FEDERAL BUREAU OF PRISONS, OFFICE OF INTERNAL AFFAIRS, WASHINGTON, D.C. ***AND*** FEDERAL BUREAU OF PRISONS, OFFICE OF INTERNAL AFFAIRS, AURORA, COLORADO ***AND*** FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION ENGLEWOOD, LITTLETON, COLORADO Respondents	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 709, AFL-CIO Charging Party	Case No. DE-CA-40661

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© through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **JULY 21, 1995**, 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: June 21, 1995
Washington, DC

MEMORANDUM DATE: June 21, 1995

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, OFFICE OF INTERNAL AFFAIRS, AURORA, COLORADO ***AND*** FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION ENGLEWOOD, LITTLETON, COLORADO

Respondents

and Case No. DE-CA-40661

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 709, AFL-CIO

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, OFFICE OF INTERNAL AFFAIRS, AURORA, COLORADO ***AND*** FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION ENGLEWOOD, LITTLETON, COLORADO Respondents	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 709, AFL-CIO Charging Party	Case No. DE-CA-40661

Hazel E. Hanley, Esquire
For the General Counsel

Steven R. Simon, Esquire
Marcus Williams, Esquire
For the Respondent

Ron Melton, North Central Regional Vice President
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

The complaint in this case alleges that the Respondents failed to comply with section 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute) by denying an employee's request for the assistance of the designated representative of the Charging Party (the Union) at an investigatory interview that the employee reasonably believed might result in disciplinary action against her. This denial, was in violation of sections 7116(a)(1) and (8) of the Statute. The requested Union representative was a witness to the incident about which the employee was to be interviewed, and had herself been interviewed about the incident.

Respondents' answer admits every factual allegation of the complaint except the allegation that the examination of the Union representative, as a witness, had been completed. The answer denies any failure to comply with the Statute and any unfair labor practices. The answer further asserts that the exclusion of an eyewitness as a Union representative was a legitimate employer prerogative to preserve the integrity of the investigation.

A hearing was held in Denver, Colorado. Counsel for the General Counsel and for the Respondents filed post-hearing briefs.1

Findings of Fact

The Union is the agent, for the purpose of representing bargaining unit employees at the Federal Correctional Institution Englewood, of the exclusive representative of employees in a nationwide bargaining unit. Employee Erica Shields is the president of the Union. In April 1994 Shields was called to the warden's office, where she had a confrontation with Acting Warden Daniel Fitzgerald. Shields protested Fitzgerald's issuance of a formal letter of counseling for a previous alleged use of profanity. Shields accused Fitzgerald of retaliation against her and left the April meeting. The meeting thus ended, apparently no more than five minutes from its start. Fitzgerald reported this incident to the Federal Bureau of Prisons, Office of Internal Affairs (OIA), alleging that Shields' conduct constituted insubordination.

OIA opened an investigation of the matter and assigned it to Special Agent Elizabeth P. Strack. Strack began conducting interviews about the incident on May 13, 1994. She interviewed Fitzgerald and two others, then Michele Allport, the Union's chief steward, who had been present at the April incident as Shields' Union representative. Strack interviewed Allport for two to two and one-half hours and prepared an affidavit, which Allport signed.2 Allport's account of the April incident was essentially in accord with the summary of the incident given by Fitzgerald in the report that initiated the investigation. The final paragraph of her affidavit reads as follows:

> 10. That I have cooperated fully with this investigation and I do not know of or have any additional information, that I have not already mentioned, concerning this case. I have been informed and understand that I am not to discuss this interview without the permission of the Office of Internal Affairs. I further understand that if I improperly discuss this matter, I may face adverse action to include removal from employment.

In including the last two sentences in the affidavit presented to Allport for signature, Strack was following an OIA Program Statement that includes the following: "Victims, witnesses, collateral sources and subjects shall be advised . . . that the subject matter of the interview and any information exchanged with the investigator is confidential and may not to [sic] be discussed with others."

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1/ I grant the General Counsel's motion to correct the transcript of the hearing, noting that the now corrected name, Zamparelli, appears on page 37. As there was no opposition, I also grant the request to strike page 90, line 3, to page 91, line 21.

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2/ Although Allport signed the affidavit on May 13, Strack did not give her a copy until after she interviewed Shields.

Strack told Allport that Shields was the only person remaining to be interviewed. Allport responded that in that case she and Strack would see each other again, because Allport would be acting as Shields' designated Union representative. Strack told Allport that she would not allow Allport to serve as Shields' representative because she was a witness.

On May 16, Shields was called for her interview. She notified Allport, who obtained official time and clearance from her supervisor to attend the interview with Shields. When they appeared together, Strack told them essentially what she had previously told Allport--that Allport could not serve as Shields' representative because she was a witness to the alleged misconduct that was the subject of the investigation. Shields found another Union official, Lori Salazar, to act as her representative and the interview proceeded. As Salazar was inexperienced, Shields used her presence more as a training tool for Salazar than as an assistance to herself. In the affidavit that Shields signed to conclude the interview, she noted Strack's refusal to permit her to have Allport as her representative, and protested that refusal.

Discussion and Conclusions

A union has the right to designate its representatives in investigatory examinations described in section 7114(a)(2)(B) of the Statute. *U.S. Immigration and Naturalization Service, New York District Office, New York, New York*, 46 FLRA 1210, 1221 (1993) (*INS)*. Respondents do not acknowledge this general principle. Thus, they put great stock in the Authority's specific failure to adopt the statement by Judge Devaney in *Federal Prison System, Federal Correctional Institution, Petersburg, Virginia*, 25 FLRA 210, 211-12 (1987) (*FCI Petersburg*) that "as a general rule a union's right to designate its representative for the purpose of an examination in connection with an investigation is inviolate." However, despite the Authority's rejection of that statement, its decision in that case, affirming the judge's findings and conclusions, leaves little doubt of its agreement with the general principle. Thus, the Authority affirmed Judge Devaney's finding that the activity's refusal to permit the union's president, who had also been examined in connection with the investigation, to represent other employees at their interviews, constituted a failure to comply with section 7114(a)(2)(B) of the Statute. Whatever problem the Authority may have had with Judge Devaney's formulation of the principle in *FCI Petersburg*, it reaffirmed, in the more recent *INS* decision, the existence of a union's right to designate.

In the instant case, the applicability of section 7114(a)(2)(B) is undisputed, and the only question is whether Strack, undisputedly acting on behalf of the Respondents, was entitled to disqualify the representative designated by Shields, in her capacity as Union president, to assist **herself** as an employee in a section 7114(a)(2)(B), or *Weingarten*, situation.3

Without conceding the general principle of a union right to designate, Respondents contend that the exclusion of Allport as Shields' representative was necessary to preserve the integrity of the investigation because, being a witness, her role with respect to the accused employee would carry the potential for collusion as well as an "inherent conflict of interest." In *FCI Petersburg*, Judge Devaney recognized the need to preserve the integrity of investigations, and explored, with the Authority's approval, the

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The union, not the employee, designates the representative. *FCI Petersburg* at 227.

means of accommodating the union's right and the employer's legitimate interest in the integrity of the examination.4 To deal with situations where, like the instant case, the investigation requires the examination of someone who has been designated as the representative of an employee who is the subject of the investigation, *FCI Petersburg* draws the line of accommodation at the point where the examination of the designated representative has been completed5. Once that point has been reached, the designee's participation as the subject's representative will not necessarily compromise the integrity of the investigation, and the union's right to designate must be recognized. *Id.* at 211-12, 228-29.

I treat this analysis not as a hard and fast rule but as a set of presumptions in aid of a general principle of accommodation. As the Authority has held with respect to the analogous problem of determining what information should be provided to a union to enable its representative to prepare for a *Weingarten* examination, the union's right "must be balanced against the interests of an agency employer in investigating and disciplining misconduct." *Federal Aviation Administration, New England Region, Burlington, Vermont*, 35 FLRA 645, 653 (1990). Thus, to overcome the *FCI Petersburg* presumption where the examination of a designated representative has been completed, the employer may be able to justify rejecting the union's choice of representative by showing real potential harm to the investigation.

Reflecting the only factual allegation of the complaint that is in dispute, Respondents deny that Strack had completed her examination of Allport at the time Shields was interviewed. The state of "completion" of this examination as of that time is a subjective matter, but one that must be determined on the basis of inference grounded in the objective evidence. I find that, for purposes of the *FCI Petersburg* analysis, the examination of Allport had been completed. Strack examined Allport thoroughly and obtained from her an affidavit containing, to the extent it was possible to determine this, everything relevant that Allport knew. Moreover, Allport essentially confirmed the factual basis on which Fitzgerald presented his charge of insubordination against Shields. Thus, Strack had little reason to suspect that Allport was holding information back, and she acknowledged as much at the hearing.

Respondents raise the possibility that new information coming to Strack's attention might have caused her to examine Allport further. However, if such a theoretical possibility were sufficient to prevent a finding that the examination had been completed, the *FCI Petersburg* analysis would be meaningless. The possibility of examining a witness further **always** exists until the investigation is totally completed. By

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The Authority's decision does not expressly elevate the employer's interest to the level of a "right." However, to the extent that the Authority adopted Judge Devaney's analysis, I believe that its decision is based on pragmatic considerations and is not dependent on labels such as "rights" or "interests." *See also INS* at 1221-23 (union right to designate did not require employer to postpone interviews where designated representatives were unavailable because union itself created a scheduling conflict).

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FCI Petersburg involved designated representatives who were themselves targets of the investigation. I find no basis for a guideline that is more deferential to the employer's interests where, as here, the designated representative is a witness but not a target. In this situation, the employer must bear **at least** as great a burden to show the potential for collusion.

then, of course, the employee under investigation will have been interviewed without the participation of the designee-witness.

Nor have Respondents shown any other practical reasons to suspect that Allport would violate her oath to refrain from discussing her interview. The opportunity to do so existed during all the time that elapsed between the end of Allport's interview and the beginning of Shields'. Had they been of a mind to ignore the instructions with which they were both familiar, in order to collude, they would not have needed Allport's participation as the union representative at Shields' interview to enable them.

Respondents contend that it would be "extremely unwise to subject eyewitness employees to the kind of diverging loyalties inherent" in the dual roles of witness and union representative because, under Authority precedent, a union representative may not be compelled by the employer to disclose confidential statements an employee makes to the representative in the course of representing that employee. *U.S. Department of the Treasury, Customs Service, Washington, D.C.*, 38 FLRA 1300 (1991). However, I am not able to perceive the assert conflict. Although she may later be called upon to act as an employee's representative, nothing in the Authority's decision in *Customs Service*, or the principles for which it stands, constrains a witness from revealing fully what she has **witnessed**. The assertion of a conflict of interest presupposes that, because she is also a witness, that individual is expected to reveal not only what she observed, but also, if called for further questioning, what she has been told by the employee she is assisting. Such a doctrine conflates the two roles, and is, moreover, incompatible with *Customs Service.*

Although not articulated directly, I detect in Respondents' argument the suggestion that the fact that these events occurred at a "law enforcement correctional workplace" requires a heightened sensitivity to the integrity of the investigation. While I would not recommend that the Authority ever be **insensitive** to considerations of integrity, I see no basis for giving this investigation any special status. *FCI Petersburg*, which is controlling here, also involved a "correctional workplace." Moreover, I would describe the alleged misconduct that was the subject of this investigation as more a matter of relations between Shields--as an employee--and one of her superiors, than one that was uniquely connected with law enforcement.

I conclude that, by refusing the Union's request to permit Allport to represent Shields, the Respondents failed to comply with section 7114(a)(2)(B) of the Statute and thereby violated sections 7116(a)(1) and (8).

The Remedy

Counsel for the General Counsel requests, in addition to a remedy corresponding to the one provided in *FCI Petersburg*, a nationwide posting, the notice to be signed by the chief of Respondent Office of Internal Affairs (OIA), and training for OIA and Federal Correctional Institute (FCI) Englewood officials and agents, "through an entity other than the Department of Justice and any of its agencies." Attendance at such training is to be documented by annotation of personnel records. Presumably, the requested training is to focus on section 7114(a)(2)(B) rights.

I find a nationwide posting, at Federal Bureau of Prisons facilities where members of the bargaining unit are located, to be signed by the chief of OIA, to be appropriate. The practice of denying the Union's right to designate as a representative anyone who

was a witness was defended here as a matter of national OIA policy, and therefore affected the entire bargaining unit. *See U.S. Department of Justice, Office of the Inspector General, Washington, D.C.*, 47 FLRA 1254, 1262-64 (1993) (*OIG*). As in *OIG*, however, the purposes of the notice do not require further posting at OIA facilities. *Id.* at 1265. The requested training remedy is, as far as I have been able to determine, unprecedented as an Authority-directed unfair labor practice remedy. It is also an extraordinary remedy. Neither of these labels, of course, makes it inappropriate. Counsel may be expected, however, when seeking such a remedy, to provide a compelling justification. I find none here, and deny the request. I recommend that the Authority issue the following order.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C., Federal Bureau of Prisons, Office of Internal Affairs, Aurora, Colorado and Federal Bureau of Prisons, Federal Correctional Institution Englewood, Littleton, Colorado, shall:

1. Cease and desist from:

(a) Failing and refusing to comply with section 7114(a)(2)(B) of the Statute, by interfering with the American Federation of Government Employees, Local 709's lawful desig-nation of its officers and stewards as its representatives at any examination of an employee.

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

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

(a) Post at all facilities within the Federal Bureau of Prisons where bargaining unit employees represented by American Federation of Government Employees, AFL-CIO, are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Chief of the Office of Internal Affairs, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Denver Region, 1244 Speer Boulevard, Suite 100, Denver, Colorado 80004-3581, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, June 21, 1995

JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with the American Federation of Government Employees, Local 709 (the Union) lawfully designating its officers and stewards as its representatives at any examination of an employee, pursuant to section 7114(a)(2)(B) of the Statute.

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

WE WILL comply with section 7114(a)(2)(B) of the Statute and allow the Union to designate employees whose examinations have been completed to be representatives at any examination of an employee.

(Activity)

Date: By:

(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Denver Region, 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204-3581, and whose telephone number is: (303) 844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. DE-CA-40661, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Ron Melton, Vice President
American Federation of Government
Employees, Local 709, AFL-CIO
North Central Regional
1111 East Snyder
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Erica M. Shields, President
American Federation of Government
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Council of Prison Locals
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9595 West Quincy Avenue
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Steven R. Simon, Esquire
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REGULAR MAIL:

Mr. Robert A. Hood
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American Federation of Government
Employees, AFL-CIO
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Washington, DC 20001

Dated: June 21, 1995
Washington, DC