO had let Council officials represent her a few times in the past, Newark DO could not punish Schultz for representing Crowley-Harris in the past and could not limit Schultz' activities in the future, as provided in the "Written Reminder". I reject this contention.

The record in this case establishes that among the representatives of the Council and Newark DO there was confusion whether Crowley-Harris was in the collective bargaining unit. In such circumstances it is incumbent upon each of the parties to examine the facts and make its own determination, and each operates at its own peril. Absent some showing of fraud or that Newark DO intentionally mislead the Council

officials, I conclude the Council officials acted at their own peril when they determined Crowley-Harris was in the unit and sought to provide her with union representation. The facts herein do not justify somehow converting unprotected activity by Schultz into protected activity.

Even though the Newark DO was privileged to discipline or punish Schultz for engaging in unprotected activity, nevertheless it could not do so in a way that would unduly interfere with her exercise of rights protected by the Statute. These statutorily protected rights are outside the power of an agency to limit or eliminate. Any attempt by the Newark DO to limit or eliminate these rights would interfere with Schultz' protected rights in violation of section 7116(a)(1) of the Statute.

The "Written Reminder" does not, in the circumstances of this case, interfere with Schultz' right to engage in activity protected by the Statute, more particularly acting as the union representative for employees in the unit. Thus the first two and one-half paragraphs of the "Written Reminder" deal with limitations on Schultz' ability to represent or even communicate with Crowley-Harris. Since she is not an employee in the unit, these limitations and restrictions do not interfere with Schultz' right to engage in protected activity.

The last half of the last paragraph of the "Written Reminder" states, "In particular, you are to refrain from entering the Administrative Branch without my prior approval and only for official business. In the event you fail to follow this order, appropriate administrative action may be taken." Had the instructions forbidden Schultz from entering the AB to represent employees in the AB or the nearby PSAU, they would have unduly interfered with Schultz' ability to engage in protected activity as a union representative for these unit employees. The instructions, however, did not forbid Schultz from engaging in this conduct; rather, it required that she seek Givens' approval to enter the AB and that the purpose of the visit be official business.

The record in this case establishes that whenever Council officials want official time to represent unit employees, the Council officials notify their supervisors and get permission to use official time to perform these representational duties. The record does establish that the requirements of the "Written Reminder", although less than crystal clear on their face, imposed any greater burden on Schultz, if she wished to represent AB or PSAU employees, than already existed and were common practice in the Newark DO. Accordingly, I conclude that the "Written Reminder" did not unduly interfere with Schultz' ability to engage in activities protected by the Statute, and thus did not violate section 7116(a)(1) of the Statute.[5]

The GC of the FLRA contends that Newark DO violated section 7116(a)(1), (5) and (8) of the Statute by failing to respond to the Council's May 25, 1990, request for information and by failing to furnish that information to the union.

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[5]My conclusion might be different if these restrictions and requirements were imposed only on Schultz and had not been the practice and required of all Council officials in the Newark DO.

Nelson, in considering whether to file a ULP against the Newark DO concerning the denial of union representation to Crowley-Harris, decided he needed additional information to decide whether to file such a ULP. By letter dated May 25, 1990, Nelson advised the Mid-Atlantic Regional Director of the FDA that the Council was considering filing a ULP concerning the denial of union representation to Crowley-Harris and that the Council requested memoranda issued to Crowley-Harris and union officials which deny her union representation, including correspondence to Schultz and Crowley-Harris; memoranda indicating that administrative action would be taken against Crowley-Harris or any other employee if representation is sought or given; memoranda of "Conversation", personal notes of supervisors and managers, or any other material used by management to arrive at the conclusion that Crowley-Harris should be denied union representation; copies of the position descriptions of all GS-318 series employees in the Newark DO including the optional form 8; and a list of the actual duties and assignments of Crowley-Harris in the prior twelve months.

Although this request for information was acknowledged by FDA's Mid-Atlantic Regional Director, who informed Nelson that Lewis would respond to the request, Newark DO never did respond to this request for information.

Section 7114(b)(4) of the Statute provides that an agency, as part of its obligation to bargain in good faith, must furnish the union, 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 a full discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

The FLRA has held that, pursuant to section 7114(b)(4), a union is entitled to data which is necessary for it to carry out its representational functions and responsibilities. Internal Revenue Service, Washington, D.C., 32 FLRA 920 (1988). This includes data requested by a union to enable it to decide whether to file a ULP charge. *See Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Silver Spring, Maryland,* 30 FLRA 127 (1987) (*NWS*).

The information sought by Nelson in his May 25, 1990, letter was sought in order to determine whether to file a ULP charge. In this regard there are two aspects of such a charge, first whether Crowley-Harris was in the unit and entitled to union representation; and second, whether any limitations were placed on representational activities and if such limitations constituted a ULP.

The request for the memoranda of conversations, personal notes of supervisors and managers and other material used by management to arrive at the conclusion that Crowley-Harris should be denied union representation; copies of PDs of all GS-318 in the Newark DO, including the form 8s; and the list of the actual duties and assignments performed by Crowley-Harris during the prior twelve months, was clearly aimed at

securing information that the Council needed to determine whether Crowley-Harris was in the unit and entitled to union representation. The Council needed this requested information before it could decide whether to proceed further with its contemplated course of action, to file the ULP. It needed the requested information so it could adequately perform its representational duties. In this regard, I note that there had been confusion among both union and management officials in the Newark DO as to whether Crowley-Harris was in the unit. Thus, the Council's request and contemplated ULP charge were not frivolous, but rather they were quite reasonable.

In these circumstances I conclude that this data requested by the Council was necessary for it to carry out its representational functions and responsibilities. *NWS.*

Newark DO argues that the memoranda issued Crowley-Harris denying her union representation was not releasable because she was not in the unit and therefore was not entitled to union representation and therefore the memoranda do not relate to conditions of employment. However, the Council needed these memoranda to decide the two issues necessary in its determination of whether to file a ULP charge, whether Crowley-Harris was in fact denied union representation and whether she was in the unit represented by the Council. Thus, although I have concluded in this case that Crowley-Harris was not in the unit, at the time the information was requested, and even now, the Council needed this information to determine the unit status of Crowley-Harris and the nature of the denial of union representation. With this information available the Council could have decided if a ULP charge was to be filed and could, perhaps, have obtained sufficient evidence to establish that Crowley-Harris was in the unit.

Newark DO also contended that the memoranda to Crowley-Harris were not releasable because of the Privacy Act. Newark DO never set forth how or why the Privacy Act prevented the production of these memoranda, or what Crowley-Harris' privacy interest was in them. It never explained how the production of these memoranda would have harmed, embarrassed, or prejudiced Crowley-Harris. In balancing the Council's need for this information in order for it to perform fundamental representational duties, as against the ill defined and unexplained privacy interests of Crowley-Harris, noting also that Crowley-Harris sought union representation, I conclude that the Council's interests prevail and that the Council was entitled to the memoranda.

In the absence of any contention to the contrary by Newark DO I conclude these memoranda were normally maintained by the agency in the regular course of business, were reasonably available and did not constitute guidance, advice, counsel, or training for management officials or supervisors, relating to collective bargaining. In this regard I note Newark DO never responded to the request for information by the Council.

In light of all the foregoing, I conclude Newark DO violated its obligation under 7114(b)(4) when it failed to supply the requested memoranda issued Crowley-Harris.

Newark DO argues it did not have to provide the Council with memoranda issued to union officials, including Schultz, which denied Crowley-Harris union representation. Clearly section 7114(b)(4) only requires that an agency provide data it has not already

provided. By the very terms of the request, the Council, was asking for copies of memoranda which Newark DO had already issued to union officials, documents with which the union and its officials already had been provided. Thus, I conclude Newark DO had no obligation to again provide the Council with these documents, and Newark DO's failure to comply with this portion of the Council's request did not violate any Statutory obligation.

With respect to the request that Newark DO provide the Council with memoranda which indicate that administrative action will be taken against Crowley-Harris, or any employee, if representation is sought or given, for the reasons set forth above I conclude that the Council was entitled to this information, except in so far as it included memoranda to union officials, pursuant to section 7114(b)(4) of the Statute and that the Privacy Act, on balance, did not prevent it being provided to the Council. Newark DO argues that except for the memoranda issued to Schultz, Nelson, and Crowley-Harris, no such memoranda were issued to anyone. Newark DO was obliged under section 7114(b)(4) to advise the union if the requested data is unavailable, or, as in this case, did not exist. *See U.S. Naval Supply Center, San Diego, California,* 26 FLRA 324 (1987). Also, the request was not for memoranda issued to Crowley-Harris or any employee, but rather memoranda which indicated administrative action would be taken against Crowley-Harris or any employee if union representation was sought; in effect it was a request for memoranda about Crowley-Harris or any employee.

With respect to the request for memoranda of "conversation," personal notes of supervisors and/or managers, or any other material used by management to arrive at the conclusion that Crowley-Harris should be denied union representation, again, based on the foregoing analysis, I conclude the Council was entitled to this information and Newark DO violated its obligation under section 7114(b)(4) by not providing this requested data, or by failing to advise the Council that the data did not exist. *See U.S. Naval Supply Center, San Diego, California.*

AFGE Council 242 was entitled under section 7114(b)(4) of the Statute to be provided with the "Position Descriptions of ALL GS-318 series employees" in the Newark DO, including the optional form 8s. The Council needed these PDs so it could compare them and Crowley-Harris' to determine if she was in the unit and if the denial of union representation warranted the filing of a ULP charge. Newark DO argues that these PDs were available at all FDA offices and the Council had access to them. Presumably Newark DO is arguing, but it did not state it, that the Newark DO thereby complied with its section 7114(b)(4) obligation to "furnish" this data. I reject this argument because merely making the data available for examination is not furnishing copies of the data to the Council, as the Statute requires, and Newark DO did not even have the courtesy to respond to the request and advise the Council that Newark DO would comply with the request for the PDs by making access to them available in the FDA offices.

Newark DO argues that, because Tobias read from copies of PDs, the Council already has the PDs and Newark DO was not obliged to provide them. The record herein does not establish that the Council had all of the requested PDs or even that the

one or more it might have had were current and up to date. In determining whether Crowley-Harris was in the unit the Council needed the current PDs.

The Council was also entitled, under section 7114(b)(4) of the Statute, to be provided with a listing of Crowley-Harris' actual "duties/assignments" for the prior twelve months, again so the Council could determine whether she was in the unit and whether to file a ULP charge. Again, for the reasons set forth above, I reject Newark DO's argument that this information was not releasable because of the confidential nature of the duties performed. This argument is rejected because all that was asked for was a listing of duties and assignments, not the substance of the work done, and other than a bare allegation that the work done was confidential, the Newark DO introduced no evidence to establish the confidential nature of the actual work performed by Crowley-Harris.

Additionally, Newark DO states that no such list was maintained in the regular course of business. The FLRA has held that section 7114(b)(4) obliges an agency to respond to a request for information, even if the response is that the information sought does not exist. *U.S. Naval Supply Center, San Diego, California.* The record establishes that Newark DO did not respond to the request for this information and the record does not establish that Newark DO ever advised the Council that this information does not exist. Thus, by failing to provide the list of assignments and duties or by failing to advise the Council that such a list did not exist, Newark DO failed to comply with its section 7114(b)(4) obligations.

Having concluded above that Newark DO failed to comply with its 7114(b)(4) obligations with respect to the Council's May 25, 1990, request for information, except in so far as the request dealt with memoranda issued to union officials, I conclude that Newark DO violated section 7116(a)(1), (5), and (8) of the Statute. *See Internal Revenue Service, Washington, D.C.,* and *NWS.*

The GC of the FLRA contends that Newark DO violated section 7116(a)(1) and (5) of the Statute by maintaining, since August 14,1990, that Linda Washington was not a member of the bargaining unit because she was a confidential employee and by refusing to recognize and deal with the union as her exclusive representative.

Newark DO contends that Washington was a confidential employee and was therefore excluded from the unit represented by the Council. Because she was not in the unit and was, therefore, not entitled to union representation, Newark DO argues it did not violate the Statute by refusing to recognize and deal with the Council as her collective bargaining representative.

The unit in this case, in accordance with section 7112(b) of the Statute, excludes confidential employees. Section 7103(a)(13) states, "'confidential employee' means an

employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;..."

Section 7103(a) states, in part:

> "(10) 'supervisor' means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action....;
>
> "(11) 'management official' means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;..."

Newark DO argues that, as defined in section 7103(b)(13) of the Statute, Graham, a first level supervisor and Washington's immediate superior, was "an individual who formulates or effectuates management policies in the field of labor-management relations", and that Washington acted in a "confidential capacity with respect to" Graham.

The FLRA has held that an employee is confidential within the meaning of section 7103(b)(13) of the Statute if: (1) there is evidence of a confidential working relationship between and employee and the employee's supervisor; and (2) the supervisor is significantly involved in labor relations. Both requirements need be present for an employee to be confidential. *See U.S. Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona,* 37 FLRA 239 (1990) (*DOI-Yuma*); and *U.S.Army Plant Representative Office, Mesa, Arizona,* 35 FLRA 181 (1990) (*Army-Mesa*).

Newark DO argues that Graham, a first level supervisor, formulated or effectuated management policies in the field of labor-management relations because he performed written counsellings of employees he supervises, as in the incident that lead to the Washington dispute; entertained first level grievances; proposed removals and other disciplinary actions; recommended promotions; prepared performance appraisals; was involved with an EEO matter where he was the alleged discriminating official; dealt with union representatives concerning grievances he was handling at the first step, and, apparently, when he was acting DIB and handling a grievance at the second step; and he was consulted by higher level management when it was decided, during the third step of a grievance, to reduce a punishment he had imposed.

The record establishes that Graham was a first level supervisor, with no more or less involvement or responsibility in labor-management relations, than is normal or usual

in first level supervisors. In this regard it must be noted that to be a supervisor, as defined in section 7103(a)(10) of the Statute, an individual must substantially perform the duties relied upon by Newark DO, as set forth above, to establish that Graham formulates or effectuates management policies in the field of labor-management relations. Thus, if Newark DO is correct in its argument, all first level supervisors would qualify under section 7103(a)(13) to have their secretaries excluded from collective bargaining units, if their secretaries act in a confidential capacity.

The decisions of the FLRA are less than crystal clear as to which individuals formulate or effectuate management policies in the field of labor-management. In the lead case, *DOI-Yuma*, the FLRA held that two individuals were significantly involved in labor-management relations, but in setting forth the items relied upon in making this determination with respect to one of the individuals, in addition to being involved at setting management's positions in labor-management matters, the FLRA also mentioned some very basic supervisory matters, such as having authority to take disciplinary actions, to effect transfers and promotions, and to give evaluations and awards. With respect to the other individual found to be significantly involved in labor management relations, he was involved in the formulating of policy, reviewing personnel policies, formulating contract language, and was involved in grievances at the second level.

Similarly, in *Army-Mesa*, the FLRA, in deciding someone was not significantly involved in labor-management relations, mentioned that the individual did not effectuate written counsellings, entertained no grievances, proposed no removals, recommended no promotions, wrote no performance appraisals, and pursued no EEO matters. All matters that are, at least in part, looked at to decide if an individual is a supervisor. This case, however, pre-dates *DOI-Yuma*.

I reject Newark DO's contention that any supervisor is in fact significantly engaged in labor-management relations sufficient to bring section 7103(a)(13) into play. In this regard, in *DOI-Yuma,* the individuals had substantially greater involvement in labor-management relations than merely their supervisory functions.

In *U.S. Department of Labor, Office of Administrative Law Judges, Pittsburgh, Pennsylvania,* 40 FLRA 1021 (1991) (*DOL-OALJ*), the FLRA denied review of a Regional Director's determination that the District Chief Judge was not involved in formulating or effectuating management policies. In seeking review of the Regional Director's determination the agency argued that because the District Chief Judge could hire, fire, discipline, approve leave, and handle and resolve grievances, this constituted authority to formulate and effectuate management policies. In denying the request for review, the FLRA did not take issue with the agency's allegations of fact; rather, the FLRA stated that the Regional Director's finding that the District Chief Judge, although involved in personnel matters, was not significantly involved in formulating or effectuating labor-management policies, correctly applied the *DOI-Yuma* standards.

In light of all of the foregoing, in applying the FLRA's standards as set forth in *DOI-Yuma* and *DOL-OALJ*, I conclude Graham, although involved in personnel matters,

was not significantly involved in labor relations. Accordingly, I conclude that because Graham was not an individual who formulates or effectuates management policies in the field of labor-management relations, Washington was not a confidential employee within the meaning of section 7103(a)(13) of the Statute[6] and therefore was, at all material times an employee in the unit represented by AFGE Council 242.

With respect to the conclusion that Washington was not a confidential employee, I note that secretaries to group supervisors (SCSOs) in the IB had not originally been excluded from the collective bargaining unit, and actually FDA decided to exclude such secretaries, one at a time, when vacancies were filed. In this regard it should be noted that the record fails to establish that the duties of secretaries to the SCSOs changed from the time of the unit certification and clarification, when the secretaries were included in the unit, to the date Newark DO decided to exclude Washington.

Because Washington was, at all relevant times, a member of the collective bargaining unit, Newark DO violated section 7116(a)(1) and (5) of the Statute when, on August 14, 1990 and thereafter, it excluded her from the unit and refused to recognize and deal with the Council as her exclusive representative. *See U.S. Department of the Interior, Lower Dams Project, Water and Power Resources Service, 14 FLRA 539 (1984).* Similarly, because Washington was in the unit and entitled to union representation, Newark DO violated section 7116(a)(1) of the Statute because its action in excluding her from the unit and refusing to deal with the union as her representative necessarily had the effect of discouraging employees from exercising rights under the Statute.

Section 7114(a)(2)(B) of the Statute provides that an exclusive representative of a unit shall be given the opportunity to be represented at any examination of an employee by a representative of an agency if the employee reasonably believes the examination may result in disciplinary action against the employee and if the employee requests representation.

On August 14, 1990, Washington was called into the DIB's office by Graham, the acting DIB, and was told, in the presence of SCSO Givens, that this was part of an investigation into Washington's lunchtime conduct on July 19, 1990, and that she was required to cooperate. Washington requested a union representative, but was told she was not in the unit and was not entitled to a union representative. After Washington repeated her request for union representation, which was again rejected, she left the DIB's office to seek union representation. She was subsequently charged with leaving

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[6]If the FLRA were to conclude that Graham was an individual who formulates or effectuates management policies in the field of labor-management relations within the meaning of section 7103(a)(13), I would conclude that Washington's duties were such as to constitute a confidential working relationship between Washington and Graham. Accordingly Washington would have been properly excluded from the unit and Newark DO would not have committed any violations of the Statute with respect to denying Washington union representation.

the office without permission. She asked Walker to represent her and Walker agreed, but Walker's supervisor refused to authorize Walker to use official time for this purpose because, the supervisor stated, Washington was a confidential employee.

Washington refused to return to the DIB's office until she had a union representative. Washington was eventually ordered to leave the premises.

On August 15, 1990, when she reported to work, Washington was again summoned to the DIB's office where she was again questioned about the July 19th incident. Graham told Washington to prepare a memorandum supplying the requested information and to give it to him. He did not say she had any right to a union representative. Washington left the DIB's office, prepared the requested memorandum and gave it to Graham.

This record establishes that the August 14, 1990, questioning of Washington by Graham constituted an examination in connection with an investigation and Washington reasonably believed the it could result in disciplinary action against here. Washington requested union representation. In these circumstances, the Council was entitled, pursuant to section 7114(a)(2)(B) of the Statute, to be present at the August 14th examination of Washington. Newark DO denied the Council this statutory right.

With respect to the August 15, 1990, meeting, however, Washington was not compelled to answer any questions at the meeting and was told to prepare a memorandum in response. The record does not establish that the circumstances were such that she could not have consulted a union representative for assistance in preparing the memorandum. Since Washington was not required to answer Graham's questions while in the DIB's office, I conclude this was not an examination within the meaning of section 7114(a)(2)(B) and the union had no right to be represented.

Newark DO violated section 7116(a)(1) and (8) of the Statute when it denied the Council its right, under section 7114(a)(2)(B), to be present at the August 14, 1990, examination of Washington. *U.S. Department of Justice, U.S. Immigration and Naturalization Service, U.S. Border Patrol, Washington, D.C.*, 41 FLRA 154 (1991).

The GC of the FLRA alleges that Newark DO violated section 7116(a)(1) and (5) by refusing to recognize attorney Mitchell Kastner as the union's representative for the purpose of processing a grievance filed under the negotiated grievance procedure.

On January 2, 1991, Walker designated Kastner as her representative at the second step of the grievance procedure. On January 24, 1991, DIB Messa advised Walker that Newark DO would not recognize the designation of Kastner because he was not a representative of the union. On February 6, 1991, Nelson wrote Lewis designating Kastner as the Council's representative in the Walker grievance. Newark DO has refused to recognize Kastner as the union's representative in the Walker grievance, which is currently awaiting arbitration.

The FLRA has held that an exclusive representative has the right to designate its representatives when fulfilling its responsibilities under the Statute and an agency violates section 7116(a)(1) and (5) of the Statute when it refuses to honor the union's designation of a representative. *See, e.g., Department of Health and Human Services, Food and Drug Administration, Region II, New York Regional Laboratory*, 16 FLRA 182 (1984) (*FDA Region II*).

There is nothing in the Statute or the FLRA decisions that forbid a union from designating an attorney as its representative at any stage of a grievance.

The Newark DO argues that the Council waived in the collective bargaining agreement its right to designate as its representative an attorney, or for that matter anyone not an AFGE employee, Council official, or employee of the agency.

Newark DO contends that Articles 10 and 26 of the collective bargaining agreement constitute the Council's waiver of its right to name an attorney to represent it in the grievance procedure.

Any waiver by a union of its statutory right to designate its representative must be clear and unmistakable. *See, e.g., Department of Defense, Department of the Army Headquarters, XVIII Airborne Corps and Fort Bragg*, 15 FLRA 790 (1984).

I conclude that Articles 10 and 26 of the collective bargaining agreement are not clear and unmistakable waivers of the Council's right to name its representative at the second step of Walker's grievance. The fact that the Council omitted from mention in the collective bargaining agreement its right to name attorneys as its representatives in collective bargaining and grievance matters does not constitute a waiver of this right. *See Office of Program Operations, Social Security Administration, San Francisco Region*, 10 FLRA 172 (1982).

Articles 10 sets forth how the Council can designate officials and how "National representatives" of AFGE may assist Council officers in performing its responsibilities and that "Non-employee AFGE representatives may...assist employees in the preparation of grievances." Article 26 paragraph 6 provides that an employee has a right to be represented by a Council "representative" during the processing of any grievance, except that at the first of the grievance procedure the Council "representative....will be selected from the employee's work component...."

These portions of the collective bargaining agreement do not constitute a clear and unmistakable waiver of the Council's right to name an attorney as its representative at the second step of the grievance procedure. The collective bargaining agreement does provide how the Council designates officials and that AFGE representatives can assist in performing the Council's representational functions. It does not set forth any clear and unmistakable limitation on the Council's use of an attorney or other non-employee as its representative in the grievance procedure, except the clear statement that at the first step of the grievance procedure the Council's representative "will" be selected from the employee's work component. This latter limitation on the Council's

choice of representative at the first step of the grievance procedure is the only clear and unmistakable waiver by the Council of its right to name any one it wishes as its representative in the grievance process. Thus, except for the first step of the grievance procedure, the collective bargaining agreement does not constitute a clear and unmistakable waiver of the Council's right to name a representative of its own choosing, including an attorney, at any subsequent stage of the grievance procedure. *See FDA II.*

In light of the foregoing, I conclude Newark DO violated section 7116(a)(1) and (5) of the Statute by failing to recognize and deal with Kastner as the Council's representative for the purpose of processing Walker's grievance at the second step, and above, of the grievance procedure.[7]

Having concluded that Newark DO violated section 7116(a)(1), (5) and (8) of the Statute by failing to respond to the Council's May 25, 1990 request for information and by failing to furnish certain parts of the information; violated section 7116(a)(1) and (5) and 7116(a)(1) by excluding Linda Washington from the unit and by refusing to deal with the Council as her exclusive representative; violated section 7116(a)(1) and (8) by denying Linda Washington's request for union representation at an examination covered by section 7114(a)(2)(B) of the Statute; and violated section 7114(a)(1) and (5) by refusing to recognize attorney Mitchell Kastner as the Council's representative for the purpose of processing a grievance at the second step of the grievance procedure, I recommend the Authority issue the following Order:

## ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby **ORDERED** that Food and Drug Administration, Newark District Office, West Orange, New Jersey, **SHALL**:

1. Cease and desist from:

(a) Failing and refusing to furnish American Federation of Government Employees, AFL-CIO, Council 242, the exclusive representative of its employees, all data and copies of documents requested by American Federation of Government Employees, AFL-CIO, Council 242 on May 25, 1990, to which the union is entitled under section 7114(b)(4) of the Statute, or to state if the requested items do not exist.

(b) Excluding or attempting to exclude Linda Washington, or any secretary to a group supervisor in the Investigations Branch, from the collective bargaining unit represented by American Federation of Government Employees, AFL-CIO, Council 242.

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[7]Having found this conduct violated section 7116(a)(1) and (5) I need not decide whether it also, independently, violated section 7116(a)(1) because it adds no additional remedy.

(c) Failing and refusing to deal with and recognize American Federation of Government Employees, AFL-CIO, Council 242, as the collective bargaining representative of Linda Washington, or any secretary to a group supervisor in the Investigations Branch.

(d) Failing and refusing to permit American Federation of Government Employees, AFL-CIO, Council 242, to be represented at any examination of Linda Washington, or any other employee, by a representative of the agency in connection with an investigation, if the examinee reasonably believes that the examination may result in disciplinary action against the examinee, and if representation is requested by the examinee.

(e) Failing and refusing to permit American Federation of Government Employees, AFL-CIO, Council 242, to designate William Kastner, or any other representative of its choosing, to be its representative in processing Christopher Walker's grievance, or any other grievance, beyond the first step of the grievance procedure.

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

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request, furnish to American Federation of Government Employees, AFL-CIO, Council 242, the exclusive representative of its employees, all data and copies of documents requested by American Federation of Government Employees, AFL-CIO, Council 242, on May 25, 1990, or at any other time, to which the union is entitled under section 7114(b)(4) of the Statute.

(b) Include secretaries to the group supervisors in the Investigations Branch in the collective bargaining unit and permit them to be represented by American Federation of Government Employees, AFL-CIO, Council 242.

(c) Upon request of American Federation of Government Employees, AFL-CIO, Council 242, and Linda Washington, repeat the examination of Linda Washington that had occurred on August 14, 1990, affording Linda Washington her right to union representation, and then reconsider the disciplinary action taken against Linda Washington; and thereafter, afford Linda Washington whatever grievance or appeal rights are appropriate, or offer Linda Washington reinstatement to her prior position, or an equivalent one, expunge all reference to the discipline, and make her whole for any loss of pay or benefits, with appropriate interest, she suffered as a result of her removal, from the date of that removal until the date of the offer of reinstatement.

(d) Upon request of American Federation of Government Employees, AFL-CIO, Council 242, and Christopher Walker, repeat the contractual grievance of November 26, 1990, from the second step of that procedure, affording the union the right to be represented by William Kastner or any other representative it designates.

(e) Post at its facilities, 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 District Director of the Food And Drug Administration, Newark District Office, West Orange, New Jersey, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including 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.

(f) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Boston Regional Office, Federal Labor Relations Authority, 10 Causeway Street, Room 1017, Boston, MA 02222-1046, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

All other allegations contained in the Complaint that Food and Drug Administration, Newark District Office, West Orange, New Jersey, violated the Statute are hereby **DISMISSED**.

Issued, Washington, DC, July 24, 1992

SAMUEL A. CHAITOVITZ
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

**WE WILL NOT** fail and refuse to furnish American Federation of Government Employees, AFL-CIO, Council 242, the exclusive representative of our employees, all data and copies of documents requested by American Federation of Government Employees, AFL-CIO, Council 242 on May 25, 1990, to which the union is entitled under section 7114(b)(4) of the Statute, or to state if the requested items do not exist.

**WE WILL NOT** exclude or attempt to exclude Linda Washington, or any secretary to a group supervisor in the Investigations Branch, from the collective bargaining unit represented by American Federation of Government Employees, AFL-CIO, Council 242.

**WE WILL NOT** fail and refuse to deal with and recognize American Federation of Government Employees, AFL-CIO, Council 242, as the collective bargaining representative of Linda Washington, or any secretary to a group supervisor in the Investigations Branch.

**WE WILL NOT** fail and refuse to permit American Federation of Government Employees, AFL-CIO, Council 242, to be represented at any examination of Linda Washington, or any other employee in the unit, by a representative of the agency in connection with an investigation, if the examinee reasonably believes that the examination may result in disciplinary action against the examinee, and if representation is requested by the examinee.

**WE WILL NOT** fail and refuse to permit American Federation of Government Employees, AFL-CIO, Council 242 to designate William Kastner, or any other representative of its choosing, to be its representative in processing Christophere Walker's grievance, or any other grievance beyond the first step of the grievance procedure.

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

**WE WILL**, upon request, furnish to American Federation of Government Employees, AFL-CIO, Council 242, the exclusive representative of our employees, all data and copies of documents requested by American Federation of Government Employees, AFL-CIO, Council 242, on May 25, 1990, or at any other time, to which the union is entitled under section 7114(b)(4) of the Statute.

**WE WILL** include secretaries to the group supervisors in the Investigations Branch in the collective bargaining unit and permit them to be represented by American Federation of Government Employees, AFL-CIO, Council 242.

**WE WILL**, upon request of American Federation of Government Employees, AFL-CIO, Council 242, and Linda Washington, repeat the examination of Linda Washington that had occurred on August 14, 1990, affording Linda Washington her right to union representation, and then reconsider the disciplinary action taken against Linda Washington; and thereafter, afford Linda Washington whatever grievance and appeals rights are appropriate, or offer Linda Washington reinstatement to her prior position, or an equivalent one, expunge all references to the discipline, and make her whole for any loss of pay or benefits, with appropriate interest, from the date of her removal until the date of the offer of reinstatement.

**WE WILL**, upon request, of American Federation of Government Employees, AFL-CIO, Council 242, and Christophere Walker, repeat her contractual grievance of November 26, 1990, from the second step of that procedure, affording the union the right to be represented by William Kastner, or any other representative it designates.

_____
(Activity)

Dated:_____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.