66 FLRA No. 111

UNITED STATES
DEPARTMENT OF THE AIR FORCE
AIR FORCE MATERIEL COMMAND
WARNER ROBINS AIR LOGISTICS CENTER
ROBINS AIR FORCE BASE, GEORGIA
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 987
(Charging Party/Union)

AT-CA-08-0313

DECISION AND ORDER

April 20, 2012

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Introduction

This unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the General Counsel (GC). The Respondent filed an opposition to the GC's exceptions.

The complaint alleges that the Respondent violated § 7116(a)(1)[1] of the Federal Service Labor-Management Relations Statute (the Statute) "when investigators from the Air Force Office of Special Investigations (AFOSI)" threatened the Union president with discipline if he did not reveal an informant's identity. Judge's Decision at 2; *see also id.* at 3. The Judge found that the Respondent did not violate the Statute and ordered that the complaint be dismissed. *Id.* at 16. For the reasons set forth below, we deny the GC's exceptions and dismiss the complaint.

II. Background and Judge's Decision

A bargaining unit employee told the Union president that employees working in the Respondent's mailroom were destroying unlawfully first and second class mail. *Id.* at 3. The employee requested that the Union president not identify him as the informant when the president notified management of the allegation. *Id.*

After bringing the allegation to management's attention, the Union president was asked, on a few occasions, to divulge the source of the allegation. *Id.* He refused "to do so because the employee had requested anonymity, fearing retaliation and reprisal by his first-line supervisor." *Id.* The Union president then received a written directive from his supervisors requiring him "to report to the AFOSI building for an interview." *Id.* at 4. Two investigators from AFOSI – a federal law enforcement agency within the Department of the Air Force "responsib[le] for conducting criminal investigations, counterintelligence activities, and specialized investigative and force protection support" – conducted the interview. *Id.*

During the interview, the investigators asked the Union president to sign a document stating "that disciplinary action, including dismissal[,] could be taken against him for . . . refus[ing] to answer or fail[ing] to reply fully and truthfully[.]" *Id.* The Union president refused to do so. *Id.* The Union president answered all of the investigators' questions "except the one asking him to identify the source of" the allegation. *Id.* The investigators then concluded the interview. *Id.*

The Judge concluded that AFOSI is excluded from the Statute's coverage. *Id.* at 6-7. The Judge found that, pursuant to the discretion afforded the President under § 7103(b)(1)[2] of the Statute, President Carter exempted AFOSI from "all requirements and limitations

[1] Section 7116(a)(1) states that: "[f]or the purpose of this chapter, it shall be an unfair labor practice for an agency . . . to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter." 5 U.S.C. § 7116(a)(1).

[2] Section 7103(b)(1) of the Statute states that:

> 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.

5 U.S.C. § 7103(b)(1).

imposed by the Statute" in Executive Order 12,171.[3] *Id.* at 7; *see also id.* at 6. Moreover, the Judge determined that, because AFOSI is excluded from coverage under the Statute, it is not "prohibited from engaging in the [actions] set forth in § 7116 of the Statute." *Id.* at 7.

The Judge also found that the Respondent cannot be held liable for committing a ULP based solely on the actions of AFOSI investigators. *See id.* at 8-13. Examining the Statute, the Judge determined that Congress's clear intent with respect to § 7103(b)(1) was to give the President the authority to identify federal agencies or subdivisions that should be exempt from coverage under the Statute. *Id.* at 10, 11. According to the Judge, the President properly exercised this authority when he excluded AFOSI from the Statute's coverage. *Id.* at 10. The Judge found that holding the Respondent liable for the investigators' actions would conflict with "the President's determination that the Statute's requirements were inconsistent with national security requirements and considerations when applied to . . . AFOSI." *Id.* at 13.

Finally, the Judge indicated that the Agency also argued that the threat of discipline did not constitute a ULP under § 7116(a)(1) of the Statute. *Id.* at 6, 15; *see also* Respondent's Opp'n, Attach., Respondent's Post-Hearing Brief, at 18-21 (arguing, among other things, that the threat of discipline did not constitute a ULP because the Respondent had an overriding need to know the informant's identity). However, the Judge determined that, because AFOSI's exemption shielded the Respondent from ULP liability, it was unnecessary to address this issue. Judge's Decision at 15.

[3] Executive Order 12,171 states that:

> The agencies or subdivisions thereof set forth in Section 1-2 of this Order are hereby determined to have as a primary function intelligence, counterintelligence, investigative, or national security work. It is also hereby determined that [the Statute] cannot be applied to those agencies or subdivisions in a manner consistent with national security requirements and considerations. The agencies or subdivisions thereof set forth in Section 1-2 of this Chapter are hereby excluded from coverage under [the Statute].

Exec. Order No. 12,171, 44 Fed. Reg. 66,565 (Nov. 19, 1979). AFOSI is excluded from coverage under Section 1-206(k) of the Executive Order.

III. Positions of the Parties

A. GC's Exceptions

The GC asserts that the Judge erred in finding that the Respondent is not liable for committing a ULP based solely on the actions of AFOSI investigators who are exempt from the Statute's coverage. GC's Exceptions at 8-13. The GC claims that Congress used primarily the same language in § 7103(a)(2)(B), which, according to the GC, excludes certain positions from coverage under the Statute, as it did in § 7103(b)(1). *Id.* at 10. The GC contends that, as a result, "Congress intended for [those] exclusions to have the same effect." *Id.* The GC maintains that employees who work in positions exempt from coverage under § 7103(a)(2) can, and do, commit ULPs when acting as representatives of federal agencies. *Id.* at 10-11. The GC argues that a non-exempt agency should be held responsible for any ULPs committed by an agency that is excluded from coverage under § 7103(b)(1) "when the non-exempt agency has sufficient control, direction, or participation in the complained of conduct." *Id.* at 11.

In addition, the GC claims that the Respondent, through AFOSI, committed a ULP by improperly threatening the Union president with discipline if he did not identify the source of the allegation. *Id.* at 14-17. Specifically, the GC asserts that, because the Union president learned of the informant's identity while acting in his capacity as a Union representative, the informant's identity constitutes privileged information. *Id.* at 17. Moreover, the GC contends, given that AFOSI "did not even bother to determine how many employees work[ed] in [the] Respondent's mail[room] before issuing th[e] threat," the Respondent has not established that "the identity of the informer was necessary." *Id.*

B. Respondent's Opposition

The Respondent argues that, pursuant to § 7103(b)(1), AFOSI is exempt from the Statute's coverage. Respondent's Opp'n at 1-7. As a result, the Respondent maintains the Statute's provisions do not apply to AFOSI, *id.* at 2, 3, 6, and its actions cannot constitute a violation of the Statute, *id.* at 2.

The Respondent also contends that it cannot be found liable for committing a ULP based solely on the actions of investigators from AFOSI. *Id.* at 7-8. According to the Respondent, a finding that AFOSI was acting as the Respondent's representative "would violate the principles underlying the exemption provisions[.]" *Id.* at 7. Moreover, the Respondent argues that such a finding "would, in effect, nullify [§ 7103(b)(1) because] . . . a charging party could always circumvent

[§ 7103(b)(1)] by charging indirectly what the Statute clearly prohibits [it] from charging directly." *Id.* In addition, the Respondent maintains that, even if AFOSI's exemption does not shield it from liability, AFOSI should not be treated as the Respondent's representative because it did not collaborate with AFOSI. *See id.* at 9-11.

Finally, the Respondent argues that the investigators' actions – threatening the Union president with discipline if he did not identify the informant – do not constitute a ULP under § 7116(a)(1). *Id.* at 11-16. The Respondent claims that the informant's identity is not privileged information because "[t]he privilege recognized under the Statute only applies to labor-management matters and not to criminal investigations." *Id.* at 16. Moreover, the Respondent contends that "an employee's right to confidentiality of statements he or she makes to a union representative is limited to statements made in the course of representing the employee in a disciplinary proceeding and to the substance of the statement." *Id.* at 11; *see also id.* at 12-13. Additionally, the Respondent maintains that, even if confidential communications are not so limited, it had an overriding need for the information given it was investigating alleged criminal activity.[4] *E.g.*, *id.* at 11, 15.

IV. Analysis and Conclusion: The Respondent did not violate § 7116(a)(1) of the Statute by threatening the Union president with discipline if he refused to disclose the informant's identity.

The GC asserts that the Judge erred in finding that the Respondent is not liable for the actions of AFOSI investigators who are exempt from the Statute's coverage. GC's Exceptions at 8-13. According to the GC, the Respondent violated § 7116(a)(1) of the Statute, through AFOSI, by threatening the Union president with discipline if he refused to disclose the identity of the informant. *Id.* at 14-17.

We find it unnecessary to address whether the Respondent can be held liable for AFOSI's actions. Even assuming that AFOSI's exemption does not shield the Respondent from ULP liability and that AFOSI was acting as the Respondent's representative, the Respondent did not violate § 7116(a)(1) of the Statute.[5]

The standard for determining whether management's statement or conduct violates § 7116(a)(1) is an objective one. *U.S. Dep't of Veterans Affairs*, 56 FLRA 696, 697 (2000) (*VA*). The question is whether the statement or conduct would tend to coerce or intimidate the employee, or whether the employee reasonably could have drawn a coercive inference from the statement. *VA*, 56 FLRA at 697; *see also Dep't of the Air Force, Scott Air Force Base, Ill.*, 34 FLRA 956, 962 (1990) (*Scott AFB*). Although the surrounding circumstances are taken into consideration, the standard is not based on the subjective perceptions of the employee or the intent of the employer. *E.g.*, *VA*, 56 FLRA at 697; *Scott AFB*, 34 FLRA at 962.

Applying this standard, the Authority has held that a respondent violates § 7116(a)(1) by requiring a union representative to disclose, under threat of disciplinary action, privileged communications made by an employee to that union representative in the course of representing the employee in a disciplinary proceeding. *See, e.g.*, *VA*, 56 FLRA at 697; *U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 38 FLRA 1300, 1308 (1991) (*Customs Serv.*). The Authority has determined that such communications should be protected because employees must be free to make full and frank disclosures to their representatives in order to obtain adequate advice and a proper defense. *See Customs Serv.*, 38 FLRA at 1308; *Long Beach Naval Shipyard, Long Beach, Cal.*, 44 FLRA 1021, 1037 (1992) (*Long Beach*). However, the Authority has found no violation of § 7116(a)(1) when the right to maintain the confidentiality of the conversations was waived or some overriding need for the information was established. *E.g.*, *U.S. Dep't of Treasury, U.S. Customs Serv., Customs Mgmt. Ctr., Ariz.*, 57 FLRA 319, 324 (2001)

[4] The GC filed an additional brief (GC's opposition) in the event that the Authority determined that the Respondent's opposition contained cross-exceptions. The GC asserts that the Respondent, in its opposition, implicitly disagrees with: (1) the Judge's finding that AFOSI collaborated with the Respondent and (2) the Judge's rejection of the Respondent's contention that only confidential communications made to a union representative during a disciplinary proceeding are protected. GC's Opp'n at 2. In its opposition, the Respondent does not except, or even refer, to the Judge's findings concerning the Respondent's collaboration with AFOSI or his determination that it was unnecessary for him to address whether the investigators' actions constituted a ULP. *See* Respondent's Opp'n at 9-16. Therefore, we will not construe these portions of the Respondent's opposition as cross-exceptions. *See AFGE, AFL-CIO & AFGE, Local 1164*, 53 FLRA 1812, 1813 n.2 (1998). Accordingly, we find that it is unnecessary to address the GC's opposition.

[5] The Judge did not determine whether the threat of discipline violated § 7116(a)(1). Judge's Decision at 15. Because the record is sufficient for us to decide whether the threat of discipline constituted a violation of § 7116(a)(1), we find it is unnecessary for us to remand this issue to him. *See U.S. Dep't of the Air Force, U.S. Air Force Acad., Colo.*, 65 FLRA 756, 760 n.3 (2011) (Chairman Pope dissenting in part) (finding that, because the record was sufficient to determine whether the respondent knowingly acquiesced to the disputed practice, a remand was unnecessary).

(*Customs Mgmt. Ctr.*) (Member Wasserman dissenting); *Long Beach*, 44 FLRA at 1037-38.

Even assuming – without deciding – that the discussion between the Union president and the employee was a privileged communication, the Respondent has established an overriding need to know the informant's identity. Here, the investigation was undertaken after the Union president brought an allegation to management's attention. Judge's Decision at 3; *see also Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 53 FLRA 1500, 1510 (1998) (taking into account that investigation was undertaken in response to an employee's allegations when determining that the respondent established an extraordinary need for the information). The allegation concerned a serious matter – i.e., that employees working in the Respondent's mailroom were improperly destroying first and second class mail and thus were engaging in possible criminal activity. As a result, the investigators were justified in insisting that the Union president disclose the source of the allegation. *See Customs Mgmt. Ctr.*, 57 FLRA at 324 (finding that, considering the serious nature of the allegation, the respondents were justified in attempting to verify the information that its supervisor had received); *see also United States v. Nixon*, 418 U.S. 683, 703-13 (1974) (the constitutionally-based privilege of the President of the United States to obtain confidential advice from his closest advisors gives way to the need for evidence in a criminal prosecution).

The GC contends that the Respondent has not shown that "the identity of the inform[ant] was necessary" given that AFOSI "did not even bother to determine how many employees work[ed] in [the] Respondent's mail[room] before issuing th[e] threat." GC's Exceptions at 17. However, AFOSI's detachment commander testified that many of AFOSI's agents were, or were preparing to be, deployed overseas, *see* Tr. at 126, 132, and that, with limited resources, he wanted to go directly to the source of the allegation and "develop a plan of attack from there," *id.* at 132; *see also id.* at 126, rather than interview mail-room employees individually. The GC does not dispute this testimony. Moreover, AFOSI investigators limited their questioning to the identity of the informant, and they immediately concluded the interview when the Union president refused to identify the source of the allegation. *See* Judge's Decision at 4; Tr. at 40, 56, 106, 147; *see also Customs Mgmt. Ctr.*, 57 FLRA at 324-25 (considering the fact that the special agent limited the questioning to the critical issue and ended his line of questioning immediately on being told by the employee that there had been no instruction to provide false information in finding that the respondent had an overriding need for the information).

Under these circumstances, the Respondent has established a need for this information sufficient to override any theorized privilege that might have attached to the informant's identity. *See Customs Mgmt. Ctr.*, 57 FLRA at 325. Accordingly, even assuming AFOSI's exemption does not shield the Respondent from ULP liability, the Respondent did not violate § 7116(a)(1).

V. Order

The complaint is dismissed.

Office of Administrative Law Judges

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AT-CA-08-0313

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Patricia Kush
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Phillip G. Tidmore
R. Mina Gawaran
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For the Respondent

Thomas Scott, Jr.
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This is a proceeding under the Federal Service Labor-Management Relations Statute (FSLMRS), Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 *et. seq*., 92 Stat. 1191 (Statute) and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, Subchapter B, Part 2411 *et. seq*.

The Regional Director for the Atlanta region of the FLRA issued a Complaint and Notice of Hearing on September 18, 2009, based upon an unfair labor practice charge filed against the Department of the Air Force, Air Force Materiel Command, Warner Robins, Georgia (Respondent) on May 5, 2008, by the American Federation of Government Employees, Local 987, AFL-CIO (Union). That Complaint was amended on November 12, 2009, after the Respondent filed no opposition to the General Counsel's Motion to Amend Complaint. The Amended Complaint alleges that the Respondent committed an unfair labor practice in violation of §7116(a)(1) of the Statute when investigators from the Air Force Office of Special Investigations (AFOSI) informed Union President Tom Scott "that he could be subject to discipline, up to and including discharge, if he did not reveal the identity of the person who made the allegations described in paragraph 13" of the Amended Complaint. The allegations set forth in paragraph 13 involved "potential violations of federal law in the Respondent's mail room."

The Respondent filed an Answer to the original Complaint on October 9, 2009, and amended that Answer on October 26, 2009. On October 30, 2009, the Respondent filed a Motion for Summary Judgment, to which the General Counsel filed a Reply on November 4, 2009. The Respondent's Motion for Summary Judgment was denied by an Order issued on November 5, 2009. On November 18, 2009, the Respondent filed a Motion to Revoke Subpoena, to which the General Counsel filed a response on November 19, 2009, and an Order denying the motion was issued on November 20, 2009. On November 25, 2009, the Respondent filed a Motion for Protective Order related to an un-redacted copy of an AFOSI Report of Investigation, which motion was granted at the hearing held in Warner Robins, Georgia, on December 7, 2009.

At the hearing, all parties were represented and afforded a full opportunity to be heard, produce relevant evidence, and examine and cross-examine witnesses. During the hearing, General Counsel motioned to amend the Complaint for a second time and that oral motion was denied because the General Counsel sought to alter the allegation set forth in the Complaint in a material manner for which the Respondent had no notice or opportunity to prepare a defense. In essence, the General Counsel wished to change the legal theory established in the Complaint and prehearing disclosures by asserting that an unfair labor practice occurred when Respondent's employee engaged in the separate and distinct action of directing Tom Scott to submit to an interview as part of the investigation being conducted by special agents from AFOSI. Because the Respondent was only apprised of this new theory on the day of hearing and it changed both the identity of the violator and the action asserted to be a violation, the motion to amend was denied. While the General Counsel had recognized the directive to submit to an interview as a factual predicate to the violation alleged in the Amended Complaint, the hearing was the

first time that the General Counsel gave notice that it viewed that separate act as an unfair labor practice unto itself. In fact, Paragraph 22 of the General Counsel's Amended Complaint clearly states that it was the conduct described in Paragraph 21 that violated the Statute, and Paragraph 21 only discusses the conduct of AFOSI investigators during the interview, and not the conduct of the employee who directed Tom Scott to submit to the AFOSI interview. Ex. 1(t). Although Authority precedent allows for "mere ambiguity" in the language of a complaint, the Authority also held that the complaint must put the Respondent on notice of the basis of the charge against it. *U.S. Dep't of Health and Human Serv., Health Care Financing Admin.,* 35 FLRA 491 (1990) (*DHSS*). In *DHSS*, the Authority determined that the General Counsel's incorrect identification of § 7122(a) rather than § 7122(b) of the Statute as the source of a required action was not fatal to the complaint's assertion of § 7116(a)(1) and (8) violations. However, the Authority made that determination because the failure to take the action required by § 7122(b) was clearly described as the violation even though that provision of the Statute was misidentified as §7122(a) in the complaint. Thus, Authority precedent actually requires that one look to what action the complaint alleges as an unfair labor practice. In this case, the actions set forth and clearly described in the complaint as the unfair labor practice were the actions of the AFOSI agents who interviewed Tom Scott and not the action of Respondent's employee who directed Scott to attend the interview. Simply put, due process and Authority precedent precludes the General Counsel from alleging an unfair labor practice because "A did this" and then establishing at hearing that a violation occurred by proving "B did that".

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 at the hearing, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency under § 7103(a)(3) of the Statute. GC Ex. 1(f)(g). The Union is a labor organization within the meaning of § 7103(a)(4) of the Statute. GC Ex. 1(f)(g). The Union is the exclusive representative of a unit of employees appropriate for collective bargaining at Respondent's facility. GC Ex. 1(f)(g).

On or about January 30, 2008, a bargaining unit employee who worked in the mailroom at Warner Robins Air Force Base (WRAFB) informed Union president Tom Scott that he believed first and second class mail was being improperly destroyed by employees working in the WRAFB mailroom. GC Ex. 2; T-32. While providing that information, the bargaining unit employee requested that he not be identified as the source of the allegation when Scott pursued the matter with management. GC Ex. 3; T-33.

On that same date Scott contacted Jo Ann Rape, a representative of Respondent's management within the chain of command at the mailroom who was not the informant's immediate supervisor and informed her of the allegation. T-33. In response to Scott's telephone call and electronic mail, Ms. Rape indicated that she would look into the matter and involve the appropriate officials. GC Ex. 3, T-34. Although Ms. Rape asked Scott to identify the source of the information, he declined to do so because the employee had requested anonymity, fearing retaliation and reprisal by his first-line supervisor. T-33.

The day after discussing the matter with Ms. Rape, Scott received a telephone call from Lieutenant Colonel Hubbard, detachment commander for the Air Force Office of Special Investigations (AFOSI) at WRAFB, who wanted to know the identity of the person who gave Scott the information he disclosed. T-35, 97. Scott refused to identify the source and the telephone call was concluded. T-36. A subsequent telephone call between Hubbard and Scott resulted in another refusal to identify the source, and on February 7, 2008, Scott was given a written directive from his first and second line supervisors to report to the AFOSI building for an interview at 1300 hours on that date. Jt. Ex. 1; T-37.

On February 7, 2008, Scott reported to the AFOSI building as directed, bringing with him Union executive vice president Charlie Tripis to serve as his union representative. T-38. When Colonel Hubbard directed Scott to an interview room within the AFOSI detachment, he refused to allow Scott to have his union representative present and also refused to allow a Union attorney to participate via conference call. T-39, 103-04. Lt. Colonel Hubbard did not participate in the actual interview of Scott and it was conducted by two other AFOSI agents. At the onset of interview, the AFOSI agents provided Scott with a document entitled: WARNINGS AND ASSURANANCES TO EMPLOYEE REQUIRED TO PROVIDE INFORMATION (KALKINES). After reading the document to him, which included language indicating that disciplinary action, including dismissal could be taken against him for his refusal to answer or failure to reply fully and truthfully, the special agents requested that Scott acknowledge the document with his signature. Jt. Ex. 2; T-39, 40. Scott refused to sign the document and again requested a union representative, which was refused a second time. T-40. Scott then answered all of the questions posed by the

agents except the one asking him to identify the source of his information, whereupon the interview was concluded. T-40.

The Air Force Office of Special Investigations is a field operating agency within the Department of the Air Force under the direction and guidance of the Air Force Inspector General. It performs as a federal law enforcement agency with responsibility for conducting criminal investigations, counterintelligence activities, and specialized investigative and force protection support for the Department of the Air Force. The Commander of AFOSI reports to the Air Force Inspector General, who in turn, reports to the Secretary of the Air Force. The enabling legislation which provides the legal authority for AFOSI operations include Public Law 95-452, The Inspector General Act of 1978, and Public Law 99-145, Section 1223, the Department of Defense Authorization Act of 1986. The headquarters of AFOSI is located at Andrews AFB, Maryland, with eight regional offices located throughout the United States and Europe and detachment offices at individual Air Force installations throughout the world.

Although AFOSI detachments are located upon Air Force installations and conduct criminal investigations when serious crimes occur thereupon, they are not part of the chain of command at the installation. AFOSI has an independent command structure and their authority to initiate investigations emanates from the authority granted to the Air Force Inspector General in the laws identified above and not the authority given to an installation commander by the Department of the Air Force. The badges carried by Special Agents assigned to AFOSI reflect that they are agents of the Inspector General. T-80, 87.[1]

On November 19, 1979, President Jimmy Carter issued Executive Order No. 12171 (E.O. 12171) which excluded certain agencies or subdivisions thereof from coverage under Chapter 71 of Title 5 of the United States Code pursuant to authority set forth in § 7103(b)(1) of the Statute. Jt. Ex. 3. Paragraph 1-206(k) of that Order states that the Air Force Office of Special Investigations is exempt from coverage based upon the determinations set forth in Paragraph 1-101. Jt. Ex. 3.

In the days following his interview, Scott was served a subpoena to testify before a grand jury of the United States District Court for the Middle District of Georgia on March 11, 2008. GC Ex. 4; T-41, 56. On that date and before the grand jury to which he was properly subpoenaed, Scott answered all of the questions that were posed and disclosed the identity of the bargaining unit employee who gave him the information he provided to the Respondent on January 30, 2008. T-58. At the time of the hearing, no disciplinary action had been imposed upon Scott or the bargaining unit employee who initiated the allegations that were the subject of the investigation. T-61, 62.

DISCUSSION AND ANALYSIS

Position of the Parties

A. General Counsel and the Charging Party

The General Counsel contends that the Respondent violated § 7116(a)(1) of the Statute through special agents of the Air Force Office of Special Investigations who threatened Union president Tom Scott with discipline if he did not reveal the identity of the bargaining unit employee that reported potential criminal conduct in the Respondent's mailroom facility at Warner Robins AFB. The General Counsel argues that any exclusion from the Statute bestowed upon the AFOSI does not insulate Respondent from liability for a violation. In support of its argument, the General Counsel cites *U.S. Dep't of the Air Force, Ogden Air Logistics Ctr., Hill Air Force Base, Utah*, 36 FLRA 748 (1990); *U.S. Dep't of the Air Force, Office of Special Investigations, McChord Air Force Base, Tacoma, Wash.,* Case No. 9-CA-80368 (1990), ALJD No. 90-09 (1989) and *Lackland Air Force Base Exchange, Lackland Air Force Base, Tex.*, 5 FLRA 473 (1981). GC Brief at 10. The General Counsel also contends that any exclusion from coverage under the Statute granted AFOSI excuses them from a collective bargaining obligation but not from all compliance with the Statute. T-24.

Finally, the General Counsel alleges that it properly charged the Respondent with a violation of § 7116(a)(1) by directing Union president Tom Scott to attend a meeting with AFOSI in which Scott would be threatened with discipline if he did not reveal the identity of the bargaining unit employee who reported potential criminal conduct in Respondent's mail room. In support of its contention, the General Counsel cites *DHHS*, 35 FLRA at 491. GC's Brief at 21.

B. Respondent

The Respondent contends it did not violate the Statute because the actions alleged by the General Counsel to be an unfair labor practice were committed by special agents from the Air Force Office of Special Investigations, a subdivision within the Department of the Air Force which has been exempted from coverage under

[1] Information concerning AFOSI was also provided by administrative notice of Air Force Mission Directive 39, 1 November 1995, at http://www.fas.org/irp/doddir/usaf/afmd_39.pdf; and the AFOSI Fact Sheet at http://www.osi.andrews.af.mil/library/factsheets.

the Statute pursuant to 5 U.S.C. § 7103(b)(1). Resp Brief at 7. The Respondent cites paragraph 1-206(k) of E.O. 12171 as evidence that the President exercised the authority provided within the Statute to exempt the Air Force Office of Special Investigations from coverage because it is identified within the executive order as one of the governmental entities for which the determinations required by the Statute were made.

Although it relies upon the exemption defense, the Respondent also contends that if special agents from AFOSI were not excluded from coverage under the Statute, that using a threat of discipline to force Union president Scott to identify the person who provided him with the information he previously disclosed would not be an unfair labor practice in violation of the Statute. In support of that argument, the Respondent distinguishes the facts in this case from those presented in *U.S. Dep't of the Treasury, Customs Serv., Washington, D.C.*, 38 FLRA 1300 (1991). Resp. Brief at 16.

DISCUSSION

A. The Air Force Office of Special Investigations is Excluded From 5 U.S.C. § 7116(a)(1)

Given the determinations set forth in Executive Order 12171 and signed by President Carter on November 19, 1979, it is clear that AFOSI special agents who are conducting criminal investigations pursuant to lawful authority given to the Inspector General of the Air Force by the Inspector General Act of 1978 and the Department of Defense Authorization Act of 1986, are excluded from the requirements generally imposed upon federal agencies by the Statute. In addition to the agencies and employees identified as excluded from coverage in § 7103 (a) of the Statute, subparagraph (b) of that section authorizes the President to issue an order excluding any agency or subdivision thereof from coverage under Chapter 71 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.

In this case, such determinations were made with respect to the Air Force Office of Special Investigations, as established in paragraph 1-206(k) of E.O. 12171 and AFOSI, like other entities within the Department of the Air Force, Department of Defense identified in paragraph 1-206 cannot constitute agencies prohibited from engaging in the unfair labor practices set forth in § 7116 of the Statute. The totality of the exemption provided by § 7103(b)(1) is made clear by the language in the preamble of the executive order issued pursuant to its language:

> "By the authority vested in me as President by the Constitution and statutes of the United States of America, including Section 7103(b) of Title 5 of the United States Code, and in order to exempt certain agencies or subdivisions thereof from coverage of the Federal Labor-Management Relations Program, it is hereby ordered as follows:"

Thus, it is clear that the Air Force Office of Special Investigations and those working within its authority are excluded from all requirements and limitations imposed by the Statute and not just certain provisions therein. Therefore, the General Counsel's argument that the inclusion of AFOSI in E.O. 12171 only excuses that subdivision from collective bargaining with its own employees must fail. Likewise, the General Counsel expresses misplaced concern that the Respondent could exploit such an exception to "get OSI to engage in negotiating a contract for them" and engage in bad-faith bargaining (T-25). There is no dispute that the conduct at question in this case relates to an AFOSI criminal investigation and not a contract negotiation. More importantly, a criminal investigation is one of the activities contemplated by § 7103(b)(1) of the Statute and performed by AFOSI, as determined by the presidential order. Thus, contending that AFOSI could misuse the presidential exception while acting as a labor negotiator is a different kettle of red herring which may be addressed when, and if, presented by actual facts rather than imagination. Until then, it is sufficient to understand that President Carter determined that AFOSI should be exempt from coverage of the Statute while conducting criminal investigations and that their exemption precludes them from violating § 7116 (a) while doing so.

However, the General Counsel did not issue this complaint against AFOSI. Rather, the Respondent to this complaint is another subdivision or activity within the Department of the Air Force, that being Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia (AFMC/WRALC). Therefore, the General Counsel's argument that this Respondent can commit an unfair labor practice through the action of special agents from AFOSI who are exempt from the Statute must be addressed.

B. The Respondent Cannot Violate 5 U.S.C. § 7116(a)(1) Through Actions Committed By Others Who Are Excluded From Coverage Under the Statute

The General Counsel contends that the Respondent may be found in violation of the Statute through the action of special agents from the AFOSI who interrogated Union president Tom Scott as part of their investigation of potential violations of federal law related to the destruction of first and second class mail at WRAFB. As authority for its argument, the General Counsel cites *U.S. Dep't of the Air Force, Ogden Air Logistics Ctr., Hill Air Force Base, Utah*, 36 FLRA 748 (1990) (*Hill*) and *Lackland Air Force Base Exchange, Lackland Air Force Base, Tex.*, 5 FLRA 473 (1981)(*Lackland*). While these cases conclude that a separate subdivision within the Department of the Air Force violated of the Statute because special agents from AFOSI acted as their representatives under § 7114 of the Statute, neither case indicates that AFOSI's exclusion from coverage under the Statute was raised or considered in resolving the matter. Thus, neither stands for the proposition that the exemption given to AFOSI by E.O. 12171 is inapplicable when they are interrogating an employee from an Air Force subdivision to which the Statute does apply. Rather, these cases turn upon the question of whether an AFOSI special agent can be a representative under § 7114 of the Statute without addressing the effect of the exemption provided by the executive order.

In the cases cited by the General Counsel, the respondent entity within the Department of the Air Force attempted to defend itself by asserting that the AFOSI special agents should not be treated as representatives under § 7114 because they were from an independent organization outside of its chain of command over which it had no control. Thus, the Air Force argued that they should have no liability for the actions of the special agents. In both cases, that argument was rejected because the facts demonstrated that the communication and collaboration between the respondents and AFOSI special agents were extensive and significant enough to attribute the actions of the otherwise independent AFOSI special agents to the respondent because the agents were acting as their representatives.

If the only question in this case was whether or not Respondent's employees were sufficiently involved in the interrogation of Scott that the special agents should be treated as representatives of the Respondent under § 7114 of the Statute, the answer would be in the affirmative. Testimony at the hearing demonstrated that despite AFOSI's independent status and insulation from the chain of command at WRAFB, personnel assigned to and working for AFMC/WRALC triggered the AFOSI investigation and were part of a collaborative effort between the local AFOSI Detachment and the Respondent to force Scott to disclose the identity of the informant who provided information about possible criminal conduct within Respondent's mailroom.

However, unlike *Hill* and *Lackand*, that is not the dispositive question in this case. Here, the Respondent is not alleging that the AFOSI special agents were beyond its control and thus should not be treated as its representatives under § 7114. Rather, the Respondent correctly asserts that special agents of the AFOSI cannot commit an unfair labor practice by virtue of the exemption given to AFOSI by E.O. 12171. Thus, the Respondent contends that since the special agents from AFOSI are excluded from coverage under the Statute, it cannot commit an unfair labor practice through the action of special agents who are performing the investigative function for which the exemption was issued. In other words, the Respondent relies upon the special agent's exclusion from coverage under the Statute and not their status, or lack thereof, as its representative.

In holding that AFOSI agents can be treated as representative of another Air Force subdivision despite their independent status and separate chain of command, the Authority did not consider, let alone reject the legal effect of the exemption granted to AFOSI by E.O. 12171. In fact, under Authority regulation, "the Authority will not consider evidence offered by a party, or an issue, which was not presented in the proceedings before the Regional Director, Hearing Officer, Administrative Law Judge, or arbitrator." 5 C.F.R. § 2429.5. Thus, unless the exemption was presented as a defense in earlier proceedings, the respondent could not present it for the first time before the Authority. While that provision permits the Authority to take official notice of proper matters not otherwise presented, a review of the *Hill* and *Lackland* cases demonstrates that the exemption granted by E.O. 12171 was not raised by the respondent nor considered independently by the Authority via official notice, thus, it is a question of first impression.

However, special agents assigned to AFOSI are agents of the Air Force Inspector General and the question of whether an inspector general's interest in conducting unfettered investigations pursuant to the Inspector General Act (IGA) without regard for limitations and requirements imposed by Statute is not a question of first impression. In *Nat'l Aeronautics and Space Admin., v. Federal Labor Relations Authority*, 527 U.S. 229 (1999)(*NASA v. FLRA*), the Supreme Court upheld the Authority's determination that an Office of Inspector General (OIG) investigator for the National Aeronautics and Space Administration (NASA), was a representative of NASA under § 7114(a)(2)(B) of the Statute and that the right to union representation provided

by the Statute was triggered when NASA bargaining unit employees were questioned as part of an investigation conducted by OIG personnel. *Headquarters*, *Nat'l Aeronautics and Space Admin., Wash., DC,* 50 FLRA 601 (1995)(*NASA and AFGE*). In reaching that conclusion, the Court found that the meaning of representative under § 7114 was not limited to persons directly working for the entity that collectively bargains with the recognized unit or to members of management within that entity. While the Court recognized the independence and autonomy granted Inspectors General by the IGA and gave credence to policy concerns about confidentiality and obstruction of investigations that could be imposed by such procedural protections, it presumed that Congress considered the countervailing policy arguments and vindicated the procedural protections provided by § 7114 of the Statute because Congress adopted those protections one day after passing the IGA.

At first blush, the holding of *NASA v. FLRA* appears to support the conclusion that an inspector general's special agents must comply with the Statute and that both an office of inspector general and the agency to which it is attached can commit an unfair labor practices through the actions of OIG agents. However, such a conclusion fails to recognize that the holding of that case turns upon the Court's presumption that Congress intended for the rights and protections of the Statute to prevail over the countervailing policies advanced by the IGA because there was no evidence to the contrary. In reaching that determination, the Court relied upon the fact that the Statute was passed into law the day after the IGA. *NASA v. FLRA,* 527 U.S. at 245. Furthermore, since the Authority was interpreting a provision from a statute that Congress directed the Authority to implement and administer, the Court gave administrative deference to the Authority's reasonable judgment regarding its interpretation of § 7114 because the interpretation was consistent with the Statute and the statutory and congressional intent was not clear. *Id.* at 234.

However, in the case at bar, the intent of Congress and the Statute is clear and beyond doubt. In § 7103 of the Statute, Congress clearly indicated that the protections and limitations establish within the Statute were not to apply to the employees identified in § 7103 (a)(2)(B)(i-v), to the agencies identified in § 7103 (a)(3)(A-H), or to others identified by presidential order pursuant to § 7103 (b). While NASA OIG is not one of the agencies or subdivisions thereof identified in the original E.O. 12171 or its subsequent amendments, AFOSI, the organization within the Air Force Office of Inspector responsible for conducting criminal investigations was excluded from coverage under the Statute by E.O. 12171. Furthermore, that exclusion has not been subsequently revoked. In *NASA v. FLRA*, the Authority and the Court concluded that investigators for NASA-OIG were representatives of NASA for purposes of applying the right to union representation because Congress had not indicated otherwise and passed the Statute containing the right shortly after passing the law that created inspector general positions. However, with respect to special agents from AFOSI, the same absence of intent does not exist because Congress specifically indicated within the Statute that the President could exempt agencies or subdivisions that conducted investigations from the Statute's requirements.

The President acted upon that Congressional authorization and made the determination that AFOSI was one of the governmental entities whose primary work involved intelligence, counterintelligence, investigative, or national security work and was thus determined to be exempt from the Statute's requirements. Therefore, unlike *NASA v. FLRA*, a conclusion that AFOSI special agents must comply with the Statute would not be a reasonable interpretation of § 7114 that was consistent with the Congressional intent set forth in § 7103(b)(1). Thus, the precedent of *NASA v. FLRA* is inapplicable in this case. To the extent that the Authority found that special agents from the AFOSI must comply with the Statute's right to union representation while conducting their investigations in *Hill* and *Lackland*, those determinations were made without consideration of the exemption provided by E.O. 12171 because the Respondent did not raise the issue for consideration by the Authority. Failure to speak to the issue because it was not raised cannot mean that the exemption defense was rejected by the Authority.

While there is an absence of Authority precedent regarding the effect of the exclusion given to AFOSI by E.O. 12171, the exemption authorized by § 7103(b)(1) has been the subject of an Authority decision where given to another executive agency. On January 2, 2002, President Bush amended E.O. 12171 by signing E.O. 13252 which exempted United States Attorney's Offices from coverage under the Statute. In *United States Attorney's Office, Southern District of Texas, Houston, Tex.,* 57 FLRA 750 (2002) (*U.S. Attorney's Office*), the Authority dismissed four unfair labor practice complaints because it did not have jurisdiction as a result of the exemption provided by President Bush pursuant to § 7103(b)(1). Thus, the Authority has determined that an exemption from coverage constitutes a jurisdictional bar to its consideration of unfair labor practice complaints raised under the Statute. By giving full effect to exclusion in the form of a jurisdictional bar, the Authority's decision in the *U.S. Attorney's Office* demonstrates that the General Counsel's assertion that such an exemption only relieves an agency from a collective bargaining is without merit.

Although no precedential decision on the effect of the exclusion given to AFOSI by E.O. 12171 has been issued by the Authority, a decision with no precedential significance does exist. A defense based upon the exemption was raised in *U.S. Dep't of the Air Force, Ogden Air Logistics Ctr., Hill Air Force Base, Utah,* Case No. DE-CA-60922 (1997), ALJD No. 97-46 (1997). In that case, the Administrative Law Judge issued a recommended decision dismissing the complaint because AFOSI was exempted from coverage under the Statute and respondent had no control, direction, supervision or participation in the AFOSI investigation. In essence, the judge concluded that no unfair labor practice was committed because the AFOSI was exempt from the requirements of the Statute, but in the alternative, he concluded that even if there was no exemption, there was no violation by the respondent because its involvement in the investigation was not extensive enough to make the special agent a representative. Since the General Counsel filed no exceptions to the recommended decision, the findings, conclusions, and decision and order of the ALJ became the final decision of the Authority. 5 C.F.R. § 2423.41(a). However, that regulation also provides that decisions to which no exceptions are filed have no precedential significance and while the judge's finding that the exemption granted to AFOSI by E.O. 12171 precluded a violation of the Statute cannot be cited as Authority precedent, it offers persuasive guidance regarding the effect of the exemption. Despite its lack of precedential significance, this prior decision demonstrates that the precedent of *Hill* and *Lackland*, is inadequate to dispose of the question concerning the effect of an exclusion granted pursuant to § 7103(b)(1).

Having determined that the intent of Congress was to give the President the ability to identify entities within the federal government who should be excluded from coverage under the Statute by virtue of the intelligence, counterintelligence, investigatory or national security work they perform, and having concluded that the President determined that AFOSI was one of the entities entitled to such an exclusion, it would defeat the purpose of the exclusion to find that the Respondent could be found in violation of the Statute solely upon the basis of actions undertaken by an exempted special agent. Once the President has made the requisite determinations required by § 7103(b)(1), it is the intent of Congress, as reflected in that provision, that investigations conducted by such exempted entities not be impeded by the procedural protections provided elsewhere within the Statute. The language of § 7103(b)(1) makes it clear that the countervailing policy of favoring unfettered investigations found unpersuasive in *NASA v. FLRA*, reigns supreme to the procedural protections of the Statute when the investigations are conducted by entities identified by the President as exempt pursuant to the executive order.

Although it is incongruous that some agents, like the NASA-OIG investigator in *NASA v. FLRA,* who perform investigatory functions for an Inspector General are subject to the Statute, while others, like the special agent for AFOSI in this case, are exempt, such difference is consistent with the Congressional intent expressed within the Statute. As noted by the Court in *NASA v. FLRA*, Congress passed the Statute one day after passing the IGA which established inspector general positions in various agencies. While part of an agency, the inspector general is independent thereof and authorized to investigate activities therein. Having created this independent position of inspector general on the day before, Congress could have excluded them from the Statute as a class when it passed the FSLMRS, but it elected not to do so. Instead of identifying every agency or subdivision thereof that should be excluded from its coverage, Congress left it to the President to decide which operations within the executive branch qualified for exclusion based upon the limiting criteria set forth in § 7103(b)(1). That the President exercised that authority in a manner which exempted some agencies or subdivisions with investigative functions while not exempting others does not render the exemption granted to AFOSI by E.O. 12171 invalid.

If anything, the incongruence highlights the fact that AFOSI performs all four of the activities set forth in subparagraph (A) of § 7103(b)(1) for the Air Force Inspector General and not just an investigatory function. Furthermore, the entirety of the Department of the Air Force was not given an exemption by E.O. 12171. Paragraph 1-206 limits the exclusion to 17 subdivisions within that department, which is itself, a subdivision of the Department of Defense. While the Executive Order also exempts other entities that perform investigatory functions like Criminal Investigations, Internal Revenue Service within the Department of the Treasury (1-203(c)), the Defense Investigative Service, Department of Defense (1-208), the Coast Guard Investigative Service within the Department of Homeland Security (1-214 (g)(4)), and the Office of Investigations for U.S. Immigration and Customs Enforcement within the Department of Homeland Security (1-214(h)(1), not all entities performing investigatory functions within the executive branch are excluded from coverage under the Statute. The fact that some are, while others are not, turns upon the determinations made by the President, as intended by Congress when it made § 7103(b)(1) part of the Statute. Therefore, concluding that investigators from NASA-OIG must comply with the Statute while special agents from AFOSI are exempt is consistent with the intent Congress expressed in the Statute.

This exemption would be rendered meaningless if the entity for which these special agents conducted the investigation can be found in violation of the Statute by

virtue of the special agent's conduct during an investigation. It would mean the Respondent would have to ask AFOSI to self-impose upon its investigatory process the procedural protections created by the Statute. This would contradict the President's determination that the Statute's requirements were inconsistent with national security requirements and considerations when applied to the AFOSI. Any such request will fail, as it should, and the Respondent's only recourse to avoid an unfair labor practice violation each time an AFOSI special agent interviewed one of its bargaining unit members would be a cessation in the use of their investigative services. Suffice it to say that it is difficult to imagine how such a result could be seen as consistent with the intent of Congress in passing § 7103(b)(1) of the Statute. Forcing the AFOSI to abandon the exemption it was given in accordance with the Statute by punishing a non-exempt entity whose bargain unit employees are interviewed by AFOSI would impede the very investigations Congress and the President sought to facilitate, and indirectly impose procedural protections where Congress and the President intended they not apply.

AFOSI is not the sole investigative unit on an Air Force installation and those investigations conducted by the security police, who are not exempt and are within the installation's chain of command are conducted in accordance with the Statute's procedural protections for bargaining unit members. AFOSI investigates only the most serious of offenses and it is reasonable to conclude that when investigating those types of offenses, Congress and the President did not want the investigation encumbered by the Statute's protections. If the protections of the Statute cannot be applied to AFOSI directly, they cannot be imposed indirectly by finding that their legally authorized disregard of the Statute amounts to an unfair labor practice committed by the Respondent whenever AFOSI interviews a bargaining unit member. While the Authority has jurisdiction over the Respondent, it may not establish jurisdiction over the conduct of exempted AFOSI special agents by holding the Respondent accountable for conduct the special agents exercise pursuant to lawful authority. *U.S. Attorney's Office*, 57 FLRA at 750.

C. The General Counsel's Alternative Theory

In the post hearing brief, the General Counsel argues that the complaint placed the Respondent on notice that it viewed the Respondent's act of directing Union president Scott to report to AFOSI for an interview as an unfair labor practice. As discussed above, I find that argument to be without merit because the complaint failed to provide notice of such. However, aside from the inadequacy of the due process that would be presented by allowing that theory to emerge from the violation alleged in the complaint, the idea that § 7116 of the Statute could be used to prevent one subdivision within an agency from utilizing the investigative services provided by another subdivision, to whom an exemption was given by presidential order would eviscerate the purpose of § 7103.

In passing the Statute, Congress gave federal employees rights, benefits and procedural protections. However, Congress did not blanket the entirety of the federal workforce with the Statute and it gave the President the authority to exclude and exempt others from its coverage. Under the statutory scheme enacted by Congress, those investigators determined by the President to be exempt are treated as such because their primary function was to conduct investigations and the rights, benefits and procedural protections provided by the Statute could not be applied in a manner consistent with national security requirements and considerations. In balancing the countervailing interests between unfettered investigations and procedural protections, Congress and the President concluded that unfettered investigations should prevail when conducted by those who meet the requirements of § 7103(b)(1). If an agency's only recourse to avoid an unfair labor practice allegation is to not directing bargaining unit employees to interviews conducted by special agents exempted from providing the Statute's procedural protections, the purpose of the exemption would be usurped and the tail would be wagging the dog. In fact, that result would have a greater detrimental effect upon investigations than no exemption being given.

The President gave the exemption because he wanted the result of any investigation conducted by those so entitled to be unimpeded by the procedural protections provided by the Statute. Under the General Counsel's theory, rather than getting a full and completely unfettered interview as part of the investigation, or even an interview impeded by the Statute's procedural protections, there would be no interview conducted at all because the act of directing the bargaining unit employee to such an interview would be an unfair labor practice unto itself. This could not be the intent of Congress when it gave the President the authority to exempt certain investigators from coverage under the Statute. To preclude an Agency from directing bargaining unit employees to submit to interviews because they would be conducted by persons exempted from coverage under the Statute would required an application of § 7116 that is inconsistent with § 7103. Just as an agency cannot commit an unfair labor practice under the Statute through the conduct of an individual who is exempt from its coverage, an agency does not commit an unfair labor practice by requiring its bargaining unit employees to submit to an interview that will be conducted by such an individual. Therefore, even if the General Counsel had alleged in the complaint that the Respondent committed

an unfair labor practice by directing Scott to submit to an interview conducted by AFOSI special agents, such a direction would not constitute an unfair labor practice. Congress and the President determined that the investigative work of certain agencies or subdivisions was too important to national security to be constrained by the procedural protections contained within the Statute. The President determined that the criminal investigations conducted by the AFOSI were within that category and the Respondent does not commit an unfair labor practice when it requires bargaining unit employees to submit to interviews conducted by AFOSI. The purpose in giving that subdivision an exemption from coverage under the Statute was to facilitate the important investigations they conduct and not to preclude them from occurring at all.

With respect to the General Counsel's argument that the exemption given to AFOSI is bad public policy that could result in AFOSI negotiating bargaining agreements in bad faith for the Department of the Air Force, such a declaration is misguided. The conflict between unfettered investigations and the rights of federal employees granted by the Statute is inherent in the countervailing interests they represent. As the Supreme Court recognized in *NASA v. FLRA*, the rights of federal employees prevail when it is unclear what Congress intended and the agency authorized to interpret the Statute concludes that the rights apply. However, when it is clear that Congress authorized the President to determine when the rights did not apply using criteria Congress established in the Statute, the exercise of that authority may be criticized and one may advocate for its change, but the legal effect of that exemption cannot be denied on the basis of policy arguments. There is a policy argument for conducting criminal investigations that are unfettered by the Statute's requirements that is just as legitimate as the countervailing interest in procedural protections. Allowing the President to balance those interests and make a determination to exempt certain operations when he finds that the criteria set by Congress are met is not bad policy. While it may not be the blanket coverage the General Counsel advocates, the problematic nature of blanket coverage was recognized by Congress directly in §7103(a) even before it gave the President authority to further exclude agencies and subdivisions pursuant to §7103(b)(1).

Further, the General Counsel's concern that AFOSI could use its exemption in the course of performing labor relations activities is inapplicable under the facts of this case. In this case, the exclusion given to AFOSI is recognized within the context of a criminal investigation as contemplated by § 7103(b)(1) and E.O. 12171. If AFOSI were to undertake a labor relations function, which is highly unlikely given its independent status, cause for challenging the exemption would be present since labor relations is not one of the primary functions identified within § 7103(b)(1). The exemption was created by the stroke of a Presidential pen and it could be extinguished just as easily if the reason AFOSI was initially determined eligible ceased to exist by virtue of their performing labor relations functions. However, until those facts are presented, the possibility of an exemption being misused is an argument without merit.

As the Respondent's argument regarding the presidential exemption given to AFOSI is sufficient to insulate Respondent from an unfair labor practice allegation that is based only upon an act of omission or commission by special agents assigned to AFOSI in the course of an authorized and lawful investigation, there is no need to consider the Respondent's contention that the threat of discipline given in this case was not an unfair labor practice absent the exemption.

CONCLUSION

Based upon the foregoing, I find that a preponderance of the evidence establishes that the Respondent did not violate section 7116(a)(1) 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., January 12, 2011.

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CHARLES R. CENTER
Chief Administrative Law Judge