

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C.

OGDEN AIR LOGISTICS CENTER

HILL AIR FORCE BASE, UTAH

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL
1592

Case No.
DE-CA-60922

Charging Party

Monte E. Crane, Esquire

Lisa M.J. Lindblad, Esquire

Mr. Barry E. Hildebrandt

For the Respondent

Mr. Wayne Tate

For the Charging Party

Matthew Jarvinen, Esquire

Lisa Belasco, Esquire

For the General Counsel

Before: WILLIAM B. DEVANEY

Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor- Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. ⁽¹⁾, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Ogden Air Logistics Center, Hill Air Force Base, Utah (hereinafter, "Respondent" or "Ogden Logistics Center", although it conducted no investigatory interviews, nevertheless, failed to comply with § 14(a)(2)(B), and thereby violated §§ 16(a)(1) and (8) of the Statute, because the Air Force Office of Special Investigations (hereinafter, "OSI"), which is excluded from coverage under the Statute, did conduct investigatory interviews of bargaining unit employees and denied their requests for a Union representative. For reasons fully set forth hereinafter, I conclude that Ogden Logistics Center did not fail to comply with § 14(a)(2)(B); Respondent's Motion for Judgment should be granted; and the Complaint should be dismissed.

This case was initiated by a charge filed on August 23, 1996 (G.C. Exh. 1(a)); a First Amended charge was filed on February 27, 1997 (G.C. Exh. 1(b)); and the Complaint and Notice of Hearing issued February 28, 1997 (G.C. Exh. 1(c)), setting the hearing for May 23, 1997, at a place to be determined in Salt Lake City, Utah. By Order dated April 18, 1997, (G.C. Exh. 1(e)), the hearing was rescheduled for May 21, 1997, in Ogden, Utah, pursuant to which a hearing was duly held on May 21, 1997, in Ogden, Utah, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard and to introduce evidence bearing on the issues involved. At the conclusion of the General Counsel's case, Respondent moved for judgment in its favor because, ". . . General Counsel has failed to make even a prima facie showing that Hill Air Force Base in any way violated the Weingarten rights of any of the bargaining unit employees interviewed by the Office of Special Investigations" (Tr. 243-244); I stated that it was my intention to grant the motion, because, I saw no evidence of a violation by Hill Air Force Base of 14(a)(2)(B), ". . . unless you can convince me to the contrary" (Tr. 244); and fixed the date for mailing post-hearing briefs as June 23, 1997, which time was subsequently extended, on timely motion of the General Counsel, with which the other parties concurred, for good cause shown, to July 11, 1997. Respondent and General Counsel each timely mailed a brief, received on, or before, July 16, 1997, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following

findings and conclusions:

FINDINGS

1. The Department of the Air Force is a primary national subdivision, as defined in § 2421.5 of the Authority's Rules and Regulations, 5 C.F.R. § 2421.5, of the Department of Defense, an Executive agency within the meaning of § 3(a)(3) of the Statute, 5 U.S.C. § 7103(a)(3).

2. The Air Force Material Command (AFMC), formerly designated, "Air Force Logistics Command", Wright-Patterson Air Force Base, Ohio, is a component of the Department of the Air Force and is an activity of the Department of the Air Force as defined in § 2421.4 of the Authority's Rules and Regulations, 5 C.F.R. § 2421.4. Ogden Air Logistics Center, Hill Air Force Base, Utah, is a component of AFMC.

3. The Air Force Office of Special Investigations (OSI) is an agency or subdivision of the Department of the Air Force. By Executive Order No. 12171, dated November 19, 1979, 44 F.R. 66565, President Jimmy Carter, pursuant to § 3(b)(1) of the Statute, 5 U.S.C. § 7103(b)(1), excluded from the Federal Labor-Management Relations Program, inter alia, ". . . Air Force Office of Special Investigations" (E.O. 12171, § 1-2, subsection 1-206(B)). The Executive Order provides, in relevant part, as follows:

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

"1-1. Determinations

"1-101. The agencies or subdivisions thereof set forth

in Section 1-2 of this Order are hereby determined to have as a primary function intelligence, counterintelligence, investigative, or national security work. It is also hereby determined that Chapter 71 of Title 5 of the United States Code cannot be applied to those agencies or subdivisions in a manner consistent with national security requirements and considerations. The agencies or subdivisions thereof set forth in Section 1-2 of this Order are hereby excluded from coverage under Chapter 71 of Title 5 of the United States Code.

. . .

"1-2. Exclusions

. . .

"1-206. Agencies or subdivisions of the Department of the Air Force, Department of Defense:

. . .

"(k) Air Force Office of Special Investigations" (E.O. 12171)

4. On April 11, 1996, a person, referred to as a confidential informant⁽²⁾ came to the office of Major Mark A. Tarnow, then Deputy Branch Chief of the Landing Gear Branch (Tr. 156)⁽³⁾, and told him that gun parts were being manufactured in Building 507 of the Landing Gear Branch by employees using government equipment and materials (Jt. Exh. 1, Par. 3-1; Tr. 171). After the informant left, Major Tarnow went to Lieutenant Colonel Edward Trust, Director of Operations (Tr. 156-157), and told him what the informant had reported (Tr. 171). Col. Trust and Major Tarnow then went to the machine shop (Building 507) and walked through but saw nothing untoward (Tr. 171). They returned to Col. Trust's office and called Mr. Lynn Yates, then Division Chief (Tr. 171), and told him what had been reported and Mr. Yates recommended that they get a couple more people to act as witnesses and go back to Building 507 to try

to find some evidence to substantiate what had been reported (Tr. 171-172).

Col. Trust and Major Tarnow got Messrs. Carter and McClellan to accompany them and the four of them returned to Building 507 where Col. Trust, when he picked up a towel at machinist Gary Cannon's tool box to wipe his hands, saw a round cylindrical object which appeared to have gun bluing on it (Tr. 172). Major Tarnow said that Mr. Cannon at first said it was a tooling fixture but, when pressed to show where it went, admitted it did not go on any fixture in the shop and that he was, ". . . covering up for somebody" (Tr. 173). Col. Trust told Mr. Cannon he would call in the OSI, Mr. Cannon said "Okay" and everyone left and returned to Col. Trust's office where Col. Trust called OSI (Tr. 173).

5. Col. Trust's call was taken by Special Agent Kallen Kerr⁽⁴⁾ (Tr. 179) and he and Special Agent Paul Gaubatz, currently stationed at Malmstrom Air Force Base, Montana (Tr. 176), went to Col. Trust's office where they interviewed Col. Trust and Major Tarnow. They, Agents Kerr and Gaubatz, decided they needed to interview employees in the machine shop (Building 507) and proceeded to Building 507 to do so (Tr. 218).

6. Mr. Gary Cannon, a machinist at Hill Air Force Base for about 13 years (Tr. 90), works in Building 507. Mr. Cannon confirmed that at about 11:00 a.m. on April 11, 1996, during lunch, Major Tarnow and Col. Trust approached him in Building 507 and, ". . . asked me about an object that they had found and wanted to know if it was mine. . . . I said it wasn't. I said . . . jokingly said it was a widget for a maniform" (Tr. 91); that Major Tarnow asked, ". . . if I was spoofing him or kidding him and I said, yes, I was." (Tr. 91); and that Col. Trust was going to call the OSI (Tr. 91).

Mr. Cannon stated that after Col. Trust and Major Tarnow left the area, security police came in and ". . . roped off a milling machine" (Tr. 92). Mr. Cannon said that, ". . . we just stayed in the work area until . . . about 2:00 o'clock . . ." (Tr. 92) when Major Tarnow came to his work station and got him, saying, ". . . there were some people that wanted to talk to me and I was to follow him into the LAO office." (Tr. 92). Major Tarnow took him to the conference room, which Mr. Cannon said was about 25 feet square with a large table with chairs all the way around it (Tr. 92, 96-97), where there were two OSI agents (Tr. 92-93). Major Tarnow said, "These are the gentlemen that are going to want to talk to you" (Tr. 93) and he left. Agent Kerr introduced himself and introduced his partner [Special Agent Gaubatz] (Tr. 93). Mr. Cannon stated that he, ". . . told them that I really didn't want to answer any questions until I had some union representation." (Tr. 93); ". . . Officer Kerr said that -- well, he denied it. He just said, 'Because we're the OSI we don't have to give you any representation.'" (Tr. 93).

(Tr. 94). Mr. Cannon said this response wasn't satisfactory; that he really felt that there was a possibility that they might try to take disciplinary action; that he told Agent Kerr, ". . . I didn't want anything I said to be misunderstood or misrepresented or I didn't want to be misquoted. Q. Well, did he grant your request for representation? A. No, no, he didn't. Q. Did you -- A. He flatly denied it." (Tr. 94-95).

Special Agent Paul Gaubatz, who was present, confirmed that Mr. Cannon requested Union representation (Tr. 221) which is also shown by Mr. Gaubatz's notes of the interview (G.C. Exh. 9). Agent Gaubatz stated that Mr. Cannon was told, ". . . that the Executive Order exempts OSI from having to allow union representation in an OSI interview and he [Cannon] understood. He said he understood." (Tr. 221). Agent Gaubatz further stated that Mr. Cannon was told this was a non-custodial interview and was told, "The exact same thing as Mr. Sharkey (Tr. 222), which was that, ". . . if someone is not taken into custody . . . he has a right to not talk with us, that he can leave the interview at any time and it's a voluntary interview" (Tr. 220); and Mr. Cannon did not leave but stayed and answered questions (Jt. Exh. 1, Par. 3-4; G.C. Exh. 9).

Agent Gaubatz stated that after interviewing Col. Trust and Major Tarnow, he and Agent Kerr had contacted security police to secure the evidence, or possible evidence, in Building 507 and they sent three security policemen, ". . . to make sure any possible evidence that was in that work area was not touched." (Tr. 219).

7. Mr. Jesse Lorenzo Sharkey, a machinist who has been employed by Respondent for about 12 years (Tr. 122), actually was the first employee interviewed on April 11, 1996. Mr. Sharkey stated that when he returned from lunch at about 11:30, he noticed photography going on in the F-16 area; that he walked over and asked what was going on and was told, ". . . they was investigating some parts in there" (Tr. 123). Mr. Sharkey said that he saw some yellow paper around the Bridgeport Mill and a couple of security police (Tr. 123).

Mr. Sharkey stated that about two hours later, Major Tarnow came to his work place and took him to the conference room. He said that Major Tarnow said, "He wanted me to come and talk to a couple of people up here in front" (Tr. 123); that Major Tarnow said nothing else and, after taking him to the conference room, left (Tr. 123-124). Mr. Sharkey said that Agent Kerr, another OSI Agent he thought was ". . . a Dave" (Tr. 124), and, ". . . two other fellows. I don't even remember their name" (Tr. 124) were present in the conference room. Special Agent Gaubatz testified that during the interview only Special Agent Kerr and he were present (Tr. 219), which is confirmed by his notes (G.C. Exh. 8), and Mr. Sharkey's testimony strongly suggests that only Messrs. Kerr and Gaubatz were present during the interview (Tr. 126-127). Mr. Sharkey

referred to four or five items on the conference room table ("four or five pieces of stock about an inch, inch and a half in diameter, different various materials about three feet long. There was a part that was a receiver to a black powder gun and then some trigger guards . . . a couple of end caps and a couple of retainers" (Tr. 124-125)), and it seems probable that the two other people in the conference room when he arrived had brought the items on the table. In any event, I credit Agent Gaubatz's testimony that only he and Agent Kerr were present during the interview.

Mr. Sharkey stated that he, ". . . asked them if I could have union representation" (Tr. 126) and at this point Agent Kerr told him it was an informal investigation (Tr. 126). Mr. Sharkey further stated that Agent Kerr, ". . . told me that OSI was not a part of that and they did not have union representation on OSI's investigations." (Tr. 126). Agent Gaubatz testified that Mr. Sharkey did not ask for a Union representative (Tr. 220) and his notes do not indicate a request for union representation, rather, his notes show, "Explained non-custodial interview to s/(SA Kerr)" (G.C. Exh. 8). Agent Gaubatz testified that he told Mr. Sharkey that a non-custodial interview meant, ". . . if someone is not taken into custody . . . that he has a right to not talk with us, that he can leave the interview at any time and it's a voluntary interview." (Tr. 220). I credit Mr. Sharkey's testimony that he asked for Union representation. I found both witnesses credible; but on the question of asking for union representation, I found Mr. Sharkey's testimony compelling in view of his further reference to Agent Kerr's statement that "OSI was not a part of that and they did not have union representation on OSI's investigation", which, in turn, was an obvious reference to the statement to the same effect Agent Gaubatz said Agent Kerr made to Mr. Cannon, namely, ". . . that the Executive Order exempts OSI from having to allow union representation in an OSI inter-view. . . ." (Tr. 221). Absent Agent Kerr's reference, Mr. Sharkey would have had no knowledge that "OSI was not a part of that" [the Statute], and/or that OSI "did not have union representation" in its investigations.

8. Mr. Kris Tilly, a machinist who has been employed in the LIO, industrial operations, landing gear division for sixteen years (Tr. 53)⁽⁵⁾, was not interviewed on April 11, 1996, as indicated on Jt. Exh. 1, Par. 3-5. Mr. Tilly thought it was Monday, April 15; but Special Agent Gaubatz said it was Friday, April 12, 1996 (Tr. 222, 223), which is confirmed by his notes and Interview Record (G.C. Exh. 7), and I find that the interview was held on April 12, 1996. It is true, as Agent Gaubatz credibly testified, Mr. Tilly did not, during the interview, ask for a union representative (Tr. 223); but as Mr. Tilly credibly testified, Agent Kerr, with three other officers he did not identify, came to his work area at about 9:15 a.m., told him they were there to investigate allegations concerning illegal manufacturing of firearms; asked if he could look at his, Tilly's, toolbox; and told Mr. Tilly he

wanted to ask him a few questions (Tr. 55-56). At that point, Mr. Tilly asked to have a third party present (Tr. 56, 57), but Agent Kerr told him he couldn't have anyone (Tr. 57) and when Mr. Tilly protested, Agent Kerr told him, "Well, you can come down and talk to us voluntarily or we'll restrain you and take you down and you can talk to us." (Tr. 57-58). Mr. Tilly decided to talk to them and, in his car, followed Agent Kerr to the security police building in which the OSI's office is located (Tr. 58) and where the interview was conducted (Tr. 59, 233). The substance of Mr. Tilly's request for some type of representation was corroborated by Mr. Christopher Glen Woods, a machinist (Tr. 109), who overheard Mr. Tilly's conversation (Tr. 111). Accordingly, I find that in the shop, before the interview, Mr. Tilly asked for third party representation which was denied by Agent Kerr.

9. Mr. Woods was interviewed on April 17, 1996, by Agents Kerr and Smith (G.C. Exh. 10), not on April 18, 1996, as indicated on Joint Exhibit 1, Par. 3-7, and as Mr. Woods stated (Tr. 109). Mr. Woods' recollection of the date was qualified ("I think") and both the Statement form, which Mr. Woods signed, and the notes of the interview show that the interview took place on April 17, 1996, and I so find. Mr. Woods stated that his supervisor, Keith Stephens, told him, ". . . they wanted to interview me for questioning . . . in the office. . . . I think he said it was OSI wanted to question me . . . In the conference room" (Tr. 112); that, on his way to the conference room, he met Major Tarnow outside the conference room (Tr. 112). Mr. Woods first said that Major Tarnow introduced him, ". . . to a couple of gentlemen that was inside the conference room" (Tr. 112); but then said, ". . . they introduced themselves (sic) . . ." (Tr. 112). Mr. Woods said Major Tarnow did not enter the conference room (Tr. 112). Mr. Woods stated that after the Agents introduced themselves, they, ". . . showed me their badges and said, 'We are investigating the possibility of the manufacture of muzzle loaders'" (Tr. 113), at which point Mr. Woods testified: ". . . I said, 'I'd like representation from the union or some type of representation. . . . They said that this was an informal investigation and that they did not have to grant union representation or any representation and that I basically could leave at any time I wanted to in that interview.'" (Tr. 113). The notes of the interview confirm that Mr. Woods, "Requested 3rd party . . . not requesting attorney" (G.C. Exh. 10, notes, p. 1).

10. Mr. Jarrell Holland, now a police officer for the City of American Fork [Utah] (Tr. 82), had been a machinist for Respondent and had worked in Building 507 (Tr. 82). He was interviewed on his last day of work at Respondent when he came in to clear the Base on Friday, April 19, 1996 (Tr. 83), not on April 20, 1996, as shown on Joint Exhibit 1, Par. 3-9. He did not remember whether the OSI Agent called him or whether his supervisor, Mr. Keith Stephens, told him to go to the OSI office. In any event, he went to the OSI office and was interviewed by Agent Kerr (Jt. Exh. 1, Par. 3-9; Tr. 84). Mr. Holland said that Agent

Kerr told him, ". . . I was there to be questioned concerning some possible incidents occurring in Building 507. That I was under no obligation to talk to him if I didn't want to and I could leave at any time." (Tr. 84). Mr. Holland did not ask for Union representation.

11. Special Agent Gaubatz contacted the Bureau of Alcohol, Tobacco and Firearms ("AFT") and was informed that the manufacture of black powder rifles using ammunition loaded as a muzzle loader is legal and is not regulated by AFT (Jt. Exh. 1, Par. 3-12; Tr. 226).

12. Respondent received a copy of the OSI Report of Investigation, dated May 21, 1996 (Jt. Exh. 1).

13. On June 18, 1996, Respondent, on the basis of the Report of Investigation (Tr. 140), gave Mr. Tilly notice of proposed removal (Jt. Exh. 2), which, following his oral and written replies, on August 14, 1996, was reduced to a suspension of fourteen days (Jt. Exh. 3).

On June 18, 1996, Respondent, on the basis of the Report of Investigation (Tr. 140), gave Mr. Cannon notice of proposed removal (Jt. Exh. 4), which, following his oral and written replies, on August 14, 1996, was reduced to a suspension of fourteen days (Jt. Exh. 5).

On June 18, 1996, Respondent, on the basis of the Report of Investigation (Tr. 140), gave Mr. Sharkey notice of proposed removal (Jt. Exh. 6), which, following his oral and written replies, on August 14, 1996, was reduced to a suspension of five days (Jt. Exh. 7).

CONCLUSIONS

The operative allegation of Paragraph 41 of the Complaint is that Respondent, Ogden Air Logistics Center, Hill Air Force Base, Utah, ". . . failed to comply with 5 USC Section 7114(a)(2)(B)." (G.C. Exh. 1(c), Par. 41). § 14(a)(2)(B) of the Statute provides,

"(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--

. . .

"(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if--

"(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

"(ii) the employee requests representation."

(5 U.S.C. § 7114(a)(2)(B)).

A. OSI

The Air Force Office of Special Investigations (OSI) indisputably is an agency or subdivision of the Department of the Air Force, e.g., E.O. No. 12171, 44 F.R. 66565 (November 19, 1979). In cases dealing with an agency's Office of Inspector General (OSI), the Authority has held that the OIG is a representative of the agency for the purposes of § 14(a)(2)(B), Department of Defense, Defense Criminal Investigative Service; Defense Logistics Agency and Defense Contract Administrative Services, New York, 28 FLRA 1145 (1987), enf'd sub nom. Defense Criminal Investigative Service v. FLRA, 855 F.2d 93 (3d Cir. 1988); 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, 612 (1995) (hereinafter, "NASA"). But, accepting at the outset that OSI is a representative of the Department of the Air Force within the meaning of § 14(a)(2)(B) of the Statute, the inquiry goes no further because OSI is exempt from coverage of the Statute. Moreover, the Executive Order not only grants exemption from the Statute, but specifically states that,

". . . It is also hereby determined that Chapter 71 of Title 5 of the United States Code cannot be applied to those agencies or subdivisions in a manner consistent with national security requirements and considerations

. . . ." (E.O. 12171, Par. 1-101).

Accordingly, as OSI is excluded from coverage under the Statute, because the Statute cannot be applied to those agencies or subdivisions in a manner consistent with national security requirements and considerations, the requirements of § 14(a)(2)(B) may not be imposed on OSI.⁽⁶⁾

The only apparent explanation for the failure to raise E.O. 12171 in the cases noted in footnote 6, supra, is unawareness of the Executive Order. It has been said, "Ignorance is bliss", and so it was. In U.S. Mint, supra, the Secret Service, which conducted the interview and refused to permit union representation, was not named as a party and the Complaint against the Mint was dismissed because it did not fail or refuse to comply with § 14(a)(2)(B) of the Statute. To the contrary, the Mint conducted no examination; obtained a union representative for the employee and introduced the union representative to the Secret Service as the employee's representative; and had no control or supervision over the Secret Service. In Lackland AFB, supra, OSI was not named as a party; but Lackland had detained the employee for more than two hours, had denied repeated requests for union representation, and participated in the interview conducted by OSI. The Order merely directed Lackland AFB Exchange to cease requiring any bargaining unit employee to take part in an examination or investigative interview without union representation. In Hill AFB, supra, OSI was not named as a party; Hill AFB did not directly take part in the meetings of OSI and two witnesses; but Hill AFB initiated the OSI investigation and OSI collaborated closely with Hill AFB, inter alia, by giving Hill AFB a copy of the pre-arbitration interview statement of a union witness. As noted, the Order directed Hill AFB to cease requiring any bargaining unit employee to take part in a pre-arbitration interview which constitutes a formal discussion without notice and opportunity for union to be present. In addition, Hill AFB was ordered to cease, "coercively questioning Union witnesses concerning matters known to be at issue at scheduled arbitration hearings", i.e., conducting a formal discussion without compliance with 14(a)(2)(A). In both Lackland AFB and Hill AFB, the Respondent Air Bases violated 16(a)(1) and (8) by their, not OSI's, action. Thus, in Lackland AFB, because it, as a joint participant, denied the right to representation and in Hill AFB, because it used OSI as its alter ego to conduct for it the interview of a union designated arbitration witness.

McChord, supra, is the only case of which I am aware that named OSI as a party and directed the Order at OSI. No exceptions were filed, so that the decision of Administrative Law Judge Oliver became final, as the Authority notes, "without precedential significance". Because E.O. 12171 was not raised, and because E.O. 12171 precludes a finding of violation of § 14(a)(2)(B) of the Statute by OSI, from which it is excluded, I give

no credence to the finding that OSI violated §§ 16(a)(1) or (8) and/or the Order directed at OSI. As to McChord, it was a participant in the examination and the Order, directing McChord to cease imposing an absolute prohibition on a union representative speaking during a 14(a)(2)(B) examination and to permit full participation by the union representative at any examination by it, remedied McChord's, not OSI's, violation of the Statute.

B. Ogden Air Logistics Center

The Ogden Air Logistics Center (hereinafter, "Ogden") conducted no examination; was not present at any examination conducted by OSI; and nothing in the record shows any direction, control or authority over OSI's conduct of its investigations and/or examinations.

General Counsel contends that Ogden manipulated OSI, as in Hill AFB, to do, ". . . its dirty work for them by conducting an investigation it could not otherwise do for itself without involving the Union." (General Counsel's Brief, p. 38). He points to Mr. Holland's testimony and his letter, dated June 26, 1996 (G.C. Exh. 3A), "To whom it may concern", that the OSI investigator told him, ". . . that this type of investigation was not normally in the scope of their line of work. He stated that his boss, 'As a personal favor to Col. Trust', had agreed to investigate this matter." (G.C. 3A; Tr. 84, 86, 87). I did not find Mr. Holland's testimony in this regard convincing. Nor does the "personal favor to Col. Trust" square with the record. Mr. Kerr, alone, interviewed Mr. Holland (Tr. 86) and Mr. Kerr's boss, and the person who approved OSI taking jurisdiction, was Special Agent Gregory Johnson, Superintendent of Detachment 113 (Tr. 178, 227, 228, 230, 231) and he credibly testified that, ". . . I would not recognize him personally [Col. Trust]. I don't know that I've ever spoke (sic) with him but I've heard the name. . . ." (Tr. 235). Further, the record shows that, although Col. Trust called OSI, the impetus both for the call and for OSI's action was the report of ". . . possibly some illegal firearms being manufactured in Building 507. . . ." (Tr. 179, 206-207, 218); that the allegation constituted a major felony, quite possibly involving prosecution by the United States Attorney or by the County prosecutor (Tr. 180-181; 195; 205; 207); that once OSI has information of possible criminal conduct on the Base, regardless of its source (Tr. 196), it is the duty of OSI to investigate the allegation (Tr. 177-178); and OSI is responsible for investigating alleged felonies committed on a Base (Tr. 191). Special Agent Gaubatz stated that OSI was the only authority on the Base that could conduct criminal investigations, ". . . in this nature" (Tr. 177) and that security police could not conduct, ". . . this type investigation" (Tr. 177). Mr. Holland was also a licensed gun dealer who sold Mr. Cannon sixteen rifle barrels (G.C. Exhs. 7, 8, 9, 10; Tr. 63-64; 127) and, even though he made no parts (G.C. Exh. 8, p. 2), was well aware that muzzle loading rifles were being made but was less than forthright in his

testimony. He stated, "He [Kerr] asked me -- basically he stated that it was alleged that there were (sic) basically a production set-up with firearms being manufactured in the building and my response to that was I just laughed." (Tr. 84); and the assertion in his letter of June 26, 1996, ". . . that arms manufacturing, in any conspiratorial manner, has been taking place in the machine shop of Building 507 is nothing more than the imaginations of fools and idiots . . ." (G.C. Exh. 3A), while full of sound and fury, in truth is a negative pregnant. Mr. Holland was purposely evasive and I do not credit his statement that OSI agreed to investigate as a personal favor to Col. Trust.

I am aware that Mr. Woods stated, ". . . I believe it was Mr. Kerr that they normally don't do this type of investigation and that management asked them to come in and investigate what they could and then they would give their reports back to management." (Tr. 114). General Counsel is correct that Mr. Woods' testimony was not refuted (General Counsel's Brief, p. 32); but, for reasons noted above, the credibility of his statement was terminally undermined by the credible testimony of Agent Gaubatz. Nor does he make any reference to the assertion in the statement he wrote on April 17, 1996 (G.C. Exh. 10).

Mr. Cannon and Major Tarnow each stated that on the morning of April 11, 1996, when he, Cannon, admitted he was "spoofing" them about the object found in his toolbox, Col. Trust said he was going to call OSI (Tr. 91, 173). Mr. Tilly said that Agent Kerr said, ". . . he was up here on management's request to investigate a -- allegations concerning illegal manufacturing of firearms and he'd like to ask me a few questions if he could." (Tr. 55). Mr. Cannon said, ". . . that they were going to talk to me about -- they were asked by management to look into this incident that happened earlier and they wanted to ask me a few questions about it." (Tr. 93). Mr. Sharkey said, ". . . They [Kerr] said that they wanted to investigate something that management had found out in the shop . . ." (Tr. 126). The testimony of Cannon, Tilly and Sharkey was credible and consistent and I credit their testimony.

C. General Counsel's Last Doesn't Fit Respondent's Shoe

As noted above, General Counsel's last is the delineation of an entity that uses OSI as its alter ego to do, ". . . its dirty work . . . by conducting an investigation it could not otherwise do for itself without involving the union." (General Counsel's Brief, p. 38). Here, Ogden was shocked, dismayed and chagrined by the assertion of an informer that weapons were being made on its premises and Lieutenant Col. Trust and Major Tarnow immediately went to Building 507 (Machine Shop) to see if any such activity was going on. They saw nothing; but the Director of Operations suggested that they go back and look again. The second time,

Col. Trust, quite by accident, when he picked up a towel to wipe grease from his hand, saw an object in Mr. Cannon's tool box which did not seem to belong in the landing gear area but which looked like a part of a gun. Mr. Cannon at first told them that it was part of a fixture but then admitted he was "spoofing". At this point, Col. Trust told Mr. Cannon he was going to call OSI and he did.

Having discovered evidence of probable unlawful activity, Respondent, who had no authority to conduct a criminal investigation (Tr. 177, 242), was required to report the existence of the possible criminal activity on pain of committing a criminal violation (obstruction of justice) by its failure to report activity of which it was aware (Tr. 191, 242). Although Security Police also have authority to conduct criminal investigations on the Base (Tr. 177), they do not have jurisdiction to investigate major criminal violations, and this appeared to be a major criminal activity, namely the manufacture of illegal firearms (Tr. 226), nor of criminal conspiracies involving more than two people (Tr. 238). Accordingly, even if Respondent had called Security Police, the investigation would have been referred to OSI because it was within OSI's jurisdiction. Lackland AFB, supra, 5 FLRA at 480; Tr. 177, 179, 181, 186, 195-196).

Only after interviewing employees, including: Cannon and Sharkey, did OSI learn that the weapons involved were muzzle loading rifles and not until 3:00 p.m. on April 11, 1996, when Agent Gaubatz contacted the Bureau of Alcohol, Tobacco and Firearms (AFT) did OSI learn that the manufacture of black powder, muzzle loading rifles was not regulated by AFT and is legal (Jt. Exh. 1, Par. 3-12; G.C. Exh. 6, p. 3; Tr. 226). Even though the manufacture of muzzle loading rifles was not illegal per se, the misuse of government property and materials to produce them was unlawful and the conspiracy, involving more than three people, remained under the jurisdiction of OSI (Tr. 238).⁽⁷⁾

Major Tarnow took Mr. Cannon and Mr. Sharkey to the Conference Room; Mr. Tilly was told by Agent Kerr to come to the OSI office; Mr. Woods was told by his supervisor, Mr. Stephens, that OSI wanted to interview him; and Mr. Holland did not remember whether the OSI Agent called him or whether his supervisor, Mr. Stephens, told him to go to the OSI office. OSI has full police power, as Mr. Tilly was informed (Tr. 57-58), and neither needed nor sought Respondent's assistance in requiring attendance. Respondent took no part in any interview and was not present at any interview. OSI's final act is its Report of Investigation which in this case issued on May 21, 1996 (Jt. Exh. 1). On June 18, 1996, Respondent, on the basis of the Report of Investigation, issued proposed notices of removal to Messrs. Tilly (Jt. Exh. 2), Cannon (Jt. Exh. 4) and Sharkey (Jt. Exh. 6). On August 14, 1996, each proposed removal was reduced to a suspension (Tilly, fourteen days, Jt. Exh. 3; Cannon, fourteen days, Jt. Exh. 5 and Sharkey, five days (Jt. Exh. 7).

OSI did not act as Ogden's alter ego; Ogden did not use, control or manipulate OSI in any manner; and Ogden merely reported information it had received of probable criminal activity. OSI's meeting with officials of Ogden in May, 1996, after the end of its investigation, but before issuance of its Report of Investigation, was to inform management of their findings (Tr. 141). While OSI, at this meeting, stated that there, ". . . was some foundation in the fact that there had been parts manufactured at the machine shop . . . that there was some foundation and basis for Colonel Trust's and Major Tarnow believing that there were black powder gun parts being manufactured in the machine shop area . . ." (Tr. 142-143), Ogden took no action against any employee until nearly a month after the Report of Investigation had been received. Mr. Ronald Henline, Chief, Production Branch, Landing Gear Division, who received the oral and written replies and who issued the decisions to suspend on August 14, 1996, had no contact with OSI and was not present at the debriefing session (Tr. 154, 155).

OSI is exempt from the coverage of the Statute and it is debatable that an agency which does not participate in an examination can be found to have failed to comply with 14(a)(2)(B) of the Statute when OSI, which is exempt from coverage of the Statute, had conducted the interview and it, alone, has refused requested representation. Nevertheless, the Authority in Hill AFB, supra, where the exemption of OSI was not raised, did find that the agency [Hill AFB] failed to give the Union notice of a formal discussion, an examination by OSI, as required by 14(a)(2)(A) of the Statute and thereby violated §§ 16(a)(1) and (8) of the Statute; and, in addition, independently violated § 16(a)(1) of the Statute, ". . . by conducting a coercive interview of a Union arbitration witness."⁽⁸⁾ The continuing validity of the Authority's decision, in light of Respondent's failure to raise the exemption of E.O. 12171 is doubtful. However, accepting for purposes of analysis, General Counsel's interpretation, namely, that Hill AFB, supra, stands for the proposition that if an agency uses OSI as its alter ego to do, ". . . its dirty work . . . by conducting an investigation it could not otherwise do for itself without involving the union" (General Counsel's Brief, p. 38), not any such qualifying factor was shown to be present in this case.

Because the only examination of bargaining unit employees was conducted by OSI which, pursuant to E.O. 12171, is exempted from the coverage of the Statute, and because Respondent, Ogden Air Logistics Center, was not shown by a preponderance of the evidence to have had any control, direction or supervision over OSI and no participation in the examinations conducted by OSI, Respondent's Motion For Judgment is granted and the Complaint is hereby dismissed. United States Department of Agriculture, Farm Service Agency, Kansas City, Missouri, et al., Case No. DE-CA-60399, OALJ 97-35 (June 13, 1997), Slip Opinion, pages 21-24; Department of the Treasury, Bureau of the Mint, U.S. Mint, Denver, Colorado, Case No. 7-CA-876, 9 Adm. Law Judge Dec. Rep., April 30, 1982; Department of Defense, Defense Criminal Investigative Service, Defense Logistics Agency and Defense Contract Administration Service Region, New York, 28 FLRA 1145, 1148-1149, 1152, 1163 (1987) en'd. 855 F.2d 93 (3rd Cir. 1988).

B. GENERAL COUNSEL'S OTHER CONTENTIONS ARE WITHOUT MERIT

General Counsel's assertion that, "THE ADMINISTRATIVE LAW JUDGE IMPROPERLY CLOSED THE RECORD WITHOUT HEARING ALL OF THE GENERAL COUNSEL'S EVIDENCE AND WITHOUT RULING ON RESPONDENT'S MOTION" (General Counsel's Brief, p. 39) is wholly without basis. It was General Counsel who, when invited to call his next witness, announced, "General Counsel rests, your Honor." (Tr. 243).

To be sure, objections were sustained to questions which were immaterial. For example, General Counsel's attempt to explore asserted inaccuracies in OSI's report of interviews (Tr. 76). As I stated, this may go to the incompetence of the investigator but has nothing to do with the denial of representation (Tr. 79). Moreover, the merits of the suspensions, including the Report of Investigation on which they were based, have been challenged through the grievance procedure (Tr. 137). When General Counsel asserted that inaccuracies in the report of an interview related to remedy, I stated that I was not interested in remedy unless liability was first established, ". . . Unless you can show liability, I don't care about the remedy" (Tr. 79-80). Indeed, General Counsel said, "I agree . . . Analytically, you're absolutely correct, your Honor. . . ." (Tr. 80). But more important, General Counsel made an offer of proof. (Tr. 68-69; 77-79).

Because, following General Counsel's completion of his case, Respondent moved for entry of judgment in its favor, asserting that, ". . . General Counsel has failed to make even a prima facie showing that Hill Air Force Base [Ogden Air Logistics Center] in any way violated the Weingarten rights of any of the bargaining unit employees interviewed by the Office of Special Investigation" (Tr. 243-244), and I stated that, ". . . my intention is to grant the motion unless you can convince me to the contrary. . . ." (Tr. 244). Accordingly, Respondent called no witnesses and because this matter was submitted on motion for judgment at the close of General Counsel's case, no inference is proper because Respondent called no particular witness, specifically, as General Counsel contends, ". . . there was no explanation for [Col.] Trust's failure to appear at the hearing." (General Counsel's Brief, p. 39).

Having found that General Counsel failed to establish that Respondent Ogden Air Logistics Center failed to comply with § 14(a)(2)(B) of the Statute, and did not establish that Ogden Air Logistics Center violated § 16(a)(1) or (8) of the Statute, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. DE-CA-60922 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY

Administrative Law Judge

Dated: August 26, 1997

Washington, DC

1. 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 7114 (a)(2)(B) will be referred to, simply, as, "§ 14(a)(2)(B)."

2. Major Tarnow wrote a memorandum for the record which set forth the statements of the informant. This document was introduced into evidence as General Counsel Exhibit 5 and was received under seal. To protect the identity of the witness, G.C. Exh. 5 shall not be copied, reproduced, or examined by any person except authorized representatives of the Authority.

3. Major Tarnow is now Branch Chief of Electronics Repair (Tr. 156).

4. Special Agent Kerr is now stationed in Germany (Tr. 223).

5. At the time of the hearing, Mr. Tilly had been on a career broadening detail for a couple of weeks to a "network administrative position." (Tr. 53).

6. So far as I am aware, this is the first case involving § 14(a)(2) of the Statute in which the exemption of E.O. 12171 has been raised, notwithstanding that agencies covered by E.O. 12171 have been involved in other cases. For example:

Lackland Air Force Base Exchange, Lackland Air Force Base, Texas, 5 FLRA 473 (1981) (hereinafter, referred to as "Lackland AFB") (cashier suspected of "cash register manipulation"; Exchange Detective participated in interview conducted by OSI; violation of 16(a)(1) and (8) found because of denial of request for representation).

Department of The Treasury, Bureau of the Mint, U.S. Mint, Denver, Colorado, Case No. 7-CA-876, 9 Adm. Law Judge Dec. Rep., April 30, 1982 (hereinafter, referred to as, "U.S. Mint") (interrogation by Secret Service).

Department of The Air Force, Office of Special Investigations, McChord Air Force Base, Tacoma, Washington and Department of The Air Force, McChord Air Force Base, Tacoma, Washington, Case No. 9-CA-80368, 87 Adm. Law Judge Dec. Rep., February 2, 1990 (hereinafter, referred to as, "McChord AFB") (commissary employee suspected of theft was jointly interviewed by OSI and Base security police investigator. OSI agent told union representative, who was allowed to be present, that he would not be permitted to speak during the interrogation. Both OSI and McChord AFB found to have violated 14(a)(2)(B) and 16(a)(1) and (8) of the Statute).

U.S. Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, and U.S. Department of The Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 36 FLRA 748 (1990) (hereinafter, referred to as, "Hill AFB") (complaint premised on failure to comply with 14(a)(2)(A) - formal discussion. OSI conducted interview at request of Hill AFB of witnesses to impeach grievant in pending arbitration case. The order was that Ogden ALC, Hill AFB, should cease,

"(a) Requiring any bargaining unit employee to take part in a pre-arbitration interview that constitutes a formal discussion without notifying and allowing . . . the exclusive representative . . . the opportunity to be present.

"(b) Coercively questioning Union witnesses concerning matters known to be at issue at scheduled arbitration hearings. . . ." (36 FLRA at 750).

Interestingly, Respondent filed no exceptions to the ALJ's decision.

7. The scheme was simple but clever with an eye to minimizing risk. From five to fifteen employees were interested in having a muzzle loading rifle. The barrels were bought through Mr. Holland, who was a licensed gun dealer, and each participant was to make one part, in sufficient number that each participant would receive one, e.g. receiver; end caps; trigger guard; spring retainer; etc. When each had all the requisite parts, he would assemble the parts to make the end product, namely, a high quality muzzle loading rifle worth \$300-350.00 dollars (G.C. Exhs. 7, 8, 9 and 10). No rifle was assembled on the Base.

8. The Authority stated, ". . . we will modify the recommended Order to address the Judge's finding that Respondent Hill AFB independently violated section 7116(a)(1) of the Statute by conducting a coercive interview of a Union witness." (36 FLRA at 749). The Administrative Law Judge had found, ". . . it is found that Jacksch's [OSI] questioning of Union witness Max Romero . . . constituted coercive questioning independently violative of section 7116(a)(1) of the Statute. . . ." (36 FLRA at 772). Had the exemption of OSI been asserted, the Judge could not have made the finding he did because OSI [Jacksch], pursuant to E.O. 12171, was exempt from the coverage of the Statute.