FEDERAL BUREAU OF PRISONS OFFICE OF INTERNAL AFFAIRS WASHINGTON, D.C. AND FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION ENGLEWOOD, LITTLETON, COLORADO Respondents	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 709 Charging Party	Case Nos. DE-CA-40870 DE-CA-40937

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **JUNE 10, 1996**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

JESSE ETELSON
Administrative Law Judge

Dated: May 10, 1996
Washington, DC

MEMORANDUM DATE: May 10, 1996

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: FEDERAL BUREAU OF PRISONS
OFFICE OF INTERNAL AFFAIRS
WASHINGTON, D.C.

AND

FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ENGLEWOOD, LITTLETON, COLORADO

Respondents

and Case Nos. DE-CA-40870

DE-CA-40937

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 709

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

FEDERAL BUREAU OF PRISONS OFFICE OF INTERNAL AFFAIRS WASHINGTON, D.C. AND FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION ENGLEWOOD, LITTLETON, COLORADO Respondents	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 709 Charging Party	Case Nos. DE-CA-40870 DE-CA-40937

Hazel E. Hanley, Esquire
Nicholas J. LoBurgio, Esquire
For the General Counsel

Steven R. Simon, Esquire
For the Respondents

Erica Shields, Local Union President
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

These two consolidated cases are related with respect to many of the background facts and the course of events

that resulted in the respective unfair labor practice charges but the consolidated complaint alleges different statutory violations by each of the two activities[1] named as Respondents. In Case No. DE-CA-40870, Respondent Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C. (OIA) is alleged to have failed to comply with section 7102 and to have violated section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute) by beginning an investigation into, and by questioning employees about, events that occurred at a union meeting. In Case No. DE-CA-40937, Respondent Federal Bureau of Prisons, Federal Correctional Institution, Englewood, Littleton, Colorado (FCI) is alleged to have violated sections 7116(a)(1) and (2) of the Statute by suspending for one day an employee who was the president of the Charging Party (the Union or Local 709) because she was engaged in protected activity under the Statute.[2]

A hearing was held in Denver, Colorado. Counsel for the General Counsel and for the Respondents filed post-hearing briefs and provided computer diskettes containing their briefs. Counsel for the General Counsel filed a motion to correct the transcript of the proceedings. This unopposed motion is granted.

Preliminary Findings of Fact:
General Background and Overview of Events

The Local 709 is the agent for the American Federation of Government Employees, the exclusive representative of a nationwide consolidated unit of employees appropriate for collective bargaining, for representing approximately 230 to 240 unit employees at FCI. W. A. Perrill is the Warden and Daniel J. Fitzgerald was the Associate Warden at FCI. Claire Fitzgerald is the wife of Daniel Fitzgerald and a unit employee employed at the Management Specialty Training Center (MSTC), Aurora, Colorado.

Erica Shields, a Senior Officer Specialist employed by FCI, has been the president of Local 709 since November 1993. Both before and after her election as Union president, Shields was involved, on behalf of the Union, with an inquiry into a suspected exposure of inmates and employees to asbestos in connection with a remodeling

[1] See 5 CFR § 2421.4.

[2] Neither Respondent is alleged to be responsible for the unfair labor practice(s) the complaint attributes to the other.

project. In the course of her involvement, Shields had dealings with Warden Perrill and other management official and participated in an investigation by the Occupational Safety & Health Administration (OSHA) that was apparently connected to an inquiry by Congresswoman Pat Schroeder. Shields also contacted Schroeder's office and provided it with certain information. The investigation, and the resulting citations issued by OSHA against FCI on February 1, 1994, for "Willful Violations" and "Serious Violations" and required to be posted in front of FCI's main facility, became the subject of newspaper articles. After their publication, Warden Perrill told Shields that he would appreciate some notification if she went to Pat Schroeder's office or the newspaper--that he "didn't appreciate being blindsided by [the Union's] tactics[.]" He made a similar comment to her on the occasion of a subsequent newspaper article containing comments attributed to Shields about employee concerns over asbestos-related health risks.

Concurrently, OIA was conducting an investigation of the causes and results of the alleged asbestos problems. Shields represented two unit employees, who were among the targets of the investigation, at their OIA interviews.

On March 24, 1994, a Union steward consulted Shields about a problem in dealing with Associate Warden Fitzgerald concerning mandatory overtime. Shields went to Fitzgerald's suite of offices, the "Associate Warden's Complex." Fitzgerald refused to discuss the matter with her, at least not at that time, and an altercation resulted. Voices were raised and hostile gestures were exchanged. The encounter ended with Shields telling Fitzgerald, in the presence of others, "Blow it out your ass."

Shields informed Warden Perrill of this incident. They discussed the matter and reached at least a general understanding that the question of the participants' conduct could be resolved "informally" (Tr. 79-80, 545). Later the same day, Perrill spoke with Fitzgerald about the incident and the options for responding to Shields' part in it. Perrill told Fitzgerald that Shields had reported her own behavior to him. Perrill's credited testimony suggests that he guided the discussion in the direction of handling it "on an informal basis, in terms of a performance issue" (Tr. 545-46). Perrill indicated that a letter of counseling would be appropriate and asked Fitzgerald to prepare one and issue it to Shields when it was completed.[3]

[3] This was evidently not what Shields expected after her discussion with Perrill about resolving the matter "informally."

A Union meeting was scheduled for April 12. An agenda was prepared and notices of the meeting, containing information about the agenda, were posted. A staff telephone information line was also used to "advertise" the meeting. One of the items on the agenda was the asbestos problem. On April 11, Claire Fitzgerald signed a Form 1187 Request for Payroll Deductions, authorizing deduction of Union dues. Around the same time, Associate Warden Fitzgerald made inquiries to employees about the next Union meeting, letting it be known that his wife was a new member and wanted to attend. Associate Warden Fitzgerald been involved as a possible responsible official in the asbestos investigations and also served as one of FCI's representatives at an April 5 negotiating meeting with Shields and other Union representatives concerning asbestos-related issues.

Claire Fitzgerald attended the April 12, 1994 Union meeting. Shields called the meeting to order and "recognized" Fitzgerald, whose presence had been pointed out to her. Shields advised Fitzgerald that she would have to leave when the membership voted on issues involving the asbestos problem because it involved her husband. Fitzgerald objected to this, stating that she was a dues-paying member. Shields disputed this, asserting that the employees located at the Aurora MSTC facility, as Fitzgerald was, had formed their own local union and had split off or were splitting off from Local 709. An argument between the two followed as to the status of the new local and whether Fitzgerald was a member of Local 709. Fitzgerald asked to see the Union's bylaws. Shields refused. She explained at the hearing that she did not want Fitzgerald's husband to have access to the bylaws.

Fitzgerald began to take notes, which further incensed Shields. Shields demanded that Fitzgerald stop taking notes. When Fitzgerald refused, Shields instructed the sergeant at arms to remove Fitzgerald. Then, instead of letting that action take its course, Shields requested a motion from the floor to adjourn the meeting. The motion was made and passed.

Fitzgerald remained and continued her writing. Shields approached her to see what she was writing. They argued further, with other employees still present or waiting on a deck outside the meeting room. At a certain point, Shields declaimed a vigorous set of epithets to describe Fitzgerald's husband, including one of the more extreme (if no longer uncommon) expletives. According to Claire Fitzgerald, Shields not only used "abusive and obscene

language about a member of my family," but also "threatened and attempted to inflict bodily harm upon me." Fitzgerald told her husband about the incident the same day. Her accusation became the subject of the OIA investigation that gave rise to Case No. DE-CA-40870.[4]

The day after that Union meeting Associate Warden Fitzgerald summoned Shields to the Warden's office. Perrill was absent and Fitzgerald was the Acting Warden that day. Shields, believing that she would need a Union representative for this encounter, brought Chief Steward Michele Allport with her. Fitzgerald said that the purpose of the meeting was to issue a formal letter of counseling. He began to read the letter, which related to the March 24 "blow it out your ass" incident. Shields stood up and told Allport, "Let's go." After telling Fitzgerald that he was retaliating against her in Perrill's absence, she left the meeting. The discipline administered to Shields in connection with this meeting is the basis for Case No. DE-CA-40937.

CASE NO. DE-CA-40870

Additional Findings of Fact

Following the April 12 Union meeting, Claire Fitzgerald made several attempts to report her accusations about Shields' conduct toward her. Eventually, on August 19, she made a formal "Request for Local Investigation of Employee Misconduct" to the Director of MSTC, her employer. The matter then was brought to the attention of OIA, and Special Agent Elizabeth B. Strack was assigned to interview Claire Fitzgerald. She did so on April 24 and prepared an affidavit based on the interview, which Fitzgerald signed. In that affidavit, Fitzgerald described the following acts of Shields:

> She made an aggressive move toward me with her right fist clenched and her right arm "cocked" back as though to punch me. . . . Two women quickly grabbed Shields on each arm. . . . While still being restrained, Shields said to me, "I would like to take everything I feel about your husband and take it out on you!

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As I advised the parties at the hearing, I do not find the question of the truth of Claire Fitzgerald's allegations to be relevant to this case.

On April 25, OIA referred the matter to the Office of the Inspector General of the Department of Justice, which, after a few days, referred it back to OIA on a standard form on which the sender had checked a box next to the printed option: "This office concurs that BOP [Bureau of Prisons] should dispose of this complaint commensurate with BOP policy and regulations."

OIA assigned Supervisory Special Agent Brian E. Hertel to the case. Hertel testified credibly that, because of the connection between the incident and the Union meeting, the agreed-upon approach to the investigation was:

> that we would focus specifically on the incident or the individual that we needed to, in fact, talk to in order to determine what, in fact, occurred during this alleged attempted assault and not to get into the specific union business regarding what was actually said during the union meeting.[5]

Hertel, accompanied by Special Agent Susan Beasley, took the next step of the investigation by interviewing Shields. As was the case with each of the employees whose interviews produced an affidavit, Shields was required to acknowledge that she had a duty to reply to questions, and that "disciplinary action, including dismissal, may be undertaken if I refuse to answer or fail to respond fully and truthfully to each question."

Chief Steward Michele Allport accompanied Shields as her Union representative at the interview. Shields had already prepared the unfair labor practice charge that was later filed in this case, alleging, in pertinent part, that the investi-gation was "seen as a blatant attempt at management [sic] to control internal union business since the person making the accusation is the AW's wife."[6] Shields handed a copy of the charge to the OIA agents. Hertel gave credible testimony characterizing his response to the concern, expressed in the charge, that the investigation involved itself in internal union business:

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[5] Hertel's intentions are not, of course conclusive as to how the investigation was actually conducted. However, they are relevant to the limited extent that they may cast light on the otherwise incomplete record of the individual interviews.

[6] The charge alleges further that the investigation "is also perceived as direct retaliation for protected union activities." However, the complaint contains no such allegation.

He told Shields and Allport that the agents were not interested in the specific union business, that is, with "what was being said in the actual meeting," but that they "were very interested in . . . the alleged assault, the unprofessional conduct which we believed management had a right to investigate as an unprofessional violation of standards of employee conduct."

Nevertheless, the agents asked about who was at the meeting. Extended discussions followed these questions. Shields explained that she was bound by the constitution of the American Federation of Government Employees not to divulge the names of members attending the meeting and that she was concerned about possible agency retaliation against employees so identified. The agents' response, as characterized by Shields, was that "they needed to know who was there in order to go and interview them, that they needed to find out because the allegation was an attempt assault or an assault during the union meeting". Shields told them that she understood why they needed to know, but that she could not tell them who was there, "that they would have to get it from somebody else, not the president of the local."

After that subject was exhausted, Hertel asked, as Shields recalled it, "what was the chain of events and what was said by myself or other union employees during the meeting." Allport did not corroborate Shields with respect to the implied open-endedness of Hertel's questions about what was said at the Union meeting. Allport did testify about questioning with regard to Shields' calling the meeting to order and adjourning it, which questions Shields refused to answer. Hertel also testified that he asked Shields and other employees about whether certain events occurred before or after the meeting was adjourned. He also testified that he asked about conversations between Shields and Claire Fitzgerald. I credit this narrower characterization of the questioning.

The Shields interview went on for several hours, including interruptions to permit Shields to compose herself. Hertel testified that Shields "very much tried to be respon-sive" but did not agree with the legitimacy of the investiga-tion and was "very visibly upset" with the process and with her own representative. Apparently most of the interview time was taken up in discussions of the appropriateness of the questions, as the interview yielded an affidavit of only three (typewritten, single-space) pages.

When Shields had signed the affidavit documenting her interview, Hertel informed her that she was required to remain for another interview concerning an incident that had occurred two or three days earlier. The gist of that incident was a comment Shields had made that she should be referred to the Employee Assistance Program because she felt like shooting Associate Warden Fitzgerald. This remark had been reported to Warden Perrill, who referred it to OIA for investigation. Interviewees concerning this matter considered Shields' remark to be a joke. The subsequent history of that investigation is scattered in the record. I do not find it to be of any assistance in the resolution of this case.

Other employee interviews concerning the Union meeting reflected a focus by the interviewers similar to that of the Shields interview. Some of the interviews were documented in affidavits and some in memoranda composed by the interviewers. The reason for this dichotomy was not explained. However, none of the documents reflected questioning about union business, nor did any employee witness testify that such questioning occurred. References in the affidavit of Debra Walker and the memorandum of the interview of Union Steward Lisa Tabor, regarding the fact that the asbestos issue was discussed at the meeting, were made in the context of the employees' attempts to explain why they thought Claire Fitzgerald was at the meeting. Tabor testified that she could not recall Special Agent Hertel pursuing any questions about the discussion of the Union membership. Union Sergeant at Arms Victor Jaynes testified that his interviewer "may have asked me questions on the issue dealing with asbestos," but his affidavit reflects no such subject and I find his equivocal testimony on this point to be an inadequate basis for an affirmative finding.

Discussion and Conclusions: Case No. DE-CA-40870

A. General Principles

The violation alleged in this case is interference with, restraint, and coercion of employees in the exercise of their rights under the Statute. Specifically, the employee right involved here is the right to participate in the meetings of a labor organization and to do so, as stated in section 7102 of the Statute, "freely and without fear of penalty or reprisal."

The Authority's standard for determining whether conduct by management constitutes interference, restraint, or coercion within the meaning of section 7116(a)(1) of the

Statute is whether, under the circumstances, the conduct may reasonably tend to coerce or intimidate employees with regard to the exercise of their statutory rights. The standard is an objective one, and is not based either on the subjective perceptions of the employee or on the intent of the employer. *Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah*, 35 FLRA 891, 895-96 (1990)(*OALC*); *Veterans Administration, Washington, D.C. and Veterans Administration Medical Center and Regional Office, Sioux Falls, South Dakota*, 23 FLRA 122, 124 (1986) (*VA*). *VA* was itself a case in which a management official's questioning of an employee about his union activities was held to have had that proscribed tendency. Moreover, the Authority has given its general framework for section 7116(a)(1) analysis specific application to employee interviews, holding that it would determine in each case "whether the circumstances in which interviews occur are coercive[.]" *Department of the Air Force, F.E. Warren Air Force Base, Cheyenne, Wyoming*, 31 FLRA 541, 549 (1988) (*F.E. Warren*).

Questioning may, of course, be coercive in various ways. The coercive tendency that is proscribed by the Statute is that which relates to protected activity. Thus, the Authority has determined that requiring an employee who was a union representative, under threat of disciplinary action, to disclose statements another employee made to him in the course of the representation of that employee in a disciplinary proceeding violated section 7116(a)(1). The conversations between the employee and his union representative, the Authority held, constituted protected activity, and their disclosure would interfere with the employee's right to representation, which right "demand[s] that the employee be free to make full and frank disclosure to his or her representative . . . ." *U.S. Department of the Treasury, Customs Service, Washington, D.C.*, 38 FLRA 1300, 1308 (1991)(*Customs Service*). Stated another way, the Authority has held that an employee has a right to maintain the confidentiality of conversations with his union representa-tive, and that any interference with that right violates the Statute unless the right had been waived "or some overriding need for the information was established."

Long Beach Naval Shipyard, Long Beach, California, 44 FLRA 1021, 1038-39 (1992).[7]

B. Application to this Case

Counsel for the General Counsel seeks to derive from these confidential conversation cases a general rule, or at least one that applies here, regarding what an agency must show in order to justify the investigation of an incident that has a connection with protected activities. I believe that to be too expansive a use of these cases. They should, rather, be read in the context of the general principles about management conduct and employee interviews. Thus, before requiring an agency to justify the questions it asks employees, it must be determined that the questions were coercive *in a particular way*. That is, it is insufficient to show that the questions were coercive in the sense that the employees were required to answer them. The coercive tendency must have been with respect to the exercise of statutory rights.

There are three prongs to the General Counsel's theory of this case. The first (based on paragraphs 17 and 25 of the complaint) is that the very undertaking of the investigation violated employee rights. The second and third (based on paragraphs 18, 19, and 26 of the complaint) are that the involuntary nature of the employee interviews and the questions asked made them coercive.

To establish the first prong of the case, Counsel for the General Counsel argues that OIA lacked any good faith basis for initiating the investigation, let alone an overriding or extraordinary need. In support of this argument, counsel presents a number of circumstances suggesting that Claire Fitzgerald's accusations lacked credibility and were improperly motivated. I find this line of attack unpersuasive. While Special Agent Hertel acknowledged a concern about the accuracy of the accusations, neither that concern nor the circumstances

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[7] In *Customs Service*, the Authority also referred to the absence, in that case, of any showing of an "extraordinary" need. *Id.* at 1309 n. 2. I express no opinion as to whether, as Counsel for the General Counsel argues, the Authority intended to equate "overriding" with "extraordinary" for this purpose. *But see and compare Defense Property Disposal Region, Ogden, Utah and Defense Property Disposal Office (DPDO), Camp Pendleton, Oceanside, California*, 24 FLRA 653, 657 (1986) (surveillance of protected activity not unlawful when "based on security considerations").

cited by counsel made it inappropriate to conduct the investigation. Rather, it is at least arguable that it would have been irresponsible for Hertel or any other OIA official to have aborted the investigation and dismissed the allegations based on a hunch about Claire Fitzgerald's credibility.[8] The course Hertel took, which I find to have been appropriate, was to approach the investigation with a certain sensitivity to the fact that the incident as alleged occurred at a union meeting.[9]

Counsel for the General Counsel also attempts to show that the investigation was tainted by the fact that OIA had added an investigation into the "shoot Fitzgerald" incident. Counsel argues that this addition supports the proposition that the investigations were instituted in retaliation for Shields' protected activity, in order to build a case against her. However, there is no allegation in the complaint either about the second investigation or that the original investigation had a discriminatory motivation. In any event, I see nothing about the circumstances surrounding the second investigation that warrants a finding that OIA (the only Respondent in Case No. 40870) acted inappropriately when it initiated an investigation of the "shoot Fitzgerald" incident. The matter having been referred to OIA, OIA may or may not have had any discretion on whether to proceed. Assuming that it had such discretion, its decision to investigate appears reasonable.

With respect to the manner in which the investigation of the April 12 incident was actually conducted, Counsel for the General Counsel, stressing the involuntary nature of the interviews, argues that OIA should have provided the employees with the safeguards set forth in *Internal Revenue Service and Brookhaven Service Center*, 9 FLRA 930 (1982) (*Brookhaven*). However, consistent with the above discussion of the kind of coercion section 7116(a)(1) contemplates, the *Brookhaven* safeguards apply only to interviews in preparation for third-party proceedings and where "a nexus is established between [the] interview . . . and the

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[8] I am not persuaded by anything in the record as to whether or not Hertel, or OIA, had the authority to exercise discretion as to conducting or aborting the investigation. In light of other dispositive considerations I need not decide which party had the burden of presenting evidence on this point, and, therefore, whether discretion should be presumed or not.

[9] Counsel for the General Counsel does not contend that what Claire Fitzgerald described as Shields' conduct would have been protected activity.

employee's section 7102 rights." *General Services Administration*, 50 FLRA 401, 406-07 (1995)(*GSA*).

I am uncertain whether this means that *Brookhaven* safeguards, or something that fulfills the same purpose (*see F.E. Warren*), are required only at interviews in preparation for third-party proceedings or whether they are required at any interview having a "nexus" with employee rights. But *GSA* does make clear that one can determine the necessity for *Brookhaven* safeguards only after exploring the connection between the interviews and the section 7102 rights. I also conclude that the *GSA* "nexus" test is based on the recognition that the purpose of the *Brookhaven* safeguards is to protect employees "from coercive questioning concerning matters involving employees' protected rights" (*F.E. Warren* at 548-49) and therefore that they are necessary only where there is at least some danger that coercion in the section 7116(a)(1) sense would otherwise occur.

I am not persuaded that the interviews of Shields and other employees were coercive. Although the questioning concerned an incident that occurred at a Union meeting, and although the formal adjournment of the meeting did not, in the circumstances, negate the protected character of the activities of the employees who remained, the questioning did not focus on either the union business that was discussed or the participation of any employees in that business. While Shields, at least, was asked about who was present, there is no objective indication that this information was being sought in order to pass the names along to management officials so that employees so identified could be subject to retaliation.

Shields' belief that the questions she was asked were coercive in the section 7116(a)(1) sense is not dispositive. But it must be acknowledged that notwithstanding the Authority's description of its standard for coercion as "objective," the process of deciding whether the standard has been met involves a subjective determination. Thus, the decision-maker must, in effect, conjure up a "reasonable employee" whose reaction to the kind of employer conduct that is alleged to be coercive must be imagined. The requisite "showing" of coercion is found if the decision-maker believes that there is some degree of probability that such artificial
employee (a legal fiction existing only in the mind of the decision-maker) would have been coerced. Nor is the requisite degree of probability of such presumed coercion evident. These considerations, to name only those that are most obvious, make the judging process a perilous enterprise and one in which the decision-maker can easily stumble by

being insufficiently sensitive to one considerations or another.[10]

Nevertheless, I do not believe that Shields' reaction to her questioning, as exhausting and painful as it may have been for her, represents the reaction of the "reasonable employee." Shields evidently believed that the whole investigation was calculated to retaliate against her for her protected activities in general and, in particular, the resulting animus between her and Claire Fitzgerald's husband. That belief cannot but have colored her reaction to her interview and to the questions she was asked. And in a certain sense that coloration was not unreasonable. But, as an employee, and it may be relevant to note her experience with how OIA investiga-tions work, I do not believe it was reasonable for Shields to ignore OIA's legitimate role in investigating allegations of employee misconduct irrespective of the source of the accusations.[11]

Absent any preconceptions about the motivation of the investigation, I conclude that the employees who were interviewed had no reasonable basis for disbelieving the announced purpose of their interviews and of the question they were asked. Nor was there shown the kind of general animosity to union activity that could reasonably be expected to have caused employees to harbor such preconceptions, except in the case of Shields, whose special concerns I have found not to have met the Authority's "objective" standard. The evidence indicates that the questioning was directed at the events leading up to and surrounding Shields' alleged misconduct, and that any questions about how the Union meeting itself was conducted were incidental to the focus of the inquiry but peripheral

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[10] Perhaps the foremost difficulty confronting the neutral decision-maker in using this intellectual construct is that an artificial employee cannot actually feel coerced, while a real employee can.

[11] Perhaps it is unavoidable for me to believe that the "reasonable employee" would view the OIA's role in initiating the investigation as I do. By the same token, Counsel for the General Counsel undoubtedly equates her view of the investiga-tion with that of a reasonable employee. But it is of at least some significance that the complaint does not allege a discriminatory motivation in the initiation of the investigation.

to considerations such as what the Union or its members were "up to."[12]

The affidavits and memoranda of employee interviews corroborate Hertel's testimony describing such a focus. Thus, although neither the employee testimony, much of which reflected hazy recollections, nor the affidavits and memoranda, purported to recreate the interviews comprehensively, the contents of the affidavits most of the employees signed at the end of their interviews reflect misconduct-directed questions. Employees reading the affidavits prepared for their signatures would have had additional basis for believing that their interviews had a legitimate purpose. Such a belief, of course, at least tends against a coercive interpretation.

Union Steward Lisa Tabor, the only interviewed employee presented as a witness who had not been given an affidavit to sign, testified that she did not recall the interviewer pursuing any questions about the discussion of the Union membership. Her testimony in general supported Hertel's explanation of how he conducted his interviews. Chief Steward Allport, who served as the Union representative for some of the interviewed employees, including Lisa Tabor, testified to nothing to the contrary.

Ultimately, therefore, I conclude that neither the initiation of the investigation of the April 12 incident nor the conduct and questioning that occurred at the employee interviews violated any employee rights protected by the Statute. While the interviews were coercive in the sense that they were involuntary, they lacked the coercive tendency that would result in a violation of section 7116(a)(1).

CASE NO. DE-CA-40937

Additional Findings of Fact

Associate Warden Fitzgerald reported the April 13 incident, in which Shields walked out of his office, to Shields' supervisor and to Warden Perrill, who informed OIA. OIA referred the matter to the Office of the Inspector General, which determined that the complaint had no prosecutorial merit and "deferred" it to OIA for

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12 References to discussion of the asbestos issue at the meeting were made in connection with the interviewees' explanations for Claire Fitzgerald presence, since the asbestos issue involved her husband.

administrative resolution. Meanwhile, Shields complained about Fitzgerald's issuance of a "formal" letter of counseling as being contrary to an agreement with the Union that such letters would be considered informal and not be issued until cleared by the human resources department. The April 13 letter was subsequently withdrawn and a similar letter was issued, omitting the word "formal." Later the substituted letter was withdrawn.

After an investigation of the April 13 incident by OIA, Shields' supervisor, Captain James A. Graham, issued a notice to Shields of a proposed 2-day suspension for Disrespectful Conduct Toward a Supervisor. The notice informed Shields that the Warden would make the final decision on the proposed discipline, that Shields could respond orally or in writing within ten days, and that the Warden would make no final decision until after a timely response was made.

Shields arranged for a presentation of an oral response to Warden Perrill. This session was transcribed, and I rely on the transcription for the pertinent excerpts of that meeting to which I refer in the "Discussion and Conclusions" below. Warden Perrill ultimately found the charge of Disrespectful Conduct Toward a Supervisor to have been fully supported by the evidence in the disciplinary action file, considering also Shields' oral response. He issued a suspension of one calendar day, deciding that, in light of such factors as her 16 years of service and her acknowledgment of the seriousness of her behavior, that such a suspension "should have the necessary corrective effect."

Discussion and Conclusions: Case No. DE-CA-40937

Section 7102 of the Statute provides, in pertinent part, that "[e]ach employee shall have the right to form, join, or assist any labor organization . . . freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." Section 7102 further delineates "such right," in general ("[e]xcept as otherwise provided . . ."), as including the right:

> (1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government . . . , and

> (2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

The employee activities protected under section 7102 are thus somewhat circumscribed in comparison to those protected by section 7 of the National Labor Relations Act (NLRA), which include, in addition to union activities, "other concerted activities for the purpose of collective bargaining or other mutual aid or protection." As the Authority has recognized, "the Statute does not expressly cover concerted activities," and not all concerted activities that are protected under the NLRA are protected under the Statute. *U.S. Department of Labor, Employment and Training Administration, San Francisco, California*, 43 FLRA 1036, 1038, 1039 (1992) (*ETA*). Thus, in *ETA*, the Authority engaged in an analysis of the alleged protected activity to determine whether it fit within the narrower scope of section 7102. *See also U.S. Department of Justice, Immigration and Naturalization Service, United States Border Patrol, San Diego Sector, San Diego, California*, 38 FLRA 701 (1990), *enforcement denied,* Case Nos. 91-70078 and 91-70162 (9th Cir. June 22, 1992).

Given this narrower scope, the Authority has focused on whether the record indicates that an employee who was alleged to have engaged in protected activities was acting on behalf of a union or acting in any other manner to invoke the assistance of a union. *See U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Detroit Teleservice Center, Detroit Michigan*, 42 FLRA 22, 23-24 (1991); *Department of the Treasury, Internal Revenue Service, Andover Service Center, Andover, Massachusetts*, 13 FLRA 481, 489-90 (1983) (*IRS Andover*).[13] Even if the employee in question serves in an official capacity or otherwise as a representative of a labor organization, the Authority inquires into whether that employee was acting in such a capacity when engaging in the allegedly protected activity. *American Federation of Government Employees, National Border Patrol Council and U.S. Department of Justice, Immigration and Naturalization Service, El Paso*

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13 *But cf. Letter Carriers v. Austin*, 418 U.S. 264, 278 n. 13 (1974) ("The absence of mention of a right to engage in concerted activities [in section 1 of Executive Order 11491, the predecessor of section 7102 of the Statute] is obviously no more than a reflection of the fact that the Order does not permit federal employee unions to engage in strikes or picketing").

Border Patrol Sector, 44 FLRA 1395, 1401-02 (1992). *See also Department of Treasury, Internal Revenue Service, Memphis Service Center*, 16 FLRA 687, 696 (1984) (Judge's decision). If, therefore, the employee was acting either solely as an individual or as a personal, rather than as a union representative, that particular activity is not protected under section 7102. *General Services Administration, Central Office, Region IV Interagency Motor Pool, Kennedy Space Center*, 17 FLRA 341 (1985); *IRS Andover* at 484, 489-90.

While it is hardly debatable that Shields was acting in her capacity as Union president when she attempted to engage Associate Warden Fitzgerald in a discussion on March 24, the same can not be said about her capacity when summoned to the meeting with Fitzgerald on April 13. Fitzgerald summoned Shields to that meeting to issue her a letter of counseling with respect to her March 24 conduct. Shields appeared with a Union representative to assist her in protecting her rights as an employee. Whether or not Shields' March 24 conduct justified the letter of counseling, or was, in itself, protected activity, is irrelevant to the capacity in which Shields attended the April 13 meeting. Nor can Shields' capacity at that meeting be transformed by Counsel for the General Counsel's characterizations of the letter and the meeting as a "nullity," or a "fraud."

Irrespective of how Shields may have wished to view her capacity during the April 13 meeting, her presence at that meeting was required because she was an employee. Thus, it is difficult to quarrel with a point Warden Perrill made to Shields, during their September 2 "oral response" session. Shields, responding to the charge that her conduct indicated a lack of respect for the positions of FCI's supervisors, had asked how there could be respect "when I believe it's retaliation." Warden Perrill replied: "Even if you believed it was retaliation[,] does that give you an excuse to walk out of a meeting that the Warden of that facility has called[?]" Shields chose not to respond to that directly, but asked the warden to "go back" to another incident. (GC Exh. 16, 2d page--unnumbered.)

When Warden Perrill asked her specifically why she had walked out, Shields' still gave him no indication that she considered herself to have been acting in pursuit of a Union objective. The reason she gave in answer to Perrill's question was that she had walked out "[t]o diffuse a situation where I had no knowledge of what [Fitzgerald] was going to do" (GC Exh. 16, 4th page). Perrill was entitled to treat that answer as an assertion that Shields had

assumed the prerogative of deciding when it was appropriate to end the April 13 meeting.

At another point in the September 2 "oral response" meeting, Perrill told Shields that what he was trying to decide was "whether it was unprofessional conduct, insubordination, or disrespectful conduct, whatever, in terms of your departing the room." Shortly after that, Perrill told Shields that "the issue is that you left a meeting that was called for a particular purpose, without allowing a supervisor to finish. And [you're] saying you did that because you thought he had no right to have the meeting." Shields' response -- "I still believe that it was in retaliation" -- still gave no indication that she purported to have been acting in a representative capacity at that meeting. (GC Exh. 16, 6th-7th pp.)[14] Later in the September 2 meeting, Shields answered affirmatively when Perrill asked whether she had decided to walk out of the April 13 meeting "simply because you thought it was an illegal meeting[.]"

On this evidence, I conclude that Shields was not acting in any Union-related capacity when she walked out of the April 13 meeting and therefore was not engaged in protected activity, as ordinarily conceived, within the purview of section 7102. A situation as complex as this, of course, lends itself to more than one interpretation. For example, Shields' conduct could be viewed as aimed at assisting the Union by protesting the treatment suffered by the Union president--herself. However, even if there was a "protected" aspect to Shields' conduct, I conclude that a *prima facie* case of unlawful discrimination would be established only if the Respondents were motivated by that aspect of the conduct rather than the manner in which she, as an employee, interacted with a supervisor.

A *prima facie* case requires not only a showing of protected activity and a motivation that is *somehow* connected to that activity, but also a showing that "consideration of such activity was a motivating factor" in the alleged discriminatory action. *U.S. Department of Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Service Center, Ogden, Utah*, 41 FLRA 1212, 1213 (1991). *Consideration* of the protected activity means a conscious interplay between (1) the agency's decision to take certain action and (2) what it was about the employee conduct that made it protected

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[14] On the other hand, Shields did make the point to Perrill that she had been acting as a Union representative during the March 24 encounter (GC Exh. 16, 18th page).

activity.[15] Thus, I believe that an agency's motivation may be found to be unlawful only to the extent that its representative has actually focused on the protected aspect of an employee's conduct.[16]

However, Shields' suspension may also be found unlawful if it was motivated by other of Shields' activities that fall within the protection of section 7102. *United States Air Force Academy, Colorado Springs, Colorado*, 50 FLRA 498, 502 (1995). Counsel for the General Counsel attempts to make such a case by weaving all of the background events into a plan by FCI to chill Shields' exercise of her section 7102 rights and to retaliate against the whole gamut of her protected activities.

I do not find that a *prima facie* case has been made. FCI took specific actions in connection with various accusations against Shields. Nothing about Warden Perrill's decision to suspend Shields for one day indicates that it was made for any reasons other than the conduct that it purports to address. I find Perrill's asserted motivation to be supported by his recorded statements and questions at his September 2 "oral response" session with Shields, which I find to be especially probative in attempting to reconstruct Perrill's decision-making process. In addition, the 1-day suspension was hardly disproportionate to what, as I find, Perrill reasonably believed to have been seriously disrespectful conduct. Although not formally labeled "insubordination" in either the notice of proposed discipline or in Perrill's decision letter, it was, on the facts Shields admitted to Perrill at the "oral response" session, substantially equivalent to that. That was also the way OIA Special Agent Strack characterized it in her Investigative Report. *Cf. Bigelow v. Department of Health & Human Services*, 750 F.2d 962 (Fed. Cir. 1984)(discharge of employees, who were union officials, for insubordination when they refused to undergo ordered retraining, upheld despite their claim that they believed the order violated their contractual right to 100 percent official time).

Nor do I find persuasive the speculative suggestion by Counsel for the General Counsel that Fitzgerald acted as he

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[15] That interplay is sometimes manifested, or described, as animus, although, using the word in a somewhat different sense, animus is sometimes identified as a separate element in a finding of discriminatory motivation.

[16] This does not mean that the representative must have possessed the *legal* knowledge that the activity was protected.

did in arranging the April 13 counseling-letter meeting in order to provoke Shields into a reaction that would lead to her discipline. Even if he harbored ill will toward Shields for other reasons, which there is reason to believe, and even though he failed to prepare the letter of counseling concerning the March 24 incident until after the April 12 incident involving his wife, there is little reason to doubt that Fitzgerald believed that a letter of counseling was appropriate. Indeed, Warden Perrill testified credibly that he and Fitzgerald discussed the March 24 incident shortly after it occurred and that Perrill asked him to prepare such a letter. Thus, while the timing of its issuance was unfortunate, there is no substantial basis on which to find that its purpose was to produce an incriminating reaction on Shields' part.

In sum, therefore, I conclude that it has not been established that Perrill's 1-day suspension of Shields constituted discrimination within the meaning of section 7116(a)(2) of the Statute or otherwise constituted interference, restraint, or coercion within the meaning of section 7116(a)(1).

Recommendation

I recommend that the Authority issue the following order:

ORDER

The consolidated complaint is dismissed.

Issued, Washington, D.C., May 10, 1996

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JESSE ETELSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case Nos. DE-CA-40870 and DE-CA-40937 sent to the following parties in the manner indicated:

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