UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, OFFICE OF INTERNAL AFFAIRS, WASHINGTON, DC Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF PRISON LOCALS Charging Party	Case No. WA-CA-60287

NOTICE OF TRANSMITTAL OF DECISION

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

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

Any such exceptions must be filed on or before **APRIL 30, 1997**, 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: March 31, 1997
Washington, DC

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: March 31, 1997

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: DEPARTMENT OF JUSTICE, FEDERAL
BUREAU OF PRISONS, OFFICE OF
INTERNAL AFFAIRS, WASHINGTON, DC

Respondent

and Case No. WA-CA-60287

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL OF PRISON LOCALS

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

DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, OFFICE OF INTERNAL AFFAIRS, WASHINGTON, DC Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF PRISON LOCALS Charging Party	Case No. WA-CA-60287

Jeanne Marie Corrado, Esquire
Christopher Feldenzer, Esquire
For the General Counsel

Amy Whelan Risley, Esquire
Donald Laliberte, Esquire
For Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION

This case presents some variations on the familiar problem of protecting the "*Weingarten*" rights of employees who are examined in connection with an investigation. An unfair labor practice complaint alleges that Respondent (OIA) failed to comply with section 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute) by denying the requests of Federal Bureau of Prisons employees Bryan Bower, James Nickerson, and Larry Zucksworth to be provided with a representative of the Charging Party (the Union), and that such failure violated sections 7116(a)(1) and (8) of the Statute. The complaint also alleges that OIA committed independent violations of section 7116(a)(1) by telling Nickerson that the Union would not represent him because of certain information he had disclosed to OIA, and by requiring employee Osvaldo Baez to wait for eight hours, and then failing to interview him, after he requested union representation.

The answer admits the jurisdictional allegations, those concerning the Union's representational status, and that it was reasonable for the employees to believe that their

examinations could result in disciplinary action against them. The answer denies that Bower, Nickerson, and Zucksworth requested union representation, denies that Baez waited as alleged, and denies that OIA committed any unfair labor practices.

A hearing on this complaint was held in St. Louis, Missouri. Counsel for the General Counsel and for OIA filed post-hearing briefs. The following findings are based on the record, the briefs, my observation of the witnesses, and my evaluation of the evidence.

I. Findings on General Background Facts

In October 1995 there was an "inmate disturbance" at the Federal Correctional Institution, Greenville, Illinois (FCI Greenville), where the employee-witnesses are employed and are represented by the Union. Nickerson, Zucksworth, and Baez were assigned by their supervisors to disturbance control teams (DCTs). Among the functions of these teams was to move inmates to the facility's Special Housing Unit (SHU) during the disturbance. Warden Richard Seiter described the SHU as "our jail within the prison," an area in which inmates may be separated from the general prison population for one reason or another. Employee Bower was assigned to the SHU during the disturbance. Each of these employees was relieved of his official duties and put in a form of administrative leave called "home duty status" pending an investigation of alleged staff misconduct, including physical abuse of inmates in the SHU.

Warden Seiter referred the allegations of misconduct to OIA in Washington. OIA Chief Jerome Graber sent two agents to FCI Greenville to conduct a preliminary investigation. On the basis of the information these agents reported back, Graber referred the matter to the Department of Justice's Office of the Inspector General (OIG) and to the Criminal Section of the Civil Rights Division. The Civil Rights Division accepted the case and assigned the Federal Bureau of Investigation (FBI) to conduct a criminal investigation.

On November 29, 1995, Union President J.P. Hough sent Warden Seiter the following memorandum:

> It has come to my attention that the [FBI] will be at the institution on Friday, December 1, 1995. It is my understanding that the FBI will be conducting an investigation in reference to the allegations against members of the [DCT], specifically Officer Larry Zucksworth[. T]he Union has appointed Mr. Thomas McGuire, Attorney at Law, as our repre-sentative, per the Master

Agreement, Article 6, Section G. I am requesting that Mr. McGuire be allowed access to the institution for this purpose.

Mr. McGuire did act as a representative for one or more of the employees during the FBI investigation. When that investigation was completed, the Civil Rights Division concluded that the case lacked prosecutorial merit and referred the matter back to OIA for administrative resolution. OIA Chief Graber then dispatched a team of investigators to continue the administrative review by building on the information that OIA and the FBI had developed. These investigators were Supervisory Special Agent John Pfistner as lead agent, and Special Agents Michael Smith, Richard Winn, and "Mike" Nelson.

II. Evidence Presented on the Conduct of the Interviews

A. General Counsel's Evidence

1. Bryan Bower Interview: Bower's Version

On February 7, 1996, Bower was called by the warden's secretary to report for an interview by OIA. He arrived at the appointed place and was met by Union Vice President Larry Dobyns. Bower testified that Dobyns immediately placed a call to Thomas McGuire. While Dobyns was on the phone, a man unknown to Bower approached and told him, in private, that his interview would begin in approximately ten minutes. Bower told the man that Dobyns was on the phone with "my attorney, or the Union's attorney at the time, and we would be there immediately after he was off the phone". The man, still unidentified, told Bower, "Well, you have ten minutes or you're fired."

Bower reported this conversation to Dobyns. Dobyns advised Bower to request McGuire as his Union representative. Then he accompanied Bower into the interview room. There, the yet unidentified Special Agent Smith asked Dobyns his name. When Dobyns told him, Smith left the room. Upon his return, Smith told Dobyns that he could not sit in on the Bower interview because Dobyns was himself going to be questioned later. Dobyns and Bower left the room, and on Dobyns' advice, Bower called employee Holly Cron (or Crone) and asked that she come to the interview. Cron arrived, but, before entering the interview room, told Bower that "they" had told her previously that she would not be allowed to speak during the interview.

When Bower re-entered the interview room with Cron, Special Agents Smith and Winn introduced themselves. They did not ask who Cron was, or whether she was Bower's Union

representative, but Bower assumed that they knew who she was because she had been sitting in on earlier interviews. The agents explained that they were investigating excessive force, or physical abuse of an inmate, and gave Bower a "Form B" to sign. "Form B" is a single-page "WARNING AND ASSURANCE TO EMPLOYEE REQUIRED TO PROVIDE INFORMATION" in an official administrative investigation.[1] It includes the following advice regarding union representation:

> If you are a member of the bargaining unit and you believe your rights are being threatened, you may request the presence of a representative. If you desire a representative no further questioning will take place until your representative is present. However, if your representative is not available within a reasonable period of time, questioning may proceed without a representative being present.

Bower read Form B and told the OIA agents that he wanted Thomas McGuire as his Union representative. The OIA agents told Bower that this was an administrative investigation and that, even if McGuire was in the building, which he was not, they would not allow him to sit in on the interview. Bower pointed to the language in Form B regarding his right to a union representative and said that McGuire was the person he wanted as his "Union rep." The OIA agents responded that McGuire was an attorney and "has no say-so in this matter." The participants discussed this issue for five to ten minutes without resolution. Then Cron indicated to Bower that he should sign the Form B. He did, and the interview proceeded. Cron did not ask any questions or otherwise speak.

After the agents had finished their questioning, they presented Bower with an affidavit they had prepared on a laptop computer as they went along. The affidavit, as signed by Bower, contained the following statement in paragraph 5:

> That I have elected to have Holly Crone as my Union Representative during this interview. I would like to state that I will answer the questions asked but I am doing it under protest because I wanted my attorney as my union rep and

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[1] Special Agent Smith characterized Form B as a "use immunity" form that is given to employees who are suspected of misconduct but is not required for a "collateral" or "witness" interview. *See American Federation of Government Employees, Federal Prison Council 33 and U.S. Department of Justice, Federal Bureau of Prisons*, 51 FLRA 1112, 1114-16 (1996).

I have been told that my attorney is not entitled to be my representative during the investigation.

Bower did not testify specifically about the origin of that statement or why he signed it notwithstanding that, according to his testimony, he did not regard Cron(e) as his Union representative and never informed the agents that she was. Bowers was asked whether he had asked to change anything in the affidavit as it was to him. He pointed out one change he had made (visible in paragraph 10) and another discrepancy he had discussed with Special Agent Smith and then had decided was too insignificant to worry about.

Bower received no discipline in connection with the October 1995 events.

2. James Nickerson Interview: Nickerson's Version

Nickerson was interviewed first on January 31, 1996 and again on February 1 and 6. He was also given a polygraph test during that week. Nickerson believed he was being questioned only as a witness and was not a target of the investigation. Thus, although advised of his right to request union repre-sentation at those interviews, he made so such request.

On February 8, 1996, Nickerson was called back. Supervisory Special Agent Pfistner took Nickerson to the office where he had previously taken the polygraph test. The windows were now taped over and the lights were very bright. Pfistner told Nickerson that "the polygraph test was proof that he was lying," that "things don't look good for you," and that "this was [Nickerson's] last opportunity to come clean." Pfistner told Nickerson to "think about your family for a couple of minutes, and what you're doing to your career, and I'll come back and get you."

Pfistner left Nickerson in the room for two and a half hours. Then someone escorted him to the warden's conference room. Agents Pfistner, Winn, Nelson and Smith were in the room. Pfistner said that "it wasn't looking good" for Nickerson and that this was his "last opportunity to come clean." Pfistner put a tape into a VCR. Nickerson heard his voice on the tape, asking "Is it erasing?" Pfistner then said, "You see what that is? We have you erasing Government evidence." Nickerson then attempted to explain to the agents what the tape showed. Pfistner threw down a picture of an inmate. He told Nickerson that he had failed the question on the lie detector test about whether or not he had hit this inmate. About then, Nickerson believed he was no longer being questioned as a witness, but that he was "being set up." He stood up and said, "I want a lawyer."

Pfistner told him that he could not have a lawyer because this was an administrative investigation. Nickerson replied, "Then I want a Union rep, I want somebody to talk to. I want to talk to somebody."

Pfistner responded that Nickerson had already stated that he had given more information than the Union wanted him to, and told Nickerson that he "[didn't] have a friend in the world at this time." Someone told Nickerson to calm down, to sit down, or both. An agent said that they were not saying he was lying but that he was not telling them everything. Pfistner said, "You refused a Union rep when we offered it to you earlier."

The agents continued the interview for another hour or two. Nickerson participated, under the impression that he had waived the right to a Union representative because he had refused it earlier. However, he testified that he was not *told* that he was being refused a representative now because he refused it earlier.

An affidavit was presented to Nickerson for his signature. Nickerson had objected to some of the statements in the affidavit when they were read to him during the interview, but he was under the impression that because Smith had refused to correct the statement prior to including them in his affidavit, Smith was not going to change the statements now. Nickerson signed the affidavit as presented because he thought he would not be allowed to leave until he signed. He did not recall being given a Form B at this interview, and none was attached to the copy of his affidavit that was received in evidence.

Nickerson was given a notice of proposed disciplinary action for conduct "admitted" in the affidavit documenting the February 8 interview. Warden Seiter affirmed the proposed action. Subsequently, the original disciplinary action was modified pursuant to an agreement between FCI Greenville and Nickerson. Nickerson received the modified discipline.

3. Larry Zucksworth Interview: Zucksworth's Version

Zucksworth was called for an interview with agents Smith and Winn on February 15, 1996. Zucksworth was told that he was being interviewed because of "alleged abuse of force or use of force" on an inmate. Zucksworth said, "Before we proceed with the interview, I want my Union representative, Thomas McGuire, to be present for this interview."

An agent responded that McGuire would not be allowed to be there because he was an attorney. Zucksworth told the agents, as he believed they already knew, that McGuire was the Union's appointed representative. However, the agents continued to insist that McGuire would not be allowed to be there because he was an attorney. They did not "dispute that the Union had designated Mr. McGuire," or ask Zucksworth how long it would take for him to get there.

Zucksworth said something that prompted one of the agents, or so he testified, to hand him a form similar to a Form B and tell him "where to write my protest down on it." Zucksworth wrote, in the space underneath the printed paragraph describing a bargaining unit member's right to a representative: "I am undergoing this interview under protest due to the fact that my union representative Thomas McGuire and Associates were [sic] not allowed to be present during this interview."

While Zucksworth was writing this protest, the agents began the substantive interview. They did not offer him, as options, either obtaining another Union representative or of proceeding without one. The interview continued throughout the day. Other agents, including Pfistner, came and went. Zucksworth signed the affidavit the agents presented to him and was excused after a total of approximately 11 hours.

Zucksworth eventually received a notice of proposed discipline arising from the events of October 1995. However, Zucksworth presented a rebuttal to the underlying allegations, and no disciplinary action was taken.

B. OIA's Evidence Concerning the Interviews

1. Evidence Pertaining to More Than One Interview

OIA agents, including Pfistner and Smith, knew that the Union had retained Thomas McGuire during the criminal portion of the investigation. However, none of them who testified had any knowledge of the Union having designated McGuire as its representative for the purpose of the administrative investigation. Winn testified that he learned later that the Union had retained McGuire, but that at the time of the interviews, "the employees were not articulating that to us."

Pfistner met with Holly Cron at the beginning of the second OIA visit to FCI Greenville, in January 1996. Cron introduced herself as a Union steward and discussed with him the issue of providing employees with copies of their

affidavits during the investigation. Cron did not raise the issue of McGuire's participation or any other issue.

Winn was teamed up with Smith for the conduct of interviews. Winn testified that he was the "number two person in the interview," who would "basically take the notes and interject anything when the number one agent was finished with the interview." Elsewhere, Winn referred to Smith as the "main agent" and the "lead agent," and that Winn was just there "assisting" Smith.

2. Bower Interview: Agents' Version

Special Agent Smith testified that he met Bower in the lobby and informed him that the agents were running late with an interview nearing completion but would be ready for Bower in about five or ten minutes. Bower responded, "Well then, if you want to interview me I want to call my attorney." Smith told Bower that "he wouldn't be allowed to have his attorney," and that, instead of discussing it further in a public area, "I would explain that to him more specifically when we got in the interview room."

When Bower was called in, Dobyns was with him. Smith told them that this was not a criminal investigation anymore, that it was now an administrative investigation, and that Bower was authorized to have a Union representative, "but [that] I was not gonna let him have an attorney in the hearing."

Smith asked Dobyns whether he was there as a Union representative, and Dobyns answered, "Yes." Smith left to ask his supervisor, Pfistner, how to proceed, because Dobyns' name had come up as a potential subject of the investigation. Pfistner told Smith to tell Dobyns that he could not remain as Bower's representative, and Smith did so. Then he offered Bower five or ten minutes to get another Union representative. Bower and Dobyns left the room. A few minutes later Bower returned with Holly Cron. Either Bower or Cron told Smith that Cron was Bower's Union representative.

Smith acknowledged that paragraph 5 of Bower's affidavit, in which Bower protested his being told that his attorney was not entitled to be his Union representative, was typed toward the beginning of the interview. Smith characterized the entire affidavit as "the employee's statement."

Special Agent Winn testified that Bower asked for, "my attorney, Thomas McGuire," in Winn's presence. (This had to be a separate conversation to that in which, according to

Smith, Bower made this request in the lobby.) Winn did not recall Bower stating that he wanted his attorney as his Union representative, but only that he wanted his attorney. Winn did not type or read Bower's affidavit, and was not familiar with the contents of paragraph 5.

Winn further testified that "we" informed Bower that he was not entitled to an attorney, but that he could have a Union representative. Bower repeated that he wanted McGuire, his attorney. After the agents "went through this again," Bower said, "Okay, I want Larry Dobyns[.]" Corroborating Smith, Winn testified that Smith left the room, returned, and reported that Dobyns could not be Bower's representative. The agents told Bower to get another representative. Bower left and returned with Cron.

Winn did not confirm any express identification of Cron as Bower's Union representative, but he had inferred that she was because of the circumstances and because "she had indicated also that . . . she was a Union steward."

3. Nickerson February 8 Interview: Agents' Version

Supervisory Special Agent Pfistner testified that at the outset he informed Nickerson that he was still under oath from his previous interviews and that the Form B that was issued to him previously still applied. Pfistner testified that Nickerson did not request either an attorney or a Union representative. Pfistner also denied that he or anyone told Nickerson that the Union would not want to provide him with representation because of information Nickerson had disclosed.

Smith more or less disclaimed any role in Nickerson's February 8 interview. However, Smith had interviewed Nickerson on two earlier occasions. On the first, January 31, he presented Nickerson with a Form B and Nickerson signed it. On the second, February 1, Smith explained that the interview was a "continuance" of the first. Smith testified that he re-apprised Nickerson of his rights under his first Form B.

When afforded the opportunity for Union representation at both of these interviews, Nickerson responded, according to Smith, by saying something to the effect that there were people in the Union who did not like him because they thought he was providing information. Smith began, but did not complete, a characterization of the connection Nickerson drew between this statement and his decision not to request Union representation. Thus, at Tr. 315, Smith heard

Nickerson as "indicat[ing] he felt he couldn't . . .," and at Tr. 316 as saying, "And so, I don't think . . . [.]"

An affidavit signed by Nickerson that was represented to have been taken by Smith at Nickerson's February 1, interview contains the following paragraph relating to Smith's testimony:

> 14. That I would like to provide additional information. When everyone was placed on home duty and the FBI began their investigation, Baez, who was also placed on home duty, told me that the Union had held a meeting concerning the incident and that an attorney had been retained to represent everyone placed on home duty. During the meeting, Holley Crone [sic], one of the officials of the union local, stood up and stated that she voted that I was not to be represented by the attorney because I was against everyone else that was involved in the incident. Baez told me they voted and that the attorney was going to represent everyone, including me. I guess Crone had been told I knew something about the Greenville staff in trouble and I was going to snitch them out or something. All I am going to do is tell the truth.

Special Agent Winn also disclaimed any part in the February 8 interview. However, Winn paraphrased Nickerson as saying at an earlier interview, upon being offered the opportunity to have a Union representative, "Ha, ha, who do you think's gonna come and represent me, they already think I'm a snitch." Winn denied telling Nickerson during any interview that the Union would not want to represent him because he had given information to OIA.

4. Zucksworth Interview: Agents' Version

According to Smith, Zucksworth asked for his attorney when Smith gave him Form B, which Smith also read to him, word for word. Smith explained to Zucksworth that "he could not have an attorney, but he could have a Union representative." On redirect examination, Smith rephrased this explanation slightly, stating, "I told Mr. Zucksworth that he was not allowed to have an attorney, *his attorney*, but he could have a Union representative." Zucksworth said that he did not want a Union representative, he wanted Mr. McGuire. Zucksworth did not explain to Smith that McGuire had been designated by the Union as the representative.

With respect to Zucksworth's handwritten statement that he was undergoing the interview under protest, Smith testified that Zucksworth requested to write this and Smith told him it was okay. Smith watched him sign it. Then Smith read the protest and signed the form under Zucksworth's signature.

Winn confirmed that Zucksworth's interview lasted 11 hours. Winn testified that Zucksworth phrased his request for McGuire's presence as follows: "I want my attorney, Thomas McGuire, out of Chicago." Zucksworth did not "make it clear," nor did Winn "understand," that he was requesting McGuire as the representative designated by the Union. Smith responded by telling Zucksworth, "[e]ssentially, that it was an administrative investigation and he was not entitled to his attorney, and that he could have a Union representative."

Winn quoted Zucksworth as responding, "No, I want my attorney, Thomas McGuire." After receiving Smith's explanation about his entitlement to a Union representative, but not his attorney, again, Zucksworth said, " Okay. Well, if you're gonna deny me my attorney I want it on record that . . . I am going through this interview under protest and I want it written on my Form B." Then Smith gave Zucksworth the Form B and Zucksworth "wrote whatever it was he wrote," and handed it back to Smith. Smith put it aside and the interview commenced.

On cross-examination, Winn changed the chronology. He testified that, first, Zucksworth was given the Form B, the agents went over it with him, and then Zucksworth said, "I want Thomas McGuire." After that, the agents re-explained the right to a Union representative, which Zucksworth declined to exercise. Winn also testified that he did not read what Zucksworth wrote on the Form B and thus did not know that Zucksworth had referred to McGuire as his Union representative.

III. Findings and Conclusion Concerning the Interviews

A. The Bower and Zucksworth Interviews

Both Bower and Zucksworth, however else they characterized their relationship with McGuire, referred to him as the person each desired as his Union representative. Thus, paragraph 5 of Bower's affidavit protests the agents' refusal to allow his attorney (whom he had previously identified as McGuire) as his Union representative. Smith admitted that this paragraph had been typed toward the beginning of the interview and was "the employee's statement." This statement precedes, in the affidavit, any

descriptions of the events about which Bower was being interviewed. I infer that, consistent with Bower's testimony, it is based on what Bower told the agents on being presented with the Form B.

Although Bower was, at that moment, accompanied by Holly Cron (who had identified herself as a Union steward according to the credited testimony of Pfistner), Cron was clearly not the representative of his choice. She had been summoned hastily only after the agents had dismissed Dobyns. In Zucksworth's case, Smith acknowledged the employee's handwritten protest (written with Smith's permission when Zucksworth was given Form B-type document) of the refusal to allow the presence of "my union representative, Thomas McGuire and Associates." I find that both Bower and Zucksworth gave the agents sufficient notice that they wanted McGuire as their Union representative.

A designated union representative may not be barred by management because he or she is an attorney. *Federal Prison System, Federal Correctional Institution, Petersburg, Virginia*, 25 FLRA 210, 232 (1987) (*FCI Petersburg*). This does not end the matter, however, because there is no evidence that the Union had actually designated McGuire to be its representative at these interviews, and it is the union, not the employees who are subject to section 7114(a)(2)(B) examinations, that has the right to choose the representatives it will provide to such employees. *Id.* at 231-32. Smith knew that the Union had retained McGuire for the employee interviews during the criminal investigation. He did not know, independent of any representations made by the employees themselves, whether the Union had also designated McGuire for the administrative interviews. But, in the circumstances, it was unreasonable for him to treat as frivolous the employees' implicit claim that McGuire was available to them.

Holly Cron, whom the agents recognized as a Union official, was present with Bower when he made his protest. But even if, up to that point, Cron (substituting for Dobyns) appeared to be the designated representative, there is no evidence that she responded, either positively or negatively, to Bower's request for McGuire, at least not before the agents refused that request. The agents had the opportunity to ask Cron whether she could respond on the Union's behalf. They neither took that opportunity nor did anything else to ascertain whether McGuire was available, within a reasonable period of time, as the Union representative. *See U.S. Immigration and Naturalization Service, New York District Office, New York, New York*, 46 FLRA 1210, 1221-22 (1993) (*INS*); *FCI Petersburg* at 233.

The yet unanswered question is whether, in these circum- stances, the examiner was required to give the employees the opportunity to request that the Union designate a particular individual, and thus give the Union the opportunity to determine whether to acquiesce in the employees' choice.2 I conclude that there was such a duty.

"[T]he Statute clearly assures the right and duty of a union to represent employees in disciplinary proceedings, and the correlative right of each employee to be represented." *U.S. Department of the Treasury, Customs Service, Washington, D.C.*, 38 FLRA 1300, 1308 (1991) (*Customs Service*). On the other hand, a union's representational rights may not inter- fere with an employer's legitimate interest and prerogative in achieving the objective of the examination or compromise its integrity. *Headquarters, National Aeronautics and Space Administration, Washington, D.C.*, 50 FLRA 601, 607 (1995).

The Authority has adopted, for section 7114(a)(2)(B) purposes, the approach taken by the National Labor Relations Board to the effect that a balance must be struck between the employee right and employer prerogatives in investigating and disciplining misconduct, and that "the proper balance must be struck 'in light of the mischief to be corrected and the end to be attained'." *Federal Aviation Administration, New England Region, Burlington, Massachusetts*, 35 FLRA 645, 653 (1990) (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 262 (1975), as quoted in *Pacific Telephone & Telegraph Co.*, 262 NLRB 1048, 1049 (1982)). Thus, where, as here, there is no evidence that the agency and the union have arranged in advance how employee requests for union representatives should be handled, the propriety of an examiner's response to an employee's request for a specific union representative must be determined with due regard for all of these rights, duties, and legitimate interests and prerogatives.

Although employees do not have the right to select their own union representatives for their section 7114(a)(2)(B) examinations, the union has a legitimate interest in consider-ing the desires of the employees it represents when it assigns them representatives. Such consideration is consistent with the union's *duty* to represent employees in disciplinary proceedings. However, the union will have no opportunity to consider such desires if employees are precluded from making such specific requests to it. *Cf.*

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2 In *FCI Petersburg*, Judge Devaney noted that the Federal Bureau of Prison's Office of Inspections (OI) (apparently the predecessor of OIA), consistent with the Statute, had a practice of permitting employees to select their representa-tives as long as the union acquiesced in that choice. *Id.* at 228 n.7.

Montgomery Ward & Co., 273 NLRB 1226, 1227 (1984) (employer conduct was deemed a "preemptive denial" of right under *Weingarten* to request an alternative representative after the employer lawfully denied an initial request for a particular representative). What occurred here had that preemptive effect.

Although the examiner knew that Zucksworth regarded McGuire as his Union representative, he decided unilaterally that Zucksworth was mistaken or was not entitled to have McGuire there.[3] Thus he failed to acknowledge Zucksworth's request as a valid request. He offered Zucksworth the option of proceeding with or without an *unknown* Union representative, but did not offer him the opportunity to challenge the unilateral determination that his request for McGuire was invalid (and thereby to ascertain whether McGuire would and could be made available to him within a reasonable time). Nor did he pursue other available options such as discontinuing the interview or offering Zucksworth the choice of having no interview. *U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas*, 42 FLRA 834, 839 (1991) (*Border Patrol, El Paso*).

Zucksworth was in a status approaching that of being in the agents' custody. From the time that he had to elect whether to exercise his right to a Union representative, until the interview ended, he could have left only at the risk of his job. In this precarious situation, Zucksworth cannot reasonably have been expected to mount an uninvited challenge to Smith's determination that McGuire was not available to him.

His choice to go forward with the interview without the presence of an *unknown* representative cannot be regarded as a waiver of his right to union representation. Such waiver must be clear and unmistakable. *Norfolk Naval Shipyard, Portsmouth, Virginia*, 35 FLRA 1069, 1077 (1990). Zucksworth's choice was expressly premised on the agents' refusal to allow the person he regarded as his Union representative to be present. Absent a determination by someone who was *authorized* to make such a determination, that his request for McGuire could not be granted, Zucksworth's rejection of the option of proceeding with an unknown alternative representative was not a rejection of union representation as such. It was only an action that he elected after being forced prematurely to abandon his original request, and represented no more than his

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3 Pfistner, the examiner's supervisor, testified, "I don't believe that employees knew who their representative was."

preference between two choices to which he should not have been limited.

Bower's situation is similar, although it is complicated by the fact that he was not alone, but with Union Steward Cron, when he elected to proceed. Cron was not the person that Bower freely acknowledged as his Union representative. Cron was an emergency replacement for Dobyns, who, as far as Bower was concerned, had been present only for the purpose of accompanying him when, as Dobyns advised him to do, he requested McGuire as his representative. Having already rejected Bower's original request for McGuire, the OIA agents treated Dobyns as Bower's designated Union representative and dismissed him because of his own prospective role in the investigation. However, they failed to adjust to the reality that neither Dobyns nor Bower had intended, at least not before the request for McGuire was rejected, that Dobyns undertake the full range of responsibilities of Bower's representative, including that of actively assisting in his defense. *See United States Department of Justice, Bureau of Prisons, Safford, Arizona*, 35 FLRA 431, 440 (1990).

Having dismissed Dobyns, the agents ignored the fact that Cron's unplanned substitution had not constituted a choice by either the Union or Bower to have her undertake that full range of responsibilities. Once Bower responded to the Form B notification of his rights by requesting McGuire, now *unequivocally* as his Union representative, the agents were on notice that there was a serious question about the extent of Cron's representative capacity. As noted above, they did not ask Cron for clarification. Nor, in my view, were they entitled to treat her silence with respect to Bower's request for McGuire as acquiescence by the Union in the agents' refusal of Bower's request. For one thing, her silence, by itself, conveyed no clear message about the Union's position. When she finally advised Bower to sign the Form B, as Bower testified she did, she could well have been reacting to the apparent futility of protesting further. More important, although Cron was a Union steward, it was not reasonable under the circumstances, especially in view of her last-minute substitution, to *presume* that she was authorized to speak for the Union regarding its willingness and ability to produce McGuire. As in Zucksworth's case, I conclude that the agents were required at least to offer the opportunity for someone to contact the Union through a representative who was authorized to respond to Bower's request.

The OIA agents failed to provide this opportunity, or the option to have no interview, at either the Bower or the Zucksworth interview. I conclude that their failure to do s

o, while proceeding with the interviews and refusing to honor Bower's and Zucksworth's requests for McGuire as their Union representative, deprived them of the choices to which they were entitled in order to exercise effectively their right to representation under section 7114(a)(2)(B). *See Border Patrol, El Paso. Cf. Montgomery Ward & Co.* at 1227. I therefore conclude that OIA failed to comply with section 7114(a)(2)(B) of the Statute and so violated sections 7116 (a)(1) and (8).

B. The Nickerson Interview

Each of the conflicting accounts of Nickerson's February 8 interview was, on analysis, unsatisfactory. However, significant inconsistencies between Nickerson's testimony and statements he made closer to the time of the interview leave me unpersuaded that he requested a Union representative.

A major theme in Nickerson's testimony was that, although he had knowingly waived Union representation at his earlier interviews, he changed his mind at the February 8 interview because it was only then, for the first time, that he felt that he might be disciplined.

In an affidavit that Nickerson signed on February 26, 1996, based on statements he made to an investigator of the OIG (GC Exh. 8), he described a series of interviews with OIA agents. Nickerson described his *final* interview with certain details that make it evident that he was referring to the February 8 interview. However, the affidavit describes a penultimate interview, two days earlier, in which agents informed him that he had failed the polygraph test, accused him of lying, and told him that:

> I didn't have a friend in the world right now because I started the whole investigation by what I said . . . . I gave information about staff . . . that the union did not want me to give, so I'd better come clean. I was led to believe at that point that they had a case against me and my career was over.

Referring then to the *final* interview, Nickerson stated in the affidavit that he was shown new evidence against him, "at which time I requested an attorney and wanted to leave and was told to sit down and I was not allowed an attorney." Nickerson did not state in the affidavit that he requested a Union representative, an omission that he explained in his testimony by stating that, at the time, he thought he was threatened with criminal prosecution and was denied an attorney, and that: "I wasn't so concerned about a Union

rep; I didn't feel as though the fact that they had denied me a Union rep was significant. I didn't know that that is a violation of anything."

This explanation does not sit well with the fact that on January 31, Nickerson had been presented with and had signed a Form B which informed him of his right to a union representa-tive. Moreover, in his testimony, Nickerson linked Pfistner's statement about Nickerson's not having a friend in the world with his request for a union representative, but the affidavit places Pfistner's statement at the earlier interview and, more importantly, fails to note any connection between the statement and a request for representation.

Nickerson's affidavit casts considerable doubt on his claim that it was only after some time into the February 8 interview that he realized that there were allegations of misconduct on his part that could result in discipline. He might have suspected this merely from having been placed and kept in home duty status. However, once he heard the statements he attributed to the agents at the penultimate (February 6) interview, he was "led to believe at that point that they had a case against me and my career was over."

Also significant in evaluating Nickerson's testimony is his February 1 affidavit, which contains his statement about the discussion, at a Union meeting, of his cooperation with OIA. This statement appears to be directly related to the "[no] friend in the world" statement Nickerson attributed to an agent at a later interview. The February 1 statement tends to corroborate the agents' testimony that Nickerson expressed reluctance to request a representative from the Union because he thought the Union was hostile to him. In any event, it would appear that Nickerson had decided to continue to forego Union representation even after he had reason to believe that the investigation could result in discipline against him, and that he did not, during any interview, change his mind and request such representation.

As difficult as this credibility determination has been, I find it more difficult, in the absence of comparably helpful clues, to resolve whether Nickerson requested an attorney. Arguably, such a request, especially if coupled with "I want somebody to talk to. I want to talk to somebody." (Nickerson at Tr. 84) could constitute sufficient notice to the agents that Nickerson desired Union representation. *See U.S. Department of Justice, U.S. Immigration and Naturalization Service, U.S. Border Patrol, Washington, D.C.*, 41 FLRA 154, 167, 187-88 (1991) (*INS*). On the other hand, it is probably inappropriate for me to make any findings in this regard.

The complaint alleges that Nickerson "requested union representation[.]" In her opening statement, Counsel for the General Counsel stated that "the evidence will show that Nickerson requested a Union representative and that OI agents denied his request by telling him that he had waived his right to a Union representative in a prior interview." In contrast to the argument made with respect to Bower and Zucksworth, the General Counsel has never suggested that Nickerson's putative request for an attorney, or for "somebody" with whom to talk, constituted a valid request for Union representation. Pfistner denied that Nickerson requested either a Union representative or an attorney, and I have already credited his denial with respect to the Union representative. Neither Pfistner nor any other agent was asked about Nickerson's claim that he said he wanted to talk to "somebody." Should Respondent have been on notice that this claim might form a basis, at least in part, for finding a request for a Union representative independent of Nickerson's specific testimony that he asked for one?

> An essential element of due process, and one imposed by law on administrative agencies such as the Authority, is the responsibility of ensuring that every respondent in an unfair labor practice proceeding is adequately notified of the "matters of fact and law asserted." 5 U.S.C. § 554(b)(3). What constitutes adequate notice will depend on the circumstances of each case. In every instance, however, this notice must afford the respondent "a meaningful opportunity to litigate the underlying issue."

American Federation of Government Employees, Local 2501, Memphis, Tennessee, 51 FLRA 1657, 1660 (1996) (*Local 2501*) (quoting *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 778 F.2d 8, 16 (D.C. Cir. 1985). In *Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and Phoenix, Arizona*, 52 FLRA 421, 431 (1996) (*Prisons*), the Authority stated that "[w]hen a complaint is ambiguous and the record does not clearly show that the respondent otherwise understood (or should have understood) what was in dispute, fairness requires that *any doubts about due process be resolved in favor of the respondent*" (emphasis added). And, in order to determine whether, in spite of a complaint's silence or ambiguity, an issue has been "fully and fairly" litigated, the Authority examines "whether the respondent knew what conduct was at issue and had a fair opportunity to present a defense." *Id.* at 429.

While this case is factually distinguishable from both *Local 2501* and *Prisons* for due process purposes, most

significantly in that the complaint unambiguously introduces the issue of Nickerson's request for Union representation, the concerns that underlie the excerpts quoted above seem applicable to notice of the legal theories behind the factual allegations as well as of the allegations themselves. In the instant case, the complaint and the General Counsel's opening statement clearly put OIA on notice that it had to be prepared to controvert evidence that Nickerson made a specific request for a Union representative. The question then is whether it understood or should have understood that the proof of that allegation might come in the form of testimony that Nickerson requested an attorney or requested "somebody to talk to."

I find a reasonable basis for doubt as to whether OIA understood or should have understood this, and I resolve that doubt in OIA's favor, as the Authority dictates. For even if the complaint could be construed more broadly, the General Counsel's opening statement surely focuses one's attention on the specific request for a "Union representative," and the agents' response to that specific request. Another indication that such a doubt may be well-founded is that the General Counsel has not, even after reviewing the record, asserted that such additional testimony supports the allegation. It seems unreasonable, then, to charge OIA with realizing at the time of the hearing that it needed to address this testimony with the same perseverance with which it would attack testimony that it could recognize as being crucial. For example, although Pfistner testified summarily that Nickerson did not ask for an attorney, he, and perhaps other agents, ight have been examined in more detail concerning what was occurring at the point in the interview when Nickerson claimed to have made that request. Thus, at least the potential for prejudice exists if this testimony is relied on to establish a violation.

Another aspect of the Authority's due process approach may also come into play, and that is the question of OIA's ability to know "what conduct was in issue." The conduct that may have been required of the agents if Nickerson had requested an attorney, or "somebody to talk to," may or may not have been the same as what would have been required if he had made a specific request for a Union representative. For example, given the history of the agents' prior encounters with Nickerson, it might have been permissible, had he requested an attorney or "somebody to talk to" to respond with words to the effect of, "I assume you are not interested in a Union representative," whereas such a response would clearly have been inappropriate if he had requested a Union representative.

The degree of protection of a respondent's rights that these ruminations suggest may provide more "process" than is considered minimally "due" in every type of "due process" proceeding. However, if any general outlook on this issue may be extrapolated from the words of the Authority's decisions, one aspect of it is surely that the Authority is more concerned over the danger of providing respondents with too little process than over the inconvenience of providing too much. Accordingly, I conclude that the testimony about requesting an attorney or "somebody" may not form the basis of a finding that Nickerson requested Union representation, and shall recommend dismissal of the allegation that OIA denied such a request.

In the event, however, that the Authority has occasion to review this conclusion and that it finds this due process analysis wanting, I take an unusual step in the interest of making a remand unnecessary. I make the following credibility findings. I find, on this record, with no great degree of confidence, that Nickerson requested an attorney and that, as is not controverted and is neither inherently implausible nor inconsistent with his other testimony, that he said something like "I want somebody to talk to." I draw no conclusions from these findings. If the Authority sees fit to consider and to affirm them, it may then draw what conclusions it will regarding the applicability of *INS*, or any other analysis, to the circumstances of this interview.

As I have found that Nickerson did not request a Union representative, I shall also recommend dismissal of the allegation that OIA committed an independent unfair labor practice, in violation of section 7116(a)(1) of the Statute, when Pfistner stated or implied to Nickerson that the Union would not represent him because of information he had disclosed to OIA. Nickerson linked that alleged statement to his request for a Union representative, and that linkage lent an arguably coercive flavor to the statement. Nickerson also linked it with the statement he attributed to Pfistner about Nickerson's not having a friend in the world. As indicated in Nickerson's February 26 affidavit, however, the "not a friend in the world" statement was not made during the February 8 interview, and was not linked with the issue of Union representation. While it is possible that, notwithstanding the February 26 affidavit, such a statement was made, or repeated, during the February 8 interview, I do not find that the preponderance of the credible evidence supports such an occurrence.

IV. Evidence Presented on Alleged Coercion of Baez

A. General Counsel's Evidence

Osvaldo Baez testified that he was in home duty status on February 14, 1996, when the warden's secretary phoned him and told him to report to the institution. When he arrived, he was sent to the warden's conference room, where Pfistner met him and took him to another conference room. (According to an affidavit Baez gave to the OIG, he had arrived at the institution on Feb. 15, at 8:25 a.m.) Pfistner told Baez he was conducting an administrative investigation on the October 1995 events and that Baez was involved in some allegations. Baez responded, "I will not provide any information or sign any document unless I have my appointed Union rep with me." Pfistner asked Baez if he was talking about Attorney McGuire. Baez answered, "Yes, he's my appoin [ted] Union rep." Pfistner then told Baez that this was an administrative investigation and he was not allowed to have McGuire. Baez said he "wouldn't help them if [he] didn't have a Union rep with [him]."

Pfistner gave Baez a form with some blanks on it, but Baez insisted that he would not sign anything or provide any information unless he had his Union representative. Pfistner told Baez that he had "enough evidence on [Baez]" to make a decision, and that he really didn't need his statement. Pfistner walked to the door and told Baez to step outside. Before Baez crossed the doorway, Pfistner asked him if he was sure he needed the Union rep. Baez said that he was. Then Pfistner told him he would have to wait outside "until I can do something about it."

Pfistner directed Baez to a little waiting room or hallway between the conference room and the warden's office. Baez sat in a chair, from which he observed Pfistner crossing the hallway from time to time. Sometimes Pfistner stopped and made "small talk" with Baez, but never told him anything about the progress of his request for representation. Once Baez "tried to take a break," but Pfistner saw him and told him to remain seated, because, "I may need you at any time." Another time, Pfistner opened the door from inside an interview room and repeated this instruction.

Pfistner reappeared at about 3:15 p.m. and told Baez that he did not think OIA was going to be able to interview him that day. About 15 or 20 minutes later, Pfistner came back and confirmed that he would not be interviewed that day and that they would contact him by phone about his next interview. OIA finally interviewed Baez around March 23.

B. OIA's Evidence

Supervisory Special Agent Pfistner explained that his conversation with Baez, at the outset, constituted an

attempt to begin this interview while Smith and Winn finished another interview and could then take over, and that his purpose was for Baez not to be kept waiting. Pfistner brought Baez into a conference room and presented him with a Form B. Baez said that he wanted a Union representative. At that point Pfistner decided that he would not conduct the interview. He told Baez that he was not in a position to obtain a Union representative for Baez, and that the other agents would interview him as soon as they finished the other interview. Meanwhile, he told Baez, "I'll need to ask you to wait out in the lobby for awhile."

Pfistner described the area where Baez was waiting as a comfortable lounge area with two or three couches. He testified that later in the morning, about 11 a.m., he told Baez that he should "go ahead and go to lunch" and "come back in about a half hour." Pfistner believed that Baez returned in a little bit over an hour (although he did not testify that he knew when Baez had left). At that time, the other agents were still involved in the other interview, which had stretched out beyond anything they had anticipated.[4]

At some point in the afternoon, Pfistner told Baez that the other interview was not over and that he would have to wait a little while longer. At around 3:00 p.m., Pfistner believed, Special Agent Smith (not Pfistner) told Baez he could go home. Smith testified that he had one conversation with Baez during that day. Its substance was to tell Baez that they had not forgotten him but that the other interview was not over yet.

Pfistner testified that he kept Baez waiting in order to expedite the investigative process, because of the delay that would have been involved if they had sent him home and then had to call him back. Pfistner regarded this treatment as ordinary OIA procedure, and noted that Baez was on paid duty status. Pfistner made no effort to obtain a Union representative for Baez because his experience taught him that it might take anywhere between a half hour and an hour to have someone made available, and he thought that, by then, the other agents would be available to conduct the interview.

Findings and Conclusion: Alleged Coercion of Baez

While the accounts of Baez and the OIA agents differed with respect to their conversations while Baez waited, and about other details, it is undisputed that:

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[4] Apparently this was the 11-hour Zucksworth interview.

(1) Pfistner gave Baez every appearance of being about to proceed with the interview;

(2) Pfistner interrupted the interview preliminaries when Baez requested a Union representative;

(3) Pfistner told Baez that he would have to wait; and

(4) Baez was required to wait for six hours or more.

Notwithstanding Pfistner's rationale for proceeding as he did, there is no evidence that he communicated to Baez any reason other than Baez's request for a Union representative, for requiring him to wait until the other interview was over.

Management statements or conduct violate section 7116 (a)(1) of the Statute if, under the circumstances, they tend to coerce or intimidate the employee, or if the employee could reasonably have drawn a coercive inference from the statements. *Department of the Air Force, Scott Air Force Base, Illinois*, 34 FLRA 956, 962 (1990) (*Scott*). Although certain statements (or, presumably, actions) may be found to be noncoercive because they are aimed at accommodating the employee's protected rights and the agency's right to manage effectively, a coercive tendency or inference cannot be negated unless the employee is given reason to believe that such accommodation is intended. *See Id.* at 963-65; *Veterans Administration Medical Center, Leavenworth, Kansas*, 31 FLRA 1161, 1171 (1988). Management's uncommunicated motives cannot serve to undo the coercive effect. *Scott* at 966.

Baez, like Zucksworth, was in a quasi-custodial situation, and remained so as he waited for a new interview to begin. This, coupled with the vulnerability attendant on Baez's knowledge or belief that the results of the interview could have serious consequences for him, presented a set of circumstances that would predictably cause him to be sensitive to suggestions of coercion, intended or not. He could reasonably have found such a suggestion in Pfistner's conduct, and that suggestion could reasonably have been reinforced as the wait lengthened.

Thus, as soon as Baez requested a Union representative, Pfistner stopped the interview and made Baez wait. Whether Pfistner was able to foresee it or not, the wait became lengthy by any reasonable standard, and Baez was given no reason for having to wait for the other agents to become available except the reason that was apparent--that he had requested Union representation. What was he to think?

From Pfistner's perspective, Baez's wait was no big deal because he was in duty status and because requiring employees to wait was normal OIA procedure. However, neither of these considerations can reasonably be expected to have eliminated the anxiety caused by the prolonged imminence of what to Baez threatened to be a hostile interrogation. Baez could reasonably attribute this situation, at least in part, to his decision to request Union representation. I conclude, therefore, that OIA coerced Baez in the exercise of his right to Union representation, by creating the impression that such exercise may have resulted in this unpleasant situation. Such coercion violated section 7116(a)(1) of the Statute.

The Remedy

Counsel for the General Counsel requests, as part of the affirmative remedy, that OIA expunge from employees' official personnel files all affidavits taken by OIA where Union representation was unlawfully denied. The record does not show whether any of the affidavits are in the employees' official personnel files. It does show that no disciplinary action was taken against Bower or Zucksworth, the two employees who were, in effect, unlawfully denied Union representation. However, the Authority requires an assurance that (1) no discipline will occur in the future based on information obtained from an unlawful investigative interview and (2) that nothing has been retained in the employee's personal records as a result of the interview that could adversely affect the employee. *U.S. Department of Justice, Office of the Inspector General, Washington, D.C.*, 47 FLRA 1254, 1265-66 (1993) (*Inspector General*). I am thus required to recommend a remedial provision that addresses this mandate. I have adapted the *Inspector General* remedy in view of the fact that neither Bower nor Zucksworth was disciplined and that Zucksworth has already been re-interviewed with union representation. This adaptation is premised on the assumption that neither of these employees has been or will be disciplined between the date of the hearing and the date of compliance with the Authority's order.

Also requested is a nationwide notice-posting. The basis for this request appears to be, at least in part, the existence of a national OIA policy of refusing requests of employees for union representatives who were attorneys.

Despite some statements in agents' affidavits taken before investigators from OIG, I credit OIA Chief Graber and the agents that OIA had not, in effect, ignored the Authority's decision in *FCI Petersburg* by continuing the practice of refusing to recognize a union's designation of

an attorney as its representative. Thus, I credit the agents' explanations of the context of their OIG statements and find that the statements appearing to suggest such a practice reflect only the agents' erroneous belief that the employees who requested McGuire as their representative did not make a valid request. The unfair labor practices committed here, including the independent section 7116(a)(1) violation involving Baez, were not shown to reflect national policy.

The absence of such a showing does not, in itself, necessarily preclude a nationwide posting. The Authority has ordered a national component of an agency to post a notice nationwide even in the absence of a finding of an unlawful nationwide policy, where a single employee's rights under section 7114(a)(2)(B) were violated, on the ground that the violation involved "an issue of import to members of the bargaining unit outside the . . . facility [at which the violation occurred]". *Inspector General* at 1261-62 (1993). *See also Department of Housing and Urban Development, San Francisco, California*, 41 FLRA 480, 482-833 (1991) (posting in all locations where employees represented by the Union are located "will more fully effectuate the purposes and policies of the Statute").

On the other hand, in determining the scope of a posting the Authority has relied on the fact that an unlawful policy was established at the national level and could therefore have a deleterious effect on bargaining unit employees throughout the country, *Federal Deposit Insurance Corporation, Washington, D.C.*, 48 FLRA 313, 331 (1993), and on the fact that the interrogation in a disciplinary proceeding that was found unlawful was authorized by the respondent's regional counsel and labor relations staff. *Customs Service* (38 FLRA) at 1310. Another factor that the Authority has considered, this time to limit the posting to the facility where the violations occurred, has been the absence of any indication that the agency had refused to abide by earlier Authority orders or that it would continue to engage in similar unlawful conduct in the future. *Federal Aviation Administration*, 23 FLRA 209, 218-19 (1986). Significantly, the Authority used this rationale to limit the scope of a posting even while affirming an administrative law judge's finding of unlawful conduct in which the respondent engaged pursuant to "a nationwide policy of the agency that is applicable to each facility[.]" *Federal Aviation Administration, Washington, D.C.*, 17 FLRA 142, 144, 146, 175-76 (1985); *accord National Treasury Employees Union*, 10 FLRA 519, 521-22 (1982) (*NTEU*).

In the instant case, OIA Chief Graber took appropriate action by putting out instructions that it is appropriate

for unions to designate representatives who are attorneys. This pro-active step constitutes an affirmative indication that, in the future, OIA agents will recognize the rights involved in this case. This does not, of course, guarantee that they will honor these rights in the manner that I have concluded here that they must, but OIA is entitled to the presumption that it will challenge my findings and conclusions only through the established review procedures, and will abide by the final determination. In these circumstances, I conclude that the policy considerations underlying the *Federal Aviation Administration* cases and *NTEU* prevail, and that a notice posted at the facility where the unfair labor practices occurred will suffice. Accordingly, 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 Federal Service Labor-Management Relations Statute (the Statute), the Department of Justice, Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C., shall:

1. Cease and desist from:

(a) Rejecting the requests of employees in the bargaining unit represented by American Federation of Government Employees, Council of Prison Locals (the Union), to be represented by one of the Union's attorneys at examinations in connection with an investigation, when the employees reasonably believe that the examinations may result in disciplinary action against them, without giving the employees the opportunity to request that the Union designate such attorneys as its representatives at such examinations.

(b) Creating the impression that employees may be made to suffer a lengthy wait for such an examination because they insist on having a union representative present.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights assured them by the Statute.

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

(a) Establish that the information from the investigative interview of Bryan Bower in February 1996 will

not be relied on so as to adversely affect Mr. Bower in the future, and that nothing has been retained in Mr. Bower's personnel records as a result of the interview that could adversely affect him. If this cannot be shown, repeat the interview, if requested by the Union and Mr. Bower. In repeating the interview, afford Mr. Bower his statutory right to union representation. After repeating the interview, reconsider the retention in Mr. Bower's personnel records of information obtained during his February 1996 interview.

(b) Establish that the information from the investigative interview of Larry Zucksworth in February 1996 will not be relied on so as to adversely affect Mr. Zucksworth in the future, and that nothing has been retained in Mr. Zucksworth's personnel records as a result of the interview that could adversely affect him. If this cannot be shown, reconsider the retention in Mr. Zucksworth's personnel records of information obtained during his February 1996 interview in light of the information obtained during the interview in which he was re-examined with a union representative present to assist him.

(c) Post at the Federal Correctional Institution, Greenville, Illinois, copies of the attached Notice to All Employees on forms furnished by the Federal Labor Relations Authority. Upon receipt of the forms, the Notice shall be signed by the Warden of the Chief of the Office of Internal Affairs, and they shall be posted and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the Notice and Order are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Federal Labor Relations Authority, Washington Region, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

All remaining allegations of the complaint are dismissed.

Issued, Washington, DC, March 31, 1997

_____

JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Justice, Federal Bureau of Prisons, Office of Internal Affairs, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT reject the requests of employees in the bargaining unit represented by American Federation of Government Employees, Council of Prison Locals (the Union), to be represented by one of the Union's attorneys at examinations in connection with an investigation, when the employees reasonably believe that the examinations may result in disciplinary action against them, without giving the employees the opportunity to request that the Union designate such attorneys as its representatives at such examinations.

WE WILL NOT create the impression that employees may be made to suffer a lengthy wait for such an examination because they insist on having a union representative present.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured them by the Statute.

WE WILL establish that the information from the investigative interview of Bryan Bower in February 1996 will not be relied on so as to adversely affect Mr. Bower in the future, and that nothing has been retained in Mr. Bower's personnel records as a result of the interview that could adversely affect him. If this cannot be shown, **WE WILL** repeat the interview, if requested by the Union and Mr. Bower. In repeating the interview, **WE WILL** afford Mr. Bower his statutory right to union representation. After repeating the interview, **WE WILL** reconsider the retention in Mr. Bower's personnel records of information obtained during his February 1996 interview.

WE WILL establish that the information from the investigative interview of Larry Zucksworth in February 1996 will not be relied on so as to adversely affect Mr. Zucksworth in the future, and that nothing has been retained in Mr. Zucksworth's personnel records as a result of the interview that could adversely affect him. If this

cannot be shown, **WE WILL** reconsider the retention in Mr. Zucksworth's personnel records of information obtained during his February 1996 interview in light of the information obtained during the interview in which he was re-examined with a union representative present to assist him.

_____

(Activity)

Dated: _____ 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 its provision, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, whose address is: 1255 22nd Street, NW, Suite 400, Washington, DC 20037-1206, (202) 653-8500.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case No. WA-CA-60287, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Jeanne Marie Corrado, Esquire
Christopher Feldenzer, Esquire
Federal Labor Relations Authority
1255 22nd Street, NW, Suite 400
Washington, DC 20037-1206

Amy Whelan Risley, Esquire
Donald Laliberte, Esquire
Department of Justice
Federal Bureau of Prisons
HOLC Building, Room 716
320 First Street, NW
Washington, DC 20534

REGULAR MAIL:

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Joe Jarvis, President
American Federation of Government
Employees, Council of Prison Locals
2628 East Farm Road, #10
Fair Grove, MO 65648

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: March 31, 1997
Washington, DC