UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: November 10, 1998

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
WASHINGTON, DC AND U.S.
DEPARTMENT OF JUSTICE
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON, D.C.

Respondents

and Case No. DE-CA-80076

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

Charging Party

Pursuant to section 2423.34(b) of the Final Rules and Regulations, 5 C.F.R. § 2423.34(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 is a Motion for Summary Judgment and other supporting documents filed by the parties.

Enclosures

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

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WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF JUSTICE WASHINGTON, DC AND U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL WASHINGTON, D.C. Respondents	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 709, AFL-CIO Charging Party	Case No. DE-CA-80076

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. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **DECEMBER 14, 1998**, and addressed to:

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

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: November 10, 1998
Washington, DC

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1 Initially, Federal Bureau of Prisons, Federal Correctional Institution Englewood, Littleton, Colorado, also, was a party; but, as part of her Motion for Summary Judgment, General Counsel moved to dismiss the Complaint as to Respondent Federal Bureau of Prisons, Federal Correctional Institution Englewood, Littleton, Colorado, to which the Charging Party did not object, and, by Order dated July 14, 1998, the Complaint as it related to Respondent Federal Bureau of Prisons, Federal Correctional Institution Englewood, Littleton, Colorado, was dismissed.

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

U.S. DEPARTMENT OF JUSTICE WASHINGTON, DC AND U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL WASHINGTON, D.C. Respondents[1]	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 709, AFL-CIO Charging Party	Case No. DE-CA-80076

Harry E. Jones, Esquire
Ms. Vivian B. Jarcho
For the Respondents

Lisa Belasco, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

The charge was filed On October 29, 1997 (G.C. Exh. 1 (a)), alleging violation of §§ 7116(a)(1), and (8) of the Statute[2]; a First Amended charge was filed on April 13, 1998 (G.C. Exh. 1(b)), alleging violation of §§ 16(a)(1), (5) and (8) of the Statute; a Second Amended charge was filed on

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[2] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116 (a)(1) will be referred to, simply, as "§ 16(a)(1)".

May 7, 1998 (G.C. Exh. 1(c)), alleging violation of §§ 16(a)(1), and (8); and the Complaint and Notice of Hearing issued on May 8, 1998 (G.C. Exh. 2), alleging violation of §§ 16(a)(1), and (8), and set the hearing for July 15, 1998. Respondent timely filed an answer (G.C. Exh. 3).

The Complaint alleged an examination for an employee by Agents of the Office of the Inspector General, that Respondents failed to comply with § 14(a)(2)(B) of the Statute, by denying the request of the employee for Union representation, and that Respondents thereby violated §§ 16(a)(1) and (8) of the Statute. The Complaint alleged that, The United States Department of Justice is an agency within the meaning of § 3(a)(3) of the Statute; that, "The Department of Justice Office of the Inspector General . . . is an activity and/or component of the U.S. Department of Justice as defined in 5 C.F.R. § 2421.4,[3]; that, inter alia, Agents of the Office of the Inspector General were management officials within the meaning of § 3(a)(11) of the Statute; and that the Agents, ". . . were representatives of and were acting on behalf of the Respondents, i.e., the Department of Justice and its Federal Bureau of Prisons, Federal Correctional Institution Englewood, Littleton, Colorado (hereinafter, "FCI" Englewood").

In its Answer, Respondent's denied that the Department of Justice Office of the Inspector General is an activity and/or component of the U.S. Department of Justice as defined in 5 C.F.R. § 2421.4; corrected the title of the Inspector General's "Agents" to, "Special Agents" and corrected the name of Special Agent Trautner; denied that the Special Agents were management officials within the meaning of § 3(a)(11) of the Statute; denied that the Special Agents were representative of, or were acting on behalf of, the Department of Justice or FCI Englewood, asserting affirmatively that the Special Agents were representatives only of the Inspector General and that Warden Brooks was a representative only of the Bureau of Prisons; and, of course, denied failure to comply with § 14(a)(2)(B) of the Statute and denied violation of 16(a)(1) or (8) of the Statute. Nevertheless, Respondents admitted that on October 15, 1997, Special Agents Trautner and Sullivan conducted an examination of Leonard Vigil, an employee of FCI Englewood; that the Special Agents told Mr. Vigil that the examination concerned a criminal investigation of him;

[3] "2421.4 Activity

> "Activity means any facility, organizational entity, or geographical subdivision or combination thereof, of any agency." (5 C.F.R. § 2421.4).

that it was reasonable for Mr. Vigil to believe that disciplinary action could result from the examination; that before the examination Mr. Vigil requested that a union representative be present at the examination and Special Agents Trautner and Sullivan denied Mr. Vigil's request for a Union representative and examined Mr. Vigil concerning an allegation that he had smuggled drugs into FCI Englewood; and that on, or about, November 7, 1997, Warden Brooks wrote a memorandum to Mr. Vigil advising him that the allegation of drug introduction had not been sustained and the case was closed.

Because Respondents admitted all material factual allegations except as to FCI Englewood[4], the asserted liability of which posed issues of fact, General Counsel on June 25, 1998, moved:

> a) To withdraw the allegations of the Complaint involving FCI Englewood; and
>
> b) For Summary Judgment as to Respondent U.S. Department of Justice and Respondent U.S. Department of Justice, Office of the Inspector General, Washington, D.C.

On July 2, 1998, Respondents filed a Response to General Counsel's Motion for Summary Judgment and a Cross-Motion to Dismiss the Complaint.

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4 Liability of an activity is highly questionable in the absence of the activity's involvement in its denial of § 14 (a)(2)(B) representation, which was not alleged as to FCI Englewood, Headquarters, National Aeronautics and Space Administration, Washington, D.C. and National Aeronautics and Space Administration, Office of The Inspector General, Washington, D.C., 50 FLRA 601, 621 (1995) (hereinafter "NASA, Hq."); United States Department of Agriculture, Farm Service Agency Kansas City, Missouri, and United States Department of Agriculture, Office of Inspector General, Kansas City, Missouri, 130 Adm. Law Judges Dec. Rep., November 13, 1997, Case No. DE-CA-60399 (June 13, 1997, slip op. pp. 21-24); although, in a perverted sense of logic and reason, the Authority countenances liability of an activity when, as the result of inept pleading, neither the agency nor its Inspector General has been made a party. NASA, Hq., 50 FLRA at 622, citing: U.S. Department of Labor, Mine Safety and Health Administration, 35 FLRA 790, (1990).

The Complaint and Notice of Hearing had set the hearing for July 15, 1998; on June 3, 1998, Respondents moved to postpone the hearing. By Order dated June 4, 1998, the date of hearing was rescheduled for July 21, 1998; on July 7, 1998, the parties filed a Joint Motion to Postpone Hearing; the pre-hearing Conference Call was duly held by the undersigned as scheduled, on July 14, 1998, at which time: a) Respondents affirmed that they had no objection to the dismissal of the Complaint as to FCI Englewood and General Counsel, while confident that the Charging Party had no objection to the dismissal of the Complaint as to FCI Englewood, agreed to ascertain and advise the undersigned of the Charging Party's position; b) after discussion, Respondents agreed they did not object to the sworn statement of Mr. Leonard Virgil, submitted as General Counsel Exhibit 4 to General Counsel's Brief in Support of her Motion for Summary Judgment; General Counsel agreed that she had no objection to the sworn statement of Special Agent Paul Sullivan, attached as Respondent's Exhibit 1 to Respondents' Response and Cross-Motion to Dismiss Complaint; both parties agreed that the facts are as stated in the pleadings and the respective sworn statements and declaration; and both parties agreed that there are no genuine issues of material fact. Following the conference call, General Counsel advised the undersigned that the Charging Party had advised that it had no objection to the dismissal of the Complaint as to FCI Englewood. Accordingly, on July 14, 1998, the undersigned issued an Order which, in pertinent part, ordered:

> "1. The Complaint as it relates to Respondent Federal Bureau of Prisons, Federal Correctional Institution Englewood, Littleton, Colorado, be, and the same is hereby, Dismissed.
>
> "2. This case is hereby submitted for decision on Motion of the parties and, accordingly, the hearing, now scheduled for July 21, 1998, is Canceled."

FINDINGS

1. The AFGE Council of Prison Locals is the exclusive representative of a nationwide consolidated bargaining unit of Bureau of Prisons employees appropriate for collective bargaining, including employees of FCI Englewood, and AFGE, Local 709 (hereinafter, "Union") is an agent and affiliate of AFGE Council of Prison Locals for the representation of employees of FCI Englewood.

2. The U.S. Department of Justice (hereinafter, "Dept. of Justice") is an agency within the meaning of § 3(a)(3) of the Statute and The U.S. Department of Justice, Office of The Inspector General (hereinafter, "OIG"), is an organizational entity of the Dept. of Justice, within the meaning of 5 C.F.R. § 2421.4, but Respondents assert that OIG is neither an agency nor a representative of an agency (Dept. of Justice) within the meaning of § 14(a)(2)(B) of the Statute.

3. Mr. Leonard Virgil is employed as a Recreation Specialist at FCI Englewood, is a member of the Union and has served as a Steward for about three years (G.C. Exh. 4).

4. On October 15, 1997, Mr. Vigil, while at work in the recreation yard, received a call from a Special Investigating Agent and was told to report to Personnel. When he arrived at Personnel, he went into a conference room and was met by two Special Agents of the Office of the Inspector General, Messrs. Craig Trautner and Paul Sullivan (G.C. Exh. 3), one of whom told Mr. Vigil they were there to conduct a criminal investigation, at which point Mr. Vigil realized that he was not there to represent another employee and requested a Union representative because he knew he could lose his job or incur other disciplinary action if he were found guilty; but one of the Special Agents told him that because this was a criminal investigation, the Union did not have the right to represent him; however, he told Mr. Vigil that they were not there to accuse him, only to investigate allegations that had been made (G.C. Exh. 2 and 4). Special Agent Sullivan stated that as part of his official duties he was assigned to investigate allegations that Bureau of Prisons employee Leonard Vigil was involved in a plan to bring illegal drugs into FCI Englewood and that, consistent with OIG policy, Mr. Vigil was not permitted to have a Union representative (Res. Exh. 1).

5. The parties agree that the interrogation of bargaining unit employee Vigil, by Special Agents Trautner and Sullivan, was an "examination" within the meaning of § 14(a)(2)(B); that Mr. Vigil reasonably believe that the examination might result in disciplinary action against him, and that Mr. Vigil requested representation by the exclusive representative.

6. On, or about, November 7, 1997, Mr. Joseph M. Brooks, Warden, FCI Englewood, wrote Mr. Vigil a letter which stated, ". . . there was nothing to substantiate the allegations, and that there would be no further investigation" (G.C. Exh. 4) and the case was closed (G.C. Exh. 2).

CONCLUSIONS

In its Cross-Motion to Dismiss, Respondents make three assertion: a) The facts as to which there is no dispute do not establish that Dept. of Justice violated the Statute by failing to comply with § 14(a)(2)(B) of the Statute because, ". . . the only undisputed fact that the General Counsel has identified that relates to Respondent DOJ is that '[t]he U.S. Department of Justice . . . is an agency as defined in 5 U.S.C. § 7103(a)(3).'" (Respondent's Response and Cross-Motion, p. 4); however, in footnote 4, Respondents further state, "The only other statement . . . which might possibly relate to Respondent DOJ is that 'the Department of Justice Office of the Inspector General . . . is an activity and/or component of the U.S. Department of Justice as defined in 5 C.F.R. § 2421.4.' . . . However, this statement is not undisputed. . . ." (id., n.4, p. 4).

Respondents' denial that OIG is an organizational entity of the Dept. of Justice is rejected as a nullity for the reasons: 1) from the name alone it is plain that it is a component of the Dept. of Justice; 2) the affidavit of Special Agent Sullivan states, in part, that the IG, ". . . is subject to the general supervision of the Attorney General . . . and Deputy Attorney General . . . ." (Res. Exh. 1, p. 1); 3) Section 2 of the Inspector General Act specifically provides, in part, as follows:

> ". . . there is hereby established in each of such establishments [i.e., here, the Department of Justice (§ 11(2))] an office of Inspector General." (5 U.S.C.A. App. 3, § 2) (See, also, §§ 3(a) ". . . Each Inspector General shall report to and be under the general supervision of the head of the establishment involved . . . ."; and 8E(a)(1)).

Moreover, whether the Special Agents were representative of the Dept. of Justice within the meaning of § 14(a)(2)(B) of the Statute is a question of law.

b) That General Counsel has not established any facts which demonstrate that the Dept. of Justice had any involvement in, or responsibility for, the examination of employee Vigil; and c) On the basis of United States Department of Justice; Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota, Office of Inspector General, Washington, D.C., et al. v. FLRA, 39 F.3d 361 (D.C. Cir. 1994) (hereinafter, "Twin Cities"), complaint as to OIG should be dismissed as a matter of law.

Each of Respondents' assertions is rejected for reasons set forth hereinafter:

1. The undisputed facts show that OIG is, as alleged in Paragraph 5 of the Complaint, ". . . an activity and/or component of the U.S. Department of Justice as defined in 5 C.F.R. § 2421.4."

Notwithstanding Respondents denial of paragraph 5 of the Complaint in their Answer, which answer has been rejected as a nullity because Respondent asserts other undisputed facts which are to the contrary, the undisputed facts show beyond cavil that the OIG is, as alleged in the Complaint, an organizational component of the Dept. of Justice. As noted above, at the outset, the name alone, i.e., "Department of Justice Office of the Inspector General", shows that it is a component of the Dept. of Justice or, as stated in 5 C.F.R. § 2421.4 that it is an "organizational entity" of the Dept. of Justice. Further, as also noted above, the Inspector General Act, which Respondents cite in part, as to which there can be no dispute as to its terms, albeit there well may be disagreement as to their meaning, defines "establishment" to mean, inter alia, the Department of Justice (5 U.S.C.A. App. 3, § 11(2)) and in § 2, provides that, ". . . there is hereby established in each of such establishments an office of Inspector General." (id. § 2); Respondents concede that the IG, ". . . is subject to the general supervision of the Attorney General . . . and Deputy Attorney General . . . ." (Res. Exh. 1, p. 1). Indeed, § 3(a) of the Inspector General Act, provides, in part, that, ". . . Each Inspector General shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head . . . ." (5 U.S.C.A., App. 3, § 3(a)). Moreover, while § 3 provides that, "Neither the head of the establishment [here, The Attorney General] nor the officer next in rank . . . shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation . . . ." (Id.), Section 8E, which applies only to the Department of Justice, provides that notwithstanding § 3, ". . . the Inspector General shall be under the authority, direction and control of the Attorney General with respect to audits or investigations . . . which require access to sensitive information concerning": ongoing civil or criminal investigations or proceedings; undercover operations; identity of confidential sources; intelligence or counterintelligence; or or other matters the disclosure of which would constitute a serious threat of national security. Further, with respect to such

information, the Attorney General, ". . . may prohibit the Inspector General from carrying out or completing any audit or investigation . . ." (id., § 8E) (Emphasis supplied). In addition, Section 11 provides, in part, that,

> "(3) the term 'Inspector General' means the Inspector General of an establishment;
>
> "(4) the term 'Office' means the Office of Inspector General of an establishment . . . ." (id., § 11(3) and (4)) (Emphasis supplied).

Accordingly, as I have found, the undisputed facts show that the OIG is an organizational entity of the Dept. of Justice. To be sure, OIG, obviously, is not an "agency", as it is simply an organizational entity of the Dept. of Justice, and it is a question of law, not of fact, whether it was a representative of the Dept. of Justice, within the meaning of § 14(a)(2)(B) of the Statute, when it conducted an examination of a bargaining unit employee.

2. Dept. of Justice is liable for violation by OIG.

It is true that the Dept. of Justice, ". . . did nothing, either actively or passively, to deny Leonard Vigil his right to representation. . . ." (Respondent's Response, p. 7) and it is quite correct that, in United States Department of Agriculture, Farm Service Agency, Kansas City, Missouri and United States Department of Agriculture, Office of Inspector General, Kansas City, Missouri, et al., (hereinafter "Farm Service") Case No. DE-CA-60399 (June 13, 1997), 130 Adm. Law Judge Dec. Rep., November 13, 1997, I held that, because Farm Service, which was not an "agency" but an "activity" of the Department of Agriculture, had no involvement with the examination and had no control over the OIG special agents who conducted the examination, it did not violate either 16(a)(1) or (8) of the Statute and, accordingly, dismissed the allegation of the Complaint as to Farm Service. However, I specifically noted that, where charged, liability of an agency for the conduct of its Inspector General is wholly different, for the Authority in Headquarters, National Aeronautics and Space Administration, Washington, D.C., et al., 50 FLRA 601 (1995), enf'd sub nom. FLRA v. National Aeronautics and Space Administration, 120 F.3d 1208 (11th Cir. 1997) cert. granted, No. 98-369 (November 2, 1998) 1998 WL 596670, 67 USLW 3170 (hereinafter "NASA"), had stated, in part, that:

" . . . the Authority also has noted in prior decisions that it is appropriate for agency headquarters with administrative responsibility for the Office of Inspector General to advise IGs 'of the pertinent rights and obligations established by Congress in enacting the Federal Service Labor-Management Relations Statute. More particularly, . . . investigators should be advised that they may not engage in conduct which interferes with the rights of employees under the Statute.' DOD, DCIS, 28 FLRA at 1151. It is with this objective in mind--ensuring that the Office of Inspector General is advised by its statutory superior of the obligation to comply with the Statute--that we find the purposes underlying the Statute will be effectuated by holding NASA, HQ liable for the actions of its Inspector General. As set forth in this decision, despite a degree of independence, the IG is nevertheless under the direct supervision of the head of the agency. Accordingly, we will no longer follow Authority precedent declining to hold an agency headquarters responsible for the statutory violations of its Inspector General."
(Slip opinion, p. 23) (50 FLRA at 622)

In enforcing the Authority's decision, the Court of Appeals for the Eleventh Circuit, as to this issue, stated, in part, as follows:

". . . In § 7103(a)(3), Congress defined 'agency' to include executive agencies, and it is undisputed that NASA-HQ falls within the statutory definition of 'agency.' 5 U.S.C. § 7103(a)(3). Nothing in the text of § 7114(a)(2)(B) indicates to us that Congress intended a different meaning when it used 'agency' in § 7114(a)(2)(B). The fact that Congress elsewhere used 'representative of the agency' and 'representative of an agency' in the context of collective bargaining matters does not establish in our view that Congress must have intended to depart from the statutory definition of 'agency' and to imply a collective bargaining requirement in § 7114(a)(2)(B). *Accord DCIS*, 855 F.2d at 100.

"Moreover, we agree with the Authority that reading such a requirement into 'representative of the agency' in § 7114(a)(2)(B) would undermine Congress's purpose in enacting this section.

Congress enacted § 7114(a)(2)(B) to extend Weingarten protection to federal employees. See 124 Cong. Rec. 29, 184 (daily ed. Sept. 13, 1978) (statement of Rep. Udall). In *Weingarten*, the Court upheld the NLRB's ruling entitling employees who 'seek[ ] "aid or protection" against a perceived threat to employment security' to union representation during intimidating investigatory confrontations. 420 U.S. at 260, 95 S.Ct. at 965. In enacting § 7114(a)(2)(B), Congress also sought to provide for 'union representation at investigatory interviews which the employee reasonably believes may result in disciplinary action against him.' 124 Cong. Rec. 29, 184 (daily ed. Sept. 13, 1978) (statement of Rep. Udall) (quoting *Weingarten*, 420 U.S. at 267, 95 S.Ct. at 968). The Statute, like the *Weingarten* rule itself, focuses on the risk of adverse employment action to the employee. Because this risk does not disappear or diminish significantly when an investigator is employed in an agency component that has no collective bargaining relationship with the employee's union, we see no reason why the protection afforded by Congress should be eliminated in such situations. See *DCIS*, 855 F.2d at 99 ('[W]e doubt that Congress intended that union representation be denied to the employee solely because [the investigator was] employed outside the bargaining unit.'). (120 F.3d at 1213)

. . . .

"In this case, the Authority found NASA-HQ guilty of an unfair labor practice because, as the parent agency, it failed to ensure that NASA-OIG complied with § 7114(a)(2)(B). The Authority found that investigative information obtained by NASA-OIG can be a basis upon which NASA-HQ disciplinary action is taken and that NASA-OIG reports to and is under the general supervision of NASA-HQ. Based on these findings, the Authority concluded that the purposes of § 7114(a)(2)(B) would be served by requiring NASA-HQ to advise NASA-OIG of its obligation to comply with the Statute.

"Although NASA-OIG is an 'independent and objective' unit of NASA-HQ, *see* 5 U.S.C. app. 3 § 2, NASA-OIG is subject to the general supervision of the agency head. 5 U.S.C. app. 3 § 3(a). In conducting investigations within the agency, NASA-

> OIG serves the interest of NASA-HQ by soliciting information
> of possible misconduct committed by NASA employees. . . . We therefore find no clear error in the Authority's determination that NASA-HQ should be held responsible for the investigator's violation of § 7114(a)(2)(B)." (id., at 1216-1217)

Further, with respect to Respondents argument that, ". . . even if OIG did fail to comply, the fact that OIG is an independent entity defeats any attempt to extend liability for such a violation to DOJ." (Response, p. 8), the Authority rejected a like assertion in NASA, supra, stating, in part, as follows:

> "To be sure, the IG Act grants an IG a degree of freedom and independence from the parent agency that employs him or her. However, this statutory recognition of autonomy is not absolute, and becomes nonexistent when the IG's purpose in 'conducting interviews . . . is to solicit information concern-ing possible misconduct of [agency] employees in connection with their work,' and 'the information secured may be disseminated to supervisors in affected subdivisions of the [agency] to be utilized by those supervisors for [agency] purposes.' DCIS, 855 F.2d at 100. (50 FLRA at 615)
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> . . . .
>
> "We conclude that the requirements of section 7114(a)(2)(B) do not conflict with the IG Act. In reaching this conclusion, we have examined the language of both statutes and their legislative histories and considered the interrelationship between these two enactments. (id. at 616)
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> . . . .
>
> ". . . the expressed legislative intent in enacting section 7114(a)(2)(B) was to provide rights to Federal sector bargaining unit employees consistent with those provided in the private sector under Weingarten. See IV.A.1., above. We agree with the Third Circuit that the purpose of the IG Act is 'to insulate Inspector Generals [sic] from pressure from agency management which might attempt to cover up its own fraud, waste, ineffectiveness, or abuse.' DCIS, 855 F.2d at 98

(emphasis added). We find that this conclusion is entirely consistent with the statement of purpose in the legislative history of the IG Act: 'The purpose of this legislation is to create Offices . . . to more effectively combat fraud, abuse, waste and mismanagement in agency programs and operations.' S. Rep. No. 1071, 95th Cong., 2d Sess. 1 (1978), reprinted in 1978 U.S.C.C.A.N. 2676. Thus, we agree with the Third Circuit's rejection of the argument that the IG Act was "intended to create "an independent investigatory office at the [agency] which would not be subject to interference by any other agency programmatic concerns, including federal labor relations.'" DCIS, 855 F.2d at 98. This broad reading is 'unsupported by the text and legislative history of the IG Act.' (id., at 617-618).

. . . .

". . . Our examination of the IG Act does not reveal any irreconcilable conflict with section 7114(a)(2)(B) of the Statute. In particular, no provision in the IG Act . . . would be rendered ineffective by the right to have a union representative present during an OIG investigative interview. For example, compliance with the Statute does not prevent an agency IG from 'conduct[ing] audits and civil and criminal investigations relating to the Department's operations. 5 U.S.C. app. § 4(a)(1).' Id. Nor does compliance with the Statute preclude an IG from 'notify[ing] the Attorney General directly, without notice to other agency officials, upon discovery of 'reasonable grounds to believe there has been a violation of Federal criminal law" [5 U.S.C. app. § 4(d)].' Id. Rather than hindering such investigations, we find that providing section 7114(a)(2)(B) rights to Federal bargaining unit employees will serve in this context as well the salutary purposes the Supreme Court envisioned in its Weingarten decision, e.g., clarifying issues or facts, raising extenuating factors, suggesting other employees having knowledge, and protecting the interests of the entire bargaining unit. Weingarten, 420 U.S. at 260-61.

"Moreover, as we have held, and as the Third Circuit noted in DCIS, 855 F.2d at 100-01, the representational function of a Weingarten representative is limited. Among other things,

the employer may insist on hearing the employee's own account of the matter under investigation and the union's presence need not transform the examination into an adversary proceeding. Id. (relying upon Weingarten, 420 U.S. at 260, 262-63); see also Norfolk Naval Shipyard, 9 FLRA 458 (1982) (agency management may have need, under certain circumstances, to place reasonable restrictions on the exclusive representative's participation at a section 7114(a)(2)(B) examination). 'Given the limited function of a Weingarten representative, it is conceivable to us that Congress might conclude that the employee's interest in representation outweighs the limited interference that his or her representative's presence might occasion in [IG] interviews.' DCIS, 855 F.2d at 101.

In sum, we agree with the Third Circuit and 'do not find section 7114(a)(2)(B) and the mandate of the [IG] so clearly irreconcilable that we are willing to imply an exception based solely on the enactment of the IG Act.' Id. at 100." (id., at 618-619)

The Eleventh Circuit Court of Appeals agreed fully, stating, in part, as follows:

"We find nothing in the text or legislative history of the IG Act, however, to justify exempting OIG investigators from compliance with the federal *Weingarten* provision. No provision of the IG Act suggests that Congress intended to excuse OIG investigators from honoring otherwise applicable federal statutes. [footnote omitted] Moreover, we do not find a sufficient conflict between the purpose of the IG Act and the mandate of § 7114(a)(2)(B) so that we would imply such an exemption into the text of the IG Act. *See DCIS*, 855 F.2d at 100.

"Congress created the Offices of the Inspector General in order 'to more effectively combat fraud, abuse, waste and mismanagement in the programs and operations' of certain specified federal agencies. S.Rep. No. 95-1071, 95th Cong., 2d Sess., *reprinted in* 1978 U.S.C.C.A.N. 2676, 2676 (1978); *see* also 5 U.S.C. app. 3 § 2. In order to accomplish these goals, Congress believed it necessary to grant OIGs a significant degree of independence from the agencies they were charged with investigating. For example, even though

Inspector Generals are under the 'general supervision' of the agency head, only the President, not the agency head, may remove an Inspector General. 5 U.S.C. app. 3 § 3(a),(b). Neither the agency head nor the deputy may 'prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investi-gation.' 5 U.S.C. app. 3 § 3(a). And apart from the limited supervision of the top two agency heads, no one else in the agency may provide any supervi-sion to the Inspector General. *Id.* ('[The Inspector General] shall not report to, or be subject to supervision by, any other officer of [the agency].'); *see also* NRC 25 F.3d at 233-35 (characterizing agency head supervision of OIG as 'nominal'); [footnote omitted] *DOJ*, 39 F.3d at 367 (discussing independence of OIG).

"In Congress's view, such independence was necessary to prevent agency managers from covering up wrongdoing within their agencies in order to protect their personal reputations and the reputations of their agencies. In light of the potentially conflicting agendas of agency management and Inspector Generals, Congress created the safeguards necessary to ensure that Inspector Generals could conduct their investigations without interference from agency management personnel. *See* S.Rep. No. 95-1071, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2682; DCIS, 855 F.2d at 98 ('[T]he purpose of these provisions was to insulate Inspector Generals from pressure from agency management which might attempt to cover up its own fraud, waste, ineffectiveness or abuse.'). We do not believe that the presence of a union representative at OIG interviews, as mandated by federal statute, creates the type of interference from which Congress sought to insulate OIG investigators. The employees' statutory right to union representation does not provide management with an opportunity to interfere with OIG investigations or to cover up fraud or waste within its own agency.

"Moreover, we do not believe that the presence of a union representative will impermissibly hinder the OIG's ability to perform its essential function of detecting and preventing fraud and abuse within the agencies. The *Weingarten* representative is present only to

assist the employee, and the employer is free to insist in hearing only the employee's own account of the matter under investigation. *See Weingarten*, 420 U.S. at 260, 95 S.Ct. at 965. The representative's presence 'need not transform the interview into an adversary process.' Id. at 263, 95 S.Ct. at 966. . . . Moreover, we do not see how the right of an employee to be represented by a union representative presents a significantly greater interference with OIG interviews than the existing right of an employee to be represented at such interviews by an attorney. *See* 5 U.S.C. § 555 (b) (providing for the right to be advised and represented by counsel for anyone compelled to appear in person before an agency or agency representative).

"We therefore conclude that allowing a union employee to exercise the full rights granted to him or her by § 7114(a)(2)(B) is not sufficiently inconsistent with the IG Act to justify an implied exemption for OIG investigators. . . ." (120 F.3d at 1214-1215) (Emphasis supplied)

3. D.C. Circuit's Decision in Twin Cities is Rejected as Controlling Precedent.

For reasons already set forth, it must be apparent, with all due deference, that I consider Twin Cities, 39 F.3d 361 (D.C. Cir. 1994), wrongly decided; but my opinion is of no moment. The controlling consideration is that the Authority has respectfully declined to follow Twin Cities and the decision of the Authority would, in any event, be binding on me. Thus, in NASA the Authority held, in part, as follows:

"Consistent with our decision in DOD, DCIS [28 FLRA 1145 (1987)], and the Third Circuit's affirmance of this decision in DCIS [855 F.2d 93 (3d Cir. 1988)], we find that investigator Dill was acting as a 'representative of the agency'--NASA, HQ--within the meaning of section 7114(a)(2)(B). We reach this conclusion based upon our determination that: (1) the term 'representative of the agency' under section 7114(a)(2)(B) should not be so narrowly construed as to exclude management personnel employed in other subcomponents of the agency; (2) the statutory independence of agency OIGs is not determinative

of whether the investi-gatory interviews implicate section 7114(a)(2)(B) rights; and (3) section 7114 (a)(2)(B) and the IG Act are not irreconcilable. See DCIS, 855 F.2d at 99, 100. . . ." (50 FLRA at 614)

. . . .

". . . Contrary to the D.C. Circuit's determination that '[t]he Inspector General does not stand in the shoes of management,' DOJ, 39 F.3d at 368, under these circumstances we conclude, in agreement with the Third Circuit, that 'Congress would regard [an OIG] investigator as a "representative of the [agency]."' DCIS, 855 F.2d at 100. [footnote omitted]" (id. at 616)

. . . .

"The D.C. Circuit concluded in DOJ that if required to comply with 5 U.S.C. § 7114(a)(2)(B), 'the Inspector General's independence and authority would necessarily be compromised.' DOJ, 39 F.3d at 361. With all due respect, we disagree. . . ." (id. at 618)

. . . .

"In sum, we agree with the Third Circuit and 'do not find section 7114(a)(2)(B) and the mandate of the [IG] so clearly irreconcilable that we are willing to imply an exception based solely on the enactment of the IG Act.' Id. at 100.

"Even if we were to find a conflict between these two statutes, given the absence of statutory language evidencing a legislative intent that one is preemptive of the other, [footnote omitted] we find no support for the D.C. Circuit's determination that the IG Act should trump the Statute in general, or section 7114(a)(2)(B) in particular. . . .

"Our reading of the Statute and the IG Act is consistent with the canons of statutory construction because it gives effect to each law while preserving their sense and purpose. . . . (id. at 619)

In granting enforcement of NASA, the Eleventh Circuit Court of Appeals stated, in part, as follows:

"Two circuits have considered the status of OIG investigators under § 7114(a)(2)(B) and have reached opposite conclusions. In *Defense Criminal Investigative Service v. FLRA*, the Third Circuit held that investigators of the Defense Criminal Investigative Services ('DCIS'), a subdivision of the Department of Defense ('DOD') under the authority of that agency's Inspector General, are bound by the terms of this section. 855 F.2d 93 (3d Cir. 1988) ('DCIS'). The court concluded that '[i]t is apparent from the face of the statute that Congress wanted federal employees to have the assistance of a union representative when they were placed in a position of being called upon to supply information that would expose them to the risk of disciplinary action.' *Id.* at 98-99. The court expressly rejected DCIS's contention that 'representative of the agency' referred only to members of the bargaining unit with which the employee's union has a collective bargaining agreement. *Id.* at 99-100.

"In *Department of Justice v. FLRA*, 39 F.3d 361 (D.C. Cir. 1994) ('DOJ'), the D.C. Circuit concluded that the DOJ's Office of the Inspector General was not the 'agency' Congress intended under § 7114(a)(2)(B) because it had no collective bargaining relationship with the union. *Id.* at 365-66 In holding that interviews with DOJ's OIG investigators are not governed by the federal *Weingarten* provision, the *DOJ* court relied on the independence and authority granted Inspector Generals by the Inspector General Act of 1978, 5 U.S.C. app. 3 §§ 1-12 ('IG Act'). '[T]he Inspector General's independence and authority would necessarily be compromised if another agency of government–the Federal Labor Relations Authority–influenced the Inspector General's performance of his duties on the basis of its view of what constitutes an unfair labor practice.' *Id.* at 367.

"In the face of these conflicting opinions, the Authority independently analyzed the terms of § 7114(a)(2)(B). It first determined that NASA-HQ was the relevant agency under this section. *See* 5 U.S.C. § 7103(a)(3) (defining 'agency' to mean an 'Executive agency'). The Authority then concluded that NASA-OIG should be considered a representative of NASA-HQ for the purposes of §

7114(a)(2)(B) because it is a subcomponent of NASA-HQ and provides investigatory information to NASAHQ and to other agency subcomponents for use in disciplinary proceedings.

"The Authority rejected NASA-OIG's assertion that § 7114(a)(2)(B) applies only to examinations conducted by an employee of a component of the agency that has a collective bargaining relationship with the union. . . ." (120 F.3d at 1212)

. . . .

"After a careful examination of the text and motivating purposes of § 7114(a)(2)(B), we find no error in the Authority's interpretation of 'representative of the agency.'

. . . .

"Moreover, we agree with the Authority that reading such a requirement into 'representative of the agency' in § 7114(a)(2)(B) would undermine Congress's purpose in enacting this section. . . .

. . . .

". . . Under these circumstances, we conclude that the Authority's determination that the NASA-OIG investigator was a 'representative of the agency' within the meaning of § 7114(a)(2)(B) is a permissible construction of the Statute. [footnote omitted]" (id. at 1213)

. . . .

"We find nothing in the text or legislative history of the IG Act, however, to justify exempting OIG investigators from compliance with the federal *Weingarten* provision. . . ." (id. at 1214).

Indeed, the Second Circuit Court of Appeals, in FLRA v. U.S. Department of Justice, Washington, D.C. et al., [INS and OIG], 125 F.3d 106 (2d Cir. 1997), has rejected the underpinnings of the D.C. Circuit's decision, in pertinent part, as follows:

". . . The District of Columbia Circuit has concluded that the OIG of the DOJ 'plainly

qualifies as an "agency" because it is an "independent establishment" and "not an Executive department" (5 U.S.C. § 104(1)).' *United States Department of Justice v. FLRA*, 39 F.3d 361, 365 (D.C. Cir. 1994) ("DOJ/FLRA"). The Third Circuit has interpreted the definition quite differently, reasoning that "'[i]ndependent establishments' are defined by 5 U.S.C. § 104 in such a way as to exclude any Executive departments *or parts thereof*.' *Defense Criminal Investigative Services v. FLRA*, 855 F.2d 93, 98 (3d Cir. 1988) (emphasis added) ("*DCIS/FLRA*"). Based on this interpretation, the Third Circuit upheld the FLRA's view that the pertinent "agency" in a dispute similar to ours was the Department of Defense ("DOD") . . . The Eleventh Circuit has also held that the pertinent 'agency' was the parent agency (NASA) in which the component that employed the interrogated employees was located. *See NASA/FLRA*, 120 F.3d at 1212-13.

"On this aspect of the pending controversy, we agree with the Third and Eleventh Circuits. The definition of 'independent establishment' excludes 'parts' of an Executive department, 5 U.S.C. § 104 (1), and the OIG of the DOJ therefore cannot be an 'independent establishment,' as the D.C. Circuit believed. . . ." (id. at 111-112).

. . . .

"We agree with the Third and Eleventh Circuits that the pertinent agency for purposes of section 7114(a)(2)(B) is the department or parent agency employing the interrogated employees (here, the DOJ). *See DCIS/FLRA*, 855 F.2d at 98-100 (pertinent agency is Department of Defense); *NASA/FLRA*, 120 F.3d at 1212-13 (pertinent agency is NASA). That conclusion comports with the statutory definition of 'agency.'[7]

_____

"7. To this extent, we disagree with the D.C. Circuit, which concluded that the DOJ was not the 'agency' within the meaning of section 7114(a)(2)(B) because, in the case reviewed by that Court, the FLRA had dismissed the DOJ as a respondent on the ground that it was

not responsible for the OIG's violation. *See DOJ/FLRA*, 39 F.3d at 365. The fact that the DOJ might not have acted in such a way as to be responsible for an unfair labor practice that the FLRA believed the OIG had committed is no indication that the DOJ is not the pertinent 'agency' for purposes of determining whether an OIG agent is a 'representative' of the 'agency' within the meaning of section 7114(a)(2)(B)." (id. at 112).

. . . .

"The Third and Eleventh Circuits have ruled that an OIG agent employed by a cabinet department (DOJ) or an agency (NASA) is a 'representative of the agency' within the meaning of section 7114(a)(2)(B). *See DCIS/FLRA*, 855 F.2d at 100; *NASA/FLRA*, 120 F.3d at 1212-13. The D.C. Circuit has ruled that section 7114(a)(2)(B) does not apply to interrogation by an OIG agent, *see DOJ/FLRA*, 39 F.3d at 364-68, a conclusion premised on that Circuit's view that only the OIG itself, rather than the parent cabinet department, might be the

'agency' for purposes of section 7114(a)(2)(B), *id.* at 365." (id. at 112-113).5

5
The Court's conclusion that,

> "In our view, whether an OIG agent is a 'representative' of the DOJ for purposes of section 7114(a)(2)(B) depends on the context in which the interrogation arises." (id. at 113)

is seriously flawed. The Court explained,

> ". . . if OIG agents were called in to question the INS-NY employees about excessive use of sick leave, section 7114(a)(2)(B) would apply to require attendance of a union representative." (id.)

But,

> ". . . if an . . . agent was questioning a DOJ employee concerning the employee's alleged criminal conduct [". . . the acceptance of bribes. . . purchasing or carrying personal firearms"], we do not believe that the Weingarten provision would apply to assure the presence of a union representative at the examination." (id.)

The Authority consistently has rejected any distinction between administrative and criminal examinations, as did the Third Circuit Court of Appeals in enforcing DCIS, 855 F.2d 93 (3d Cir. 1998), and, even though the Eleventh Circuit Court of Appeals in n.6 of its NASA decision noted, in part, that

> "6. Because this case involved only potential administrative rather than criminal consequences for the employee, we need not determine the availability or scope of § 7114(a)(2)(B) protection in the context of criminal investigatory examinations . . . ." (120 F. 3d at 1213, n.6),

its discussion of the text and motivating purposes of § 7114 (a)(2)(B) clearly suggest that it would, in agreement with the Authority, extend § 14(a)(2)(B) to criminal examinations of employees because ". . . The Statute, like the Weingarten rule itself, focuses on the risk of adverse employment action to the employee. . . ." (120 F.3d at 1213).

By denying employee Vigil's request for Union representation during its examination of him, OIG failed to comply with the requirements of § 14(a)(2)(B) of the Statute and thereby violated §§ 16(a)(1) and (8) of the Statute. Because OIG was a representative of DOJ in connection with the investigation, DOJ was responsible for the unfair labor practice committed by OIG. Accordingly, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.41 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41, and § 18 of the Statute 5 U.S.C. § 7118, the United States Department of Justice, Washington, D.C. and the United States Department of Justice Office of the Inspector General, Washington, D.C., shall:

1. Cease and desist from:

(a) Requiring any bargaining unit employee of the United States Department of Justice, Federal Bureau of Prisons, to take part in any investigatory examination conducted pursuant to § 14(a)(2)(B) of the Statute without allowing the employee's exclusive representative to represent him, or her, when the employee requests such representation and when the employee reasonably believes that the examination may result in disciplinary action.

(b) In any like or related manner, interfering with, restraining, or coercing employees of the Federal Bureau of Prisons in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) The United States Department of Justice shall order its Office of the Inspector General to comply with the requirements of § 14(a)(2)(B) of the Statute when conducting investigatory examinations of employees of the Federal Bureau of Prisons.

(b) The United States Department of Justice, Washington, D.C., shall order posted at all facilities of the Federal Bureau of Prisons, nationwide, where bargaining unit employees of the Federal Bureau of Prisons 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 Attorney General and by the Inspector General and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notice to employees are customarily posted. Reasonable step shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e), notify the Regional Director of the Denver Region, Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204-3581, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: November 10, 1998
Washington, DC

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Department of Justice, Office of the Inspector General, Washington, D.C. and the United States Department of Justice, Washington, D.C. have violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY ALL EMPLOYEES OF THE FEDERAL BUREAU OF PRISONS THAT:

WE WILL NOT require any bargaining unit employee of the Federal Bureau of Prisons, to take part in any examination in connection with an investigation without allowing the exclusive representative of such employee to be present if: the employee reasonably believes that the examination may result in disciplinary against the employee; and the employee requests representation.

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

_____
Attorney General
United States Department of Justice

_____
Inspector General
United States Department of Justice

Dated: _____
Washington, D.C.

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, whose address is: 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 WILLIAM B. DEVANEY , Administrative Law Judge, in Case No. DE-CA-80076, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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Ms. Vivian B. Jarcho
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REGULAR MAIL:

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Dated: November 10, 1998
Washington, DC