



FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 13-10

DEPARTMENT OF THE AIR FORCE
OGDEN AIR LOGISTICS CENTER
HILL AIR FORCE BASE, UTAH

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1592

CHARGING PARTY

Case No. DE-CA-08-0046

Hazel E. Hanley
For the General Counsel

Phillip G. Tidmore
R. Mina Gawaran
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For the Respondent

Richard L. Thomas
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For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

This case arose under the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), Part 2423. The Regional Director of the Denver Region issued a Complaint and Notice of Hearing on October 5, 2009, based upon an unfair labor practice (ULP), charge filed against the Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah on November 20, 2007, by the American Federation of Government Employees, Local 1592, amended on December 27, 2007. The complaint alleges that the Air Force Office of Special Investigations (AFOSI), denied Joseph

Ptacek, Jr.'s request to have his Union representative present at an examination. (G.C. 1(c) at 2-3). The General Counsel asserts that by denying Ptacek's request, the Respondent failed to comply with § 7114(a)(2)(B) of the Statute and thus committed a ULP in violation of § 7116(a)(1) and (8) of the Statute. (G.C. 1(c) at 2-3). The Respondent filed an Answer to the complaint on November 2, 2009, and an Amended Answer on November 25, 2009. (G.C. Ex. 1(d)(k)). The Respondent denied that it had violated the Statute.

On November 30, 2009, the Respondent filed a Motion for Protective Order related to an un-redacted copy of an AFOSI Report of Investigation. (G.C. Ex. 1(l)). On December 4, 2009, the General Counsel filed a Motion to modify the proposed protective order. (G.C. Ex. 1(o)). The Respondent disagreed with a portion of the General Counsel's Motion. (G.C. Ex. 1(p)). The Respondent's motion was granted at the hearing held in Ogden, Utah, on March 4, 2010. (Tr. at 204).

At the hearing, all parties were represented and afforded a full opportunity to be heard, produce relevant evidence, and examine and cross-examine witnesses. After the hearing, the General Counsel and Respondent filed timely post hearing briefs that were duly considered. Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Department of the Air Force, Air Force Materiel Command (AFMC), Ogden Air Logistics Center, Hill Air Force Base (Respondent/Agency), is an agency under § 7103(a)(3) of the Statute. (G.C. Ex. 1(c)(k)). The American Federation of Government Employees, Council 214 (the Council), is a labor organization under § 7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at the AFMC. (G.C. Ex. 1(c)(k)). The American Federation of Government Employees, Local 1592 (Charging Party/Union) is an agent of the Council for the purpose of representing employees at the Respondent within the previously described bargaining unit. (*Id.*) Joseph Ptacek, Jr., was an employee under § 7103(a)(2) in the previously described bargaining unit. (G.C. Ex. 1(c)(k)).

Joseph Ptacek's career at Hill Air Force Base (Hill) began in 1988 and started "spiraling down" in 2005, due to problems at work and home. (Tr. at 37-39). By 2007, Ptacek was engaging in behavior that led to several disciplinary actions. In February 2007, Ptacek received counseling regarding "inappropriate remarks to female co-workers." (G.C. Ex. 5 at 11; Tr. at 42). In June 2007, Ptacek was suspended for saying that he was going to "wring [a supervisor's] neck," and for having asked a co-worker "inappropriate questions of a sexual nature." (G.C. Ex. 5 at 10-11, 13; Tr. at 43-45). Then, on August 20, 2007, Ptacek was "caught observing pornography" on his computer. (*Id.* at 45). When Barbara Simbro, a supervisor of Ptacek, heard about this, she sent Ptacek home, placed him on administrative leave, and prevented him from accessing Hill. (*id.* at 24, 45, 47, 128-29; G.C. Ex. 2 at 1).

Acting under the advice of Hill's labor and employment office, Simbro asked Hill's information technology department to confirm whether Ptacek had pornography on his computer. (Tr. at 84-85; G.C. Ex. 4 at 5). An employee in Hill's information technology office informed Simbro she believed that Ptacek might have accessed "child pornography sites." (*Id.* at 85). A confidential source in the IT office reported this to the Air Force Office of Special Investigations (AFOSI). (*id.* at 146).

The parties' dispute pertains in large part to the AFOSI's status under the Statute, so I note here that the AFOSI investigates felony-level crimes for the Inspector General, Office of the Secretary of the Air Force. (*id.* at 180, 193-94). It is the mission of the AFOSI to investigate and counter criminal, terrorist, and espionage threats to Air Force personnel and resources. In 1979, President Carter invoked § 7103(b) of the Statute to exclude the AFOSI, as well as other agencies and subdivisions involved in "intelligence, counterintelligence, investigative, or national security work," from "coverage under the Chapter 71 of Title 5 of the United States Code."¹ Executive Order 12171, 44 Fed. Reg. 66,565 (Nov. 19, 1979) (E.O. 12171). E.O. 12171 has been in effect since 1979, and applies to the AFOSI.

On August 27, 2007, AFOSI Special Agent Vincent Politte took over the investigation. (*id.* at 85, 146-47, 150; G.C. Ex. 4 at 4). As part of the investigation, Politte and other AFOSI agents interviewed a number of Hill employees. (G.C. Ex. 4 at 5, 8, 10-12). While interviewing Simbro, Politte asked if he could seize Ptacek's computer. Simbro granted Politte's request. (G.C. Ex. 4 at 5; Tr. at 86, 102, 151-52). Politte then sent Ptacek's computer to the Defense Computer Forensics Laboratory (DCFL) in Maryland for analysis. (G.C. Ex. 4 at 14; Tr. at 161-62). Politte received a report from DCFL in early November 2007. (G.C. Ex. 4 at 14). The report found no evidence of child pornography on Ptacek's computer. (*id.*). However, the report found that Ptacek's computer contained "deleted internet history referencing [Ptacek's] Google searches," including searches for: "mother + son + sex + pictures;" "mom + son + sex;" "teen + hotties;" and "free + incest + sex + stories + pics + free + mother + teen + sex." *Id.* (internal quotation marks omitted).

With this information in hand, Politte determined that it was time to interview Ptacek. Politte asked Simbro to arrange for Ptacek to be interviewed at Hill by the AFOSI. (Tr. at 129, 200). At Simbro's request, Kenneth Williams, Ptacek's immediate supervisor, contacted Ptacek and directed him to meet him at the base for an interview with the AFOSI.

¹ Section 7103(b) of the Statute states, in pertinent part, that:

- (1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that--
 - (A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and
 - (B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

(*Id.* at 47, 129). Ptacek complied, and, on November 8, 2007, he and his Union representative, Richard Thomas, met Williams at the Hill AFB visitors' center. (G.C. Ex. 4 at 4; Tr. at 16, 47-48, 130). Williams drove Ptacek to the AFOSI's building, and Thomas followed behind in his own vehicle. (Tr. at 16-17, 48, 130-32)..

The three met Politte at the AFOSI's building where one of two things happened. According to both General Counsel witnesses, Ptacek asked Politte if Thomas could attend the interview as Ptacek's Union representative. (Tr. at 17, 49). The request, Ptacek testified, was the "first thing out of my mouth." (*Id.* at 49). Politte, according to Ptacek and Thomas, denied Ptacek's request. (*id.* at 17, 49). The Agency's witnesses who testified on this matter had a different recollection. According to Politte, Williams, and AFOSI Special Agent David Zenquiz, Ptacek did not ask for Union representation. (*id.* at 131, 154, 156 169-70, 200). Thomas himself "wanted to come into the interview room," Politte testified, but Ptacek made no such request. (*Id.* at 154). Politte further testified that he refused Thomas' request, telling him that the interview was a "criminal matter and not an employment relations matter." (*Id.*)

After one of the two exchanges occurred, Politte allowed Ptacek to consult for a few minutes with Thomas before the interview began. (*id.* at 17-18; 49-50, 140, 154). Ptacek then entered the interview room, where Politte conducted the interview and Zenquiz took notes. Thomas and Williams were not present during the interview. (*id.* at 148).

The interview began with Politte informing Ptacek that he was free to leave the interview at any time. (*id.* at 52, 155). Ptacek, who is the only witness to have described the substance of the interview in detail testified that Politte mentioned some "pornographic verbs" from Ptacek's internet searches. (*id.* at 51, 52-55, 154-57, 168-71). Politte asked Ptacek if he "went into pornography [on] the computer." (*Id.* at 52). Ptacek responded, saying that he was "testing the firewall that they had [at Hill] because [he] was bored." (*Id.*) Ptacek explained to Politte that he would "sometimes . . . just put in a word there – it [didn't] have to be pornographic, just any kind of word, and see what popped up." (*Id.*) Ptacek further explained that if "anything bad popped up," he'd "delete it," because he "didn't want to be in trouble for pornographic situations." (*Id.*).

Politte then went over Ptacek's disciplinary history and asked Ptacek: "[H]ow do you think the general[at Hill is going to] feel with somebody like you working for him? You're not going to be able [to be] working . . . for very long." (*Id.* at 54). Ptacek felt that Politte was "very coercive, very direct[,] and very cruel." (*Id.*) Ptacek testified that he tried to leave at one point during the interview, but that Politte stated to him: "[we're] not done with you yet." (*Id.* at 75).

After interviewing Ptacek for a time, Politte and Zenquiz left the interview room for about half an hour. (*id.* at 54, 154). Politte testified that he "[didn't] recall if [he and Zenquiz] called the base legal office to ask about the Union representative or if [they] spoke to a more experienced agent" during this break. (*Id.* at 154). While Politte and Zenquiz were

gone, Ptacek testified that he tried to leave while the agents were out, but that the interview room door was locked. (*Id.* at 54). After the agents returned, Ptacek was fingerprinted. Then Ptacek was permitted to leave. (*id.* at 156, 55, 170).

The investigation concluded and in late January 2008, the Agency proposed removing Ptacek from the Agency. (*id.* at 56; G.C. Ex. 2 at 1). After discussing the matter, the parties agreed to let Ptacek continue to work at the Agency so long as he abided by the terms of a last-chance agreement, signed in early March 2008. (G.C. Ex. 3 at 1-2). The agreement made clear that the Agency would remove Ptacek if he continued to use his computer inappropriately. (*id.* at 1). About a month after signing the last-chance agreement, Ptacek used his computer inappropriately. (Tr. at 22, 57-58, 88-90). Faced with impending removal from the Agency, Ptacek resigned. (Tr. at 22, 37, 76, 89-90).

DISCUSSION AND ANALYSIS

Position of the Parties

General Counsel

The General Counsel asserts that the Agency violated § 7114(a)(2)(B) when the AFOSI refused Ptacek's request for Union representation.² (G.C. Br. at 5, 22-24). As such, the General Counsel asserts, the Agency committed a ULP in violation of § 7116(a)(1) and (8) of the Statute.³ (*Id.* at 22-24, 31-32).

The General Counsel contends that § 7114(a)(2)(B) was violated because: (1) Politte and Zenquiz conducted an examination of Ptacek in connection with an investigation; (2) Politte and Zenquiz were representatives of the Agency; (3) Ptacek reasonably believed that the examination could result in disciplinary action against him; (4) Ptacek asked Politte to allow Thomas, his Union representative to be present during the examination; and (5) Politte denied Ptacek's request for Union representation.

² Section 7114 of the Statute states, in pertinent part:

(a)(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.

³ Section 7116 of the Statute states, in pertinent part:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

- (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

.....
(8) to otherwise fail or refuse to comply with any provision of this chapter.

The General Counsel acknowledges “various Authority decisions” indicating that, under E.O. 12171, the AFOSI “may never be subject to the jurisdiction of the FLRA.” (G.C. Br. at 23). But, the General Counsel argues that E.O. 12171 “means only that [the] AFOSI cannot participate in the Federal Labor-Management Relations Program[.]” (G.C. Br. at 31). That is, while AFOSI agents have “no right to form, join, or assist any labor organization . . . [or to] be protected in the exercise of such right” the General Counsel contends AFOSI agents must still adhere to the requirements set forth in § 7114(a)(2)(B). (G.C. Br. at 31) (quoting 5 U.S.C. § 7102)⁴. To support this claim, the General Counsel compares AFOSI agents to supervisors, asserting that both, for example, cannot be represented in labor organizations, but that both must “comply with the Statute when acting as representatives of agencies.” (G.C. Br. at 31) (citing 5 U.S.C. § 7112).⁵

The General Counsel further contends that AFOSI Agent Politte’s denial of Ptacek’s request for Union representation constitutes a violation of § 7114(a)(2)(B) on the part of the Agency. (G.C. Br. at 22-23). Specifically, the General Counsel asserts that E.O. 12171 “does not . . . insulate [the Agency] from [ULP] liability where, as here, it can be shown that AFOSI [a]gents acted on behalf of (and as the representatives of) [the Agency].” (G.C. Br. at 23). The General Counsel also asserts that E.O. 12171 does not mean that the AFOSI can “refuse to comply with [the Statute’s] provisions when acting as a representative of the [Agency].” (G.C. Br. at 31). To support these assertions, the General Counsel relies on *U.S. Dep’t of the Air Force, Ogden Air Logistics Ctr., Hill AFB, Utah*, 36 FLRA 748 (1990) (*Ogden*). In *Ogden*, the General Counsel asserts, the Authority “held . . . [the Agency] responsible for the conduct of” AFOSI agents and the Authority “did not apply any exemption” under E.O. 12171 to “absolve [the Agency] from [ULP] liability. . . .” (G.C. Br. at 24). However, the General Counsel acknowledges, the respondent in *Ogden* “did not raise the Executive Order exemption claim[.]” (G.C. Br. at 24). Nevertheless, the General Counsel asserts, the Agency should be liable for the AFOSI’s actions. (*Id.* at 24, 32). In this connection, the General Counsel asks for “mindful[ness] of the Supreme Court’s admonition . . . that adoption of a limited reading of ‘representative of the agency’ could

⁴ Section 7102 of the Statute states, in pertinent part, that “[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right.”

⁵ Section 7112 of the Statute states, in pertinent part:

(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes—

(1) . . . any management official or supervisor;

. . . .

(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security[.]

‘erode the right [of Union representation] by encouraging the use of investigative conduits outside the employee’s bargaining unit[.]’” (G.C. Br. at 24) (quoting *NASA v. FLRA*, 527 U.S. 229, 234 (1999) (*NASA*)).⁶ Further, the General Counsel argues, failing to hold the Agency responsible for the AFOSI’s actions would “thwart the Congress’ intent to protect federal employees under examination.” (*Id.* at 32) (citing *NASA*, 527 U.S. at 234).

Having argued that the Agency can be liable for the AFOSI’s actions generally, the General Counsel asserts that the Agency is liable for the AFOSI’s actions here. This is so, the General Counsel contends, because there was a high level of “collaboration” between the Agency and the AFOSI during the Ptacek investigation. (G.C. Br. at 24) (citing *U.S. DOJ, Fed. BOP, FCI, Forrest City, Ark.*, 57 FLRA 787, 790 (2002) (*FCI*). To support this contention, the General Counsel asserts that the Agency was “involved directly in all but nine of some [thirty-four] steps in [the] AFOSI’s investigation[.]” (G.C. Br. at 25, 11). These “steps” include: (1) Simbro consulting with Hill’s labor and employment relations office; (2) Simbro asking Hill’s IT office to analyze Ptacek’s computer; (3) a Hill employee contacting the AFOSI about possible child pornography on Ptacek’s computer; (4) Simbro directing Williams to have Ptacek come to Hill for the interview with AFOSI; and (5) the AFOSI interviewing Simbro and a number of other Hill employees. Additionally, the General Counsel asserts that because the AFOSI’s investigation found “no evidence of child pornography,” the AFOSI was not conducting a criminal investigation. (*Id.* at 26). Instead, the General Counsel argues that the AFOSI was “essentially . . . Personnel’s agent . . . in effecting the removal of Ptacek.” (*Id.*).

Respondent

As an initial matter, the Respondent asserts that Ptacek did not request Union representation and that Ptacek’s rights under § 7114(a)(2)(B) were thus never triggered. (Resp. Br. at 19).

Even assuming that Ptacek did request Union representation, the Respondent asserts that there was no ULP committed because E.O. 12171 exempts the AFOSI from the requirements of the Statute. (Resp. Br. at 10, 14) (citing *U.S. Attorney’s Office, S. Dist. of Tex., Houston, Tex.*, 57 FLRA 750 (2002)). Additionally, the Respondent asserts that the Statute’s legislative history supports a conclusion that the Statute does not apply to the AFOSI. (Resp. Br. at 11-14).

Further, the Respondent asserts that there is no basis for holding the Respondent liable for the AFOSI’s actions. In this regard, the Respondent asserts that the General Counsel’s reliance on *Ogden* is misplaced because the “exempt status of [the] AFOSI was neither raised nor addressed in that case.” (Resp. Br. at 15, 16) (citing non-precedential

⁶ The General Counsel asserts that the Court admonished against a certain reading of § 7114(a)(2)(B). (G.C. Br. at 24). In fact, the passage quoted by the General Counsel paraphrases the rationale given by the Authority in the underlying decision. See *NASA*, 527 U.S. at 234 (citing HQ, *NASA, Wash., D.C.*, 50 FLRA 601, 615 n.12 (1995)).

decision of Administrative Law Judge Devaney, in *Ogden Air Logistics Ctr., Hill AFB, Utah*, Case No. DE-CA-60922 (1997), ALJD No. 97-46, 1997 WL 798919 (Oct. 9, 1997) (*Air Logistics Center*). Similarly, the Respondent asserts that the General Counsel's reliance on *NASA* is misplaced because the investigative component at issue in *NASA* was "not exempt from coverage of the [Statute]." (Resp. Br. at 15 n.2). Additionally, the Respondent argues that holding it liable for the AFOSI's actions would "violate the principles underlying" § 7103(b) of "preventing undue interference with criminal and national security investigations." (*Id.* at 15, 16) (citing *U.S. DOJ v. FLRA*, 39 F.3d 361, 369 (D.C. Cir. 1994) (*DOJ v. FLRA*)).

In the alternative, the Respondent asserts that it cannot be held liable for the actions of the AFOSI because there was not a significant level of collaboration in the Ptacek investigation between the Respondent and the AFOSI. (Resp. Br. at 17-18) (citing *FCI*, 57 FLRA at 787; *Ogden*, 36 FLRA at 764-68; *Lackland AFB Exchange, Lackland AFB, Tex.*, 5 FLRA 473, 486 (1981) (*Lackland*)).

DISCUSSION

As an initial matter, the parties dispute whether Ptacek requested Union representation. Based in large part on the demeanor of the witnesses, I credit the testimony of Ptacek and Thomas on this issue over the testimony of Politte, Zenquiz, and Williams. In this connection, I find it highly unlikely that Ptacek would bring his Union representative to the examination and not request that his Union representative be permitted to attend the examination. Additionally, I find that Politte's statement, that he called either an attorney or a supervisor to "ask about the Union representative" supports a conclusion that Ptacek asked for Union representation. (Tr. at 154). Accordingly, I find that Ptacek requested Union representation.

With this factual dispute resolved, I address the General Counsel's claim that the Respondent violated § 7114(a)(2)(B) when AFOSI Agent Politte denied Ptacek's request for Union representation. To resolve the General Counsel's claim, I consider two questions: (1) whether AFOSI Agent Politte was subject to § 7114(a)(2)(B) when he denied Ptacek's request for Union representation; and (2) if not, whether the Respondent violated § 7114(a)(2)(B) when Politte denied Ptacek's request.

Whether AFOSI Agent Politte Was Subject to § 7114(a)(2)(B)

Section 7103(b)(1) of the Statute permits the President to exclude an agency or agency subdivision from coverage under the Statute if the President has determined that: (1) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work; and (2) the provisions of the Statute cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations. 5 U.S.C. § 7103(b)(1)(A), (B). President Carter invoked the authority granted under § 7103(b) when he issued Executive Order 12171, in 1979. *See* E.O. 12171. President Carter determined that the AFOSI "ha[s] as a primary function

intelligence, counterintelligence, investigative, or national security work.” E.O. 12171, §§ 1-01, 1-206(k). President Carter also determined that “Chapter 71 of Title 5 of the United States Code cannot be applied to” the AFOSI in a “manner consistent with national security requirements and considerations.” (E.O. 12171, § 1-101). Based on these determinations, President Carter ordered that the AFOSI be “excluded from coverage under Chapter 71 of Title 5 of the United States Code,” i.e., the Statute. (*id.*). I interpret the President’s direction that the AFOSI be “excluded from coverage” under the Statute to mean that the AFOSI and its agents are excluded from coverage under § 7114(a)(2)(B). The Executive Order therefore precludes a finding that the AFOSI or its agents can violate § 7114(a)(2)(B) or for that matter, § 7116(a)(1) and (8). *Cf. AFMC*, 66 FLRA at 596 (ALJ Decision) (E.O. 12171 precludes a finding that the AFOSI violated § 7116(a) while conducting a criminal investigation). Further, I find that since an AFOSI agent is excluded from coverage under § 7114(a)(2)(B), an AFOSI agent cannot be a “representative of the agency” under § 7114(a)(2)(B).

While there is an absence of precedential decisions interpreting E.O. 12171 as it pertains to § 7114(a)(2)(B), *see, e.g., U.S. Dep’t of the Air Force, AFMC, WRALC, Robins AFB, Ga.*, 66 FLRA 589, 591 (2012) (*AFMC*) (finding it unnecessary to address whether the agency could be held liable for the AFOSI’s actions); *see also id.* at 598 (ALJ Decision), my interpretation of E.O. 12171 is consistent with several non-precedential decisions interpreting the Order. In *Air Logistics Center*, Administrative Law Judge Devaney found that the AFOSI the “requirements of [§ 7114(a)(2)(B)] may not be imposed on [the AFOSI].” Similarly, in an unpublished decision, the United States Court of Appeals for the Federal Circuit stated that although the “Federal Labor-Management Relations Program does generally require that an agency give an employee the opportunity to have union representation during certain types of examination,” Executive Order 12171 “clearly exempts [the AFOSI] and other investigative agencies from this statutory provision.” *Lawson v. Dep’t of the Air Force*, No. 98-3399, 1999 WL 594536, at *1 (Fed. Cir. Aug. 6, 1999) (unpublished decision). I have previously found that under E.O. 12171, AFOSI agents are “excluded from all requirements and limitations imposed by the Statute[.]” *AFMC*, 66 FLRA at 596 (ALJ Decision). Further, I noted that President Carter “determined that [the] AFOSI should be exempt from coverage of the Statute while conducting criminal investigations and [this] exemption precludes [the AFOSI] from violating § 7116(a) while doing so.” (*Id.* at 596).

The General Counsel raises two related arguments to the contrary. First, the General Counsel argues that E.O. 12171 merely excludes the AFOSI from *some* aspects of the Statute, such as those pertaining to representation by a labor organization. (G.C. Br. at 31, 23). But E.O. 12171 is not so limited; it does not exclude the AFOSI from coverage of only *some* of “Chapter 71 of Title 5 of the United States Code;” it excludes the AFOSI from coverage of “Chapter 71 of Title 5” in its entirety. (E.O. 12171). Second, the General Counsel asserts that since the Statute treats AFOSI agents and supervisors similarly in some regards, the Statute must treat AFOSI agents and supervisors similarly in all regards. (G.C. Br. at 31). As such, the General Counsel argues, AFOSI agents are, like supervisors, “representative of agencies” under § 7114(a)(2)(B). (*id.* at 31). Logically, of course, the fact that AFOSI agents and supervisors are alike in some regards does not mean that the two are alike in all regards. Moreover, AFOSI agents and supervisors generally are not alike. AFOSI agents have as a

primary function “intelligence, counterintelligence, investigative, or national security work,” E.O. 12171, and therefore are excludable from coverage under § 7114(a)(2)(B). 5 U.S.C. § 7103(b). Supervisors, at least those in the General Counsel’s example, do not perform such investigative and national-security-related functions and thus are not excludable from coverage under § 7114(a)(2)(B). 5 U.S.C. § 7103(b). Accordingly, the fact that a supervisor can constitute a “representative of the agency” under § 7114(a)(2)(B) does not indicate that an AFOSI agent can constitute “representative of the agency” under § 7114(a)(2)(B).

Based on the foregoing, I find that E.O. 12171 excludes the AFOSI from coverage under the Statute, including § 7114(a)(2)(B). Accordingly, as discussed above, I find that AFOSI Agent Politte was not subject to, and did not violate § 7114(a)(2)(B) when he denied Ptacek’s request for Union representation. Further, I find that Politte was not a “representative of the agency” under § 7114(a)(2)(B).

Whether the Agency Violated § 7114(a)(2)(B) When AFOSI Agent Politte Denied Ptacek’s Request for Union Representation

The General Counsel asserts that the Agency violated § 7114(a)(2)(B) when AFOSI Agent Politte denied Ptacek’s request for Union representation. (G.C. Br. at 22-24, 31-32). In this regard, the General Counsel asserts that: (1) E.O. 12171 “does not . . . insulate [the Agency] from [ULP] liability where, as here, it can be shown that AFOSI [a]gents acted on behalf of (and as the representatives of) [the Agency],” (G.C. Br. at 23); and (2) E.O. 12171 does not mean that the AFOSI can “refuse to comply with [the Statute’s] provisions when acting as a representative of the [Agency],” (G.C. Br. at 31).

As explained above, E.O. 12171 precludes the possibility that the AFOSI could violate § 7114(a)(2)(B). *See* E.O. 12171; *cf.* *AFMC*, 66 FLRA at 596 (ALJ Decision) (E.O. 12171 precludes a finding that the AFOSI violated § 7116(a) while conducting a criminal investigation). Accordingly, AFOSI Agent Politte did not violate § 7114(a)(2)(B) when he denied Ptacek’s request for Union representation. Because Politte did not violate § 7114(a)(2)(B) when he denied Ptacek’s request for Union representation, and no other act is alleged to have violated § 7114(a)(2)(B), there was no violation of § 7114(a)(2)(B) and, therefore, there is no basis for finding that the Respondent violated § 7114(a)(2)(B). Or, to put it more in the terms used by the General Counsel, because Politte was excluded from coverage under § 7114(a)(2)(B), Politte was not a “representative of the agency” under § 7114(a)(2)(B) when he denied Ptacek’s request for Union representation. And because Politte was not a representative of the agency, the Respondent has no liability for Politte’s alleged violation of § 7114(a)(2)(B).

This understanding of the meaning and scope of E.O. 12171 is the only reasonable reading of the Order and of § 7103(b). If the General Counsel’s view was correct, that is, if a parent agency could commit a ULP through the act of an excluded subdivision, then the parent agency would be forced to make an odd choice: either it could permit the subdivision

to ignore the requirements of the Statute while the parent agency suffered countless ULP charges, or it could direct the subdivision to adhere to the requirements of Statute, including § 7114(a)(2)(B), and effectively ignore the President's determination that the Statute "cannot be applied to" the subdivision "in a manner consistent with national security requirements and considerations." E.O. 12171. Such a dilemma is not what Congress intended when it gave the President the power to exclude agencies and subdivisions from coverage under the Statute. *See AFMC*, 66 FLRA at 600 (ALJ Decision). Further, if the parent agency resolved such a dilemma by directing the excluded subdivision to abide by the requirements of the Statute the work of that excluded subdivision would be impeded even though the purpose of § 7103(b) exception was to provide investigative entities with an unencumbered ability to conduct expedient criminal and national-security-related investigations. *See AFMC*, 66 FLRA at 599-600.

Moreover, the General Counsel's arguments do not explain why the Agency should be liable for AFOSI Agent Politte's denial of Ptacek's request for Union representation. The General Counsel asserts that the Authority found that this Agency was liable for the actions of the AFOSI, in *Ogden*, 36 FLRA at 748. (G.C. Br. at 24). But as the General Counsel acknowledges, there was no claim in *Ogden* that the AFOSI was excluded from coverage under the Statute by E.O. 12171, *see Ogden*, 36 FLRA at 748; *see also id.* at 764-68 (ALJ Decision); *cf. FCI*, 57 FLRA at 790 (no claim of investigators being excluded from coverage of the Statute under § 7103(b)). As such, *Ogden* does not hold that the Agency is liable for the actions of investigators excluded from coverage under the Statute. *See Ogden*, 36 FLRA at 764-68 (ALJ Decision). The General Counsel also asserts that *NASA* should control the outcome of this case. (G.C. Br. at 24, 31). But unlike *Ogden*, *NASA*, did not involve investigators excluded from coverage under the Statute. *NASA*, 527 U.S. at 231-33; *see also* E.O. 12171. Accordingly, nothing in *NASA* indicates that an Agency is liable for the actions of investigators who are excluded from coverage under the Statute.

The General Counsel further asserts that adopting a "limited reading of 'representative of the agency'" in § 7114(a)(2)(B) could "erode the right [of Union representation]." (G.C. Br. at 24) (quoting *NASA*, 527 U.S. at 234). As explained above, the exclusion of the AFOSI from coverage under the Statute means that an AFOSI agent cannot be a "representative of the agency" under § 7114(a)(2)(B). With regard to the General Counsel's broader point regarding the "erosion" of employee rights and the "thwarting" of Congress' intent, the General Counsel's quibble is with Congress for drafting § 7103(b), and with President Carter for issuing E.O. 12,171. *See AFMC*, 66 FLRA at 601 (ALJ Decision). As for the General Counsel's claim that the AFOSI found no evidence of child pornography and thereby became "essentially . . . Personnel's agent," (G.C. Br. at 26), the General Counsel has not shown that the AFOSI was acting beyond its mandate to investigate felony-level crimes. Further, the General Counsel has not demonstrated that the AFOSI will do so in the future. *Cf. AFMC*, 66 FLRA at 600 (discussing the limited role of the AFOSI).

Based on the foregoing I find that the Respondent did not violate § 7114(a)(2)(B) and, therefore, did not commit a ULP in violation of § 7116(a)(1) and (8) of the Statute.

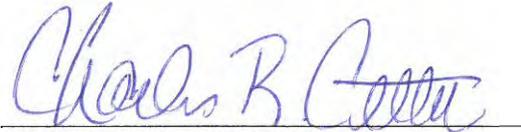
CONCLUSION

I find no violation of § 7114(a)(2)(B) of the Statute, and no commission of a ULP in violation of § 7116(a)(1) and (8) of the Statute. Accordingly, I recommend that the Authority issue the following Order:

ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, D.C., March 19, 2013



CHARLES R. CENTER
Chief Administrative Law Judge