68 FLRA No. 80

UNITED STATES
DEPARTMENT OF THE AIR FORCE
OGDEN AIR LOGISTICS CENTER
HILL AIR FORCE BASE, UTAH
(Respondent)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1592
(Charging Party)

DE-CA-08-0046

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DECISION AND ORDER

April 16, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member DuBester dissenting)

I. Statement of the Case

The Regional Director of the Federal Labor Relations Authority's (FLRA's) Denver Regional Office – which is part of the FLRA's Office of the General Counsel (GC) – issued a complaint alleging that the Respondent violated §§ 7114(a)(2)(B) and 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute)[1] when the Air Force Office of Special Investigations (AFOSI) denied union representation to a bargaining-unit employee (the employee) during an investigative interview. In the attached decision, the FLRA's Chief Administrative Law Judge (the Judge) recommended dismissing the complaint on the ground that Executive Order 12,171 precludes finding AFOSI to be a representative of the Respondent under § 7114(a)(2)(B), and the GC filed exceptions to the Judge's recommended order. In addition, we issued a Federal Register notice soliciting additional briefs from the parties as well as amici briefs from other interested persons regarding the issues in this case,[2] and we received four briefs in response to the notice.

The main question before us is whether an employee of AFOSI, which is excluded from the coverage of the Statute under § 7103(b)(1),[3] may act as a "representative of" the Respondent, within the meaning of § 7114(a)(2).[4] Because the plain wording of § 7103(b)(1) excludes AFOSI from all of the Statute's provisions, including § 7114(a)(2), we find that AFOSI's investigator did not act as a representative of the Respondent and, consequently, that the Respondent may not be held responsible under the Statute for the investigator's conduct in this case. For that reason, we deny the GC's exceptions and dismiss the complaint.

II. Background and Judge's Decision

A. Background

The employee worked at an Air Force base (the base), where he used a government-issued computer to perform some of his duties for the Respondent. When a coworker reported that the employee was "observing pornography" on his computer, one of the employee's supervisors sent the employee home from work and placed him on administrative leave.[5] Sometime after the Respondent's information-technology department examined the employee's computer, a "confidential source" reported to AFOSI that the employee may have accessed "child[-]pornography sites,"[6] and AFOSI opened an investigation into whether the employee committed a felony.

At AFOSI's request, one of the employee's supervisors "arrange[d] for [the employee] to be interviewed."[7] On the day of the interview, the employee requested that his union representative be permitted to attend with him. The lead AFOSI investigator (lead investigator) denied the request, and a few minutes later, the lead investigator and another AFOSI special agent accompanied the employee to the interview room, without the employee's supervisor or union representative joining them. During the interview, the lead investigator stated that he would be reporting the results of the investigation to the general in charge of the base, and stated further that the employee was "not going to be able" to work at the base for "very long" once the general received AFOSI's report.[8]

After completing its investigation, AFOSI sent a copy of its report of investigation to the grievant's

[1] 5 U.S.C. § 7114(a)(2)(B); *id.* § 7116(a)(1), (8).
[2] Notice of Opportunity to Submit Amici Curiae Briefs in an Unfair-Labor-Practice Proceeding Pending Before the Federal Labor Relations Authority, 79 Fed. Reg. 48,156 (Aug. 15, 2014) (Notice).
[3] 5 U.S.C. § 7103(b)(1).
[4] *Id.* § 7114(a)(2)(B).
[5] Judge's Decision at 2 (quoting Tr. at 45) (internal quotation mark omitted) (citing GC's Ex. 2 at 1).
[6] *Id.* at 3 (quoting Tr. at 85) (internal quotation marks omitted) (citing Tr. at 146).
[7] *Id.* (citing Tr. at 129, 200).
[8] *Id.* at 4 (quoting Tr. at 54) (internal quotation mark omitted).

supervisor and requested to be informed of any action taken against the employee. Approximately six weeks later, the Respondent proposed the employee's removal based on information from AFOSI's report. To avoid his potential removal, the employee entered into a settlement agreement with the Respondent. As relevant here, the settlement allowed the employee to return to duty on the condition that he cease all computer misuse. About one month later, faced with impending removal for violating the settlement agreement, the employee resigned.

B. Judge's Decision

The Judge found that, in order to hold the Respondent accountable for AFOSI's conduct under § 7114(a)(2)(B) of the Statute, the GC had to establish that the lead investigator acted as a "representative of the [A]gency" when he denied the employee's union-representation request.[9] In that regard, the Judge recognized that, because all of the allegations in the complaint depended on finding that the lead investigator acted as a "representative" of the Respondent under § 7114(a)(2)(B), the Respondent could not be found liable for an unfair labor practice (ULP) *unless* § 7114(a)(2)(B) applied to the lead investigator. In his analysis of that issue, the Judge examined President Carter's 1979 issuance of Executive Order 12,171. In that order, the President exercised his authority under § 7103(b)(1) of the Statute and "exclude[d AFOSI] from coverage under" the Statute based on "national[-]security requirements and considerations."[10] The Judge further reasoned that, because Executive Order 12,171 excluded AFOSI from the Statute "in its entirety," he was "preclude[d]" from finding that the lead investigator acted as a "representative of the [A]gency" under § 7114(a)(2)(B) of the Statute.[11] Thus, the Judge determined that there was "no basis" to hold the Respondent accountable for AFOSI's conduct,[12] and he recommended dismissing the complaint.

The GC filed exceptions to the Judge's decision, and the Respondent filed an opposition.

C. Federal Register Notice

As stated previously, we published a notice in the Federal Register (notice) allowing the parties and other interested persons to file briefs addressing the following questions, as relevant here:

> When the President of the United States issues an order under § 7103(b)(1) of the Statute and excludes an agency or subdivision thereof "from coverage under" the Statute, does such an order preclude the agency or subdivision from being a "representative of the agency" under § 7114(a)(2)(A) and (B)?
>
> Should the Authority interpret Executive Order 12,171 as having that effect with regard to [AFOSI]?[13]

The notice also specified that, in answering those questions, briefs should address: (1) the "wording of the Statute and Executive Order 12,171; (2) principles of statutory construction; (3) legislative history . . . ; (4) any information regarding the history and purposes of Executive Order 12,171; (5) any applicable precedent . . . ; and (6) policy considerations."[14]

In response to the notice, briefs were filed by: the Respondent; the Department of Defense (DOD), which is the Respondent's parent agency; the GC; and the Charging Party (AFGE).

III. Preliminary Matter: We will not consider the Respondent's opposition to the GC's exceptions.

Based on the postmark of the Respondent's opposition, we issued an order directing the Respondent to show cause why the opposition should not be rejected as untimely.[15] The order cautioned the Respondent that failure to respond in a timely manner could result in the Authority not considering the opposition.[16] The Respondent did not reply to the order. When the Authority directs a party to show cause why its filing should be considered, and the party does not respond, the Authority does not consider the filing.[17] Consistent with this precedent, we decline to consider the Respondent's opposition.

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[9] *See id.* at 10 (quoting 5 U.S.C. § 7114(a)(2)(B)) (internal quotation mark omitted); *accord id.* at 5 (GC argued that Respondent violated § 7114(a)(2)(B) because lead investigator was a "representative[] of the Agency" when he denied the employee representation).

[10] *Id.* at 9 (quoting Exec. Order No. 12,171, Exclusions From the Federal Labor-Management Relations Program, 44 Fed. Reg. 66,565 (Nov. 19, 1979)) (internal quotation marks omitted).

[11] *Id.*

[12] *Id.* at 10.

[13] Notice, 79 Fed. Reg. at 48,157.

[14] *Id.*

[15] Order to Show Cause (June 19, 2013) at 2.

[16] *Id.*

[17] *See, e.g., NAGE, Local R3-32*, 57 FLRA 624, 624 n.* (2001) (declining to consider opposition because party failed to respond to Authority's order to show cause).

IV. Analysis and Conclusions

The GC contends, as relevant here, that the Judge erred in finding that AFOSI cannot be a "representative of the [A]gency" (i.e., the Respondent), within the meaning of § 7114(a)(2)(B).[18] In particular, the GC argues that, just as a "supervisor" may be a "representative of [an] agency" under § 7114(a)(2) despite being excluded by § 7103(a)(2)(B) from the Statute's definition of an "employee," an employee of an agency or subdivision that is excluded from coverage of the Statute under § 7103(b)(1) still may be a "representative of [another] agency."[19] But, as the Judge recognized,[20] if § 7114(a)(2)(B) does not apply to AFOSI investigators, then those investigators could not act as "representatives" of the Respondent, and, consequently, the Respondent could not be liable for a ULP based on AFOSI's conduct.

In matters of statutory interpretation, the U.S. Supreme Court has stated that the first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."[21] Further, "[w]hen the words of a statute are unambiguous, then, this first canon [of interpretation] is also the last."[22] Following that guidance, we begin with the statutory wording at issue here.

Section 7103(b)(1) of the Statute provides:

> (b)(1) The President may issue an order *excluding* any agency or subdivision thereof *from coverage under this chapter* if the President determines that—
>
> (A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national[-]security work, and
>
> (B) the *provisions of this chapter* cannot be applied to that agency or subdivision in a manner consistent with national[-]security requirements and considerations.[23]

As noted above, orders issued under § 7103(b)(1) remove agencies or subdivisions like AFOSI from *all* of Chapter 71 of Title 5 of the U.S. Code – i.e., *all* of the Statute – based on a presidential finding in an executive order that the "provisions of th[e] chapter *cannot be applied*" to those agencies or subdivisions.[24] Section 7103(b)(1)'s reference to the statutory "chapter" as a whole, and the section's use of the plural word "provisions," support the Judge's conclusion that an executive order issued under § 7103(b)(1) excludes the affected agencies and subdivisions from the entirety of the Statute.[25] And although the dissent reaches a contrary conclusion,[26] we note that the dissent does not reconcile its conclusion with the specific wording of § 7103(b)(1)(B) – that "the provisions of th[e Statute] cannot be applied" to excluded entities.[27]

The next subsection of the Statute – § 7103(b)(2) – reinforces our understanding of § 7103(b)(1), insofar as § 7103(b)(2) allows the President to "issue an order suspending *any provision*" of the Statute.[28] The use of the singular "provision" in § 7103(b)(2) indicates that Congress could have granted the President authority in § 7103(b)(1) to suspend particular provisions of the Statute without suspending others. But Congress did not include such wording in § 7103(b)(1); instead, as stated above, Congress stated in § 7103(b)(1) that an executive order would suspend coverage of "this chapter" and "the provisions of this

[18] Exceptions at 11-12; GC's Amicus Br. at 1, 24.
[19] Exceptions at 12-14; GC's Amicus Br. at 13-16.
[20] Judge's Decision at 10.
[21] *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989)).
[22] *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).
[23] 5 U.S.C. § 7103(b)(1) (emphases added).
[24] *Id.* (emphasis added).
[25] *See U.S. DHS, U.S. CBP v. FLRA*, 751 F.3d 665, 672 (D.C. Cir. 2014) (*DHS*) ("[Collective bargaining] in and of itself is antithetical to [Office of Inspector General (OIG)] independence established by the Inspector General Act [(IG Act)]." (internal quotation mark omitted)).

Chairman Pope notes that *DHS* involved collective bargaining, which is not at issue here. Moreover, while *DHS* held that parties may not negotiate over OIG-investigation procedures, *DHS* reaffirmed the Supreme Court's holding in *NASA v. FLRA*, 527 U.S. 229, 234 (1999), that § 7114(a)(2)(B) rights apply to OIG investigations. *DHS*, 751 F.3d at 670. In that regard, the U.S. Court of Appeals for the D.C. Circuit stated in *DHS* that the "*Weingarten* right embodied in § 7114(a)(2)(B) is an overriding federal protection that takes precedence over . . . the OIG's authority to pursue investigations under the IG Act." *Id.* The crucial factor in this case – and the reason that Chairman Pope finds reliance on *DHS* misplaced here – is the operation of Executive Order 12,171, which (in conjunction with § 7103(b)(1) of the Statute) removes AFOSI from the coverage of the Statute entirely. However, in order to form a majority opinion on this issue and avoid an impasse in the resolution of this case, she agrees to the citation to *DHS*. *See SSA, Louisville, Ky.*, 65 FLRA 787, 789 n.6 (2011) (citing *AFGE, Local 727*, 62 FLRA 372, 374 (2008) (Separate Opinion of then-Member Pope)) (joining majority opinion in order to avoid impasse).
[26] Dissent at 10-11.
[27] 5 U.S.C. § 7103(b)(1)(B).
[28] *Id.* § 7103(b)(2) (emphasis added).

chapter"[29] – in other words, the entire Statute. And when "Congress includes particular language in one section of a statute but omits it in another section of the same [statute]" – as is the case with § 7103(b)(1) and (b)(2) – "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[30] This contrast between § 7103(b)(1) and (b)(2) further supports the Judge's conclusion that an executive order issued under § 7103(b)(1) excludes the pertinent agency or subdivision from the entire Statute – not just specific provisions thereof.[31]

Further, the wording of Executive Order 12,171 confirms that President Carter excluded AFOSI from "coverage under" the entire Statute,[32] which necessarily includes the "representative[-]of[-]the[-]agency" provision in § 7114(a)(2)(B).[33] In that regard, the order states that "*Chapter 71 of Title 5 of the United States Code* cannot be applied" to AFOSI "consistent with national[-]security requirements and considerations,"[34] which indicates that the exclusion applies to every provision in the Statute. Thus, the order's plain wording supports finding that it excluded AFOSI from all – and not just some – of the provisions of the Statute. We note, moreover, that the dissent's contrary analysis does not address the plain wording of the executive order on which we rely.

In its amicus brief, the Respondent argues that the Judge correctly found that "[b]ecause the President . . . issued an [e]xecutive [o]rder excluding AFOSI from coverage under the Statute, none of the provisions of the Statute apply to AFOSI."[35] In addition, the Respondent asserts that the GC's complaint is an attempt to "perform an 'end[-]around' attack" on AFOSI's exclusion under § 7103(b)(1) by charging another entity with a ULP based on the actions of AFOSI investigators.[36] In its amicus brief, DOD concurs with the Respondent's arguments and adds that "[t]here is no carve-out in the [e]xecutive [o]rder that allows for piecemeal application of the Statute," as DOD contends that the GC is seeking here.[37]

In contrast to the amici briefs of the Respondent and DOD, the GC, AFGE, and the dissent contend that the Authority should reject the Judge's interpretation of § 7103(b)(1) for reasons other than the plain wording of the Statute and the plain wording of Executive Order 12,171. We address those arguments further below.

First, the GC, AFGE, and the dissent argue that § 7103(b)(1) should be interpreted as authorizing the President to exclude agencies and subdivisions *only* from the Statute's benefits of collective bargaining and exclusive representation.[38] But, as explained above, the plain wording of the Statute does not indicate that an order under § 7103(b)(1) excludes agencies or subdivisions from only *some* provisions of the Statute. Rather, such an order applies to the Statute as a whole.[39] Further, Congress had no need to empower the President in § 7103(b)(1) to deny AFOSI investigators the benefits of collective bargaining and exclusive recognition. In that regard, the investigators would *already be denied* those benefits by virtue of their exclusion from the definition of an "appropriate unit" in § 7112,[40] owing to their "intelligence, . . . investigative, or security work"[41] or their "investigation or audit functions."[42] For these reasons, the GC, AFGE, and the dissent provide no basis for interpreting § 7103(b)(1) as authorizing the President to exclude agencies or subdivisions from only some provisions of the Statute.

Second, the GC argues that the legislative history of § 7114(a)(2)(B) reflects congressional intent to ensure that most federal employees enjoy representational rights during investigatory interviews.[43] But, as the GC admits, there is no relevant legislative history regarding § 7103(b)(1) on this point.[44] In that regard, the focus of this case is the *interaction* of § 7103(b)(1) with § 7114(a)(2). In particular, this case concerns how an exclusionary order under § 7103(b)(1) affects the application of § 7114(a)(2) to employees of excluded agencies or subdivisions. The GC also argues that "[n]othing in the legislative history of [§]7103(b)(1) . . . indicates that Congress intended to deprive employees of

[29] *Id.* § 7103(b)(1).
[30] *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) (internal quotation marks omitted).
[31] *See DHS*, 751 F.3d at 672 ("[Collective bargaining] in and of itself is antithetical to OIG independence established by the Inspector General Act." (internal quotation mark omitted)). *But see* note 25.
[32] Exec. Order No. 12,171, 44 Fed. Reg. 66,565.
[33] 5 U.S.C. § 7114(a)(2)(B); *see also DHS*, 751 F.3d at 670-71 (Supreme Court precedent "does not in any way suggest that the OIG is the representative of an agency for collective[-]bargaining purposes."). *But see* note 25.
[34] Exec. Order No. 12,171, 44 Fed. Reg. at 66,565 (emphasis added).
[35] Respondent's Br. at 2.
[36] *Id.* at 14.
[37] DOD's Br. at 5.
[38] Exceptions at 15; GC's Amicus Br. at 20-22; AFGE's Br. at 3; Dissent at 10-11.
[39] *See DHS*, 751 F.3d at 672 ("[Collective bargaining] in and of itself is antithetical to OIG independence established by the Inspector General Act." (internal quotation mark omitted)). *But see* note 25.
[40] 5 U.S.C. § 7112(a)-(b).
[41] *Id.* § 7112(b)(6).
[42] *Id.* § 7112(b)(7).
[43] GC's Amicus Br. at 9-10.
[44] *Id.* at 7-8.

agencies [that are] not excluded from the Statute of their [s]tatutory rights,"[45] and AFGE and the dissent make similar arguments.[46] But, by definition, employees covered by the Statute have representational rights under § 7114(a)(2)(B) only in examinations by a "*representative* of [an] agency."[47] Thus, finding that AFOSI investigators are not "representatives" of the Respondent would not deprive employees of an existing right but, rather, would recognize that AFOSI-conducted interviews do not involve § 7114(a)(2)(B) rights to begin with. As such, the GC's and AFGE's reliance on legislative history does not support interpreting § 7103(b)(1) as authorizing the President to exclude agencies or subdivisions from only some provisions of the Statute.

Third, the GC and the dissent argue that adopting the Judge's interpretation of § 7103(b)(1) will "erode the right" to representation under § 7114(a)(2)(B) "by encouraging the use of investigative conduits outside the employee's bargaining unit, and would otherwise frustrate Congress' apparent policy of protecting certain federal employees when they are examined and justifiably fear disciplinary action"[48] – a concern that the U.S. Supreme Court found in *NASA v. FLRA*[49] was a permissible basis for the Authority to hold that employees of an agency's inspector general (IG) acted as "representatives" of the IG's parent agency, for purposes of § 7114(a)(2)(B).[50] Further, the GC and the dissent note that the Authority has also held that contractors hired by agencies may act as "representatives" of those agencies for purposes of § 7114(a)(2).[51]

The GC and the dissent are correct that the Authority has found that individuals who are not *employees* of an agency or subdivision may still act as "representatives" of that agency or subdivision under § 7114(a)(2).[52] But the Authority has never recognized that non-employees may act as agency "representatives" in a situation where those non-employees work for an entity that has been expressly excluded from coverage of the *entire* Statute – including § 7114(a)(2) – *by an executive order* issued under § 7103(b)(1). Here, adopting the position of the GC and the dissent would require the Authority to apply § 7114(a)(2) to AFOSI investigators even though § 7103(b)(1)(B) and Executive Order 12,171 indicate that the "provisions of [the Statute] *cannot be applied*" to them.[53] Neither the GC, nor the dissent, cites any precedent that would support applying § 7103(b)(1) and Executive Order 12,171 in that manner. To the contrary, the U.S. Court of Appeals for the D.C. Circuit recently rejected a similar argument made by NTEU concerning IG investigators.[54] Further, we are not persuaded by the dissent's reliance on decisions that, as the dissent acknowledges, did not address § 7103(b)(1) at all.[55]

With regard to the policy concerns that the GC and the dissent raise, as an initial matter, we note that there is no dispute that AFOSI was acting within the scope of its legal authority in this case, and nothing in our analysis in this case addresses situations where agencies use entities otherwise excluded from the coverage of the Statute by executive order to conduct investigations that are outside the scope of those entities' legal authority. When agencies or subdivisions excluded from coverage from the Statute are acting within their legal authority, the policy concerns raised by the GC and the dissent must give way to the plain wording of the Statute. As the Authority has recognized, even when "[i]t seems incongruous for Congress to . . . provide rights, but . . . deny . . . enforcement" of those rights in particular circumstances, "it is for Congress, not the Authority, to correct" any problems arising from plain statutory wording.[56]

For the foregoing reasons, we find that § 7103(b)(1) of the Statute and Executive Order 12,171 preclude finding AFOSI to be a "representative of the [A]gency" under § 7114(a)(2)(B) of the Statute.[57] Because there can be no violation of § 7114(a)(2)(B) of

[45] *Id.* at 10 (emphasis omitted).
[46] AFGE's Br. at 3; Dissent at 10-11, 14.
[47] 5 U.S.C. § 7114(a)(2)(B) (emphasis added).
[48] *NASA*, 527 U.S. at 234.
[49] *Id.*
[50] *Id.*
[51] GC's Amicus Br. at 13 (citing *Pension Benefit Guar. Corp., Wash., D.C.*, 62 FLRA 219, 224 (2007) (*PBGC*); *SSA, Office of Hearings & Appeals, Bos. Reg'l Office, Bos., Mass.*, 59 FLRA 875, 880 (2004) (*SSA*)); Dissent at 14 (same).
[52] *E.g.*, *PBGC*, 62 FLRA at 223-24 (finding independent contractor to be "representative of the [a]gency" under § 7114(a)(2)); *SSA*, 59 FLRA at 880 (same); *cf. DHS*, 751 F.3d at 670 ("OIG investigators who work for an agency . . . *can be* 'representatives of the agency.'" (emphasis added)).
[53] 5 U.S.C. § 7103(b)(1)(B).
[54] *See DHS*, 751 F.3d at 670-71 ("The Supreme Court . . . d[id] not in any way suggest that the OIG is the representative of the agency for collective[-]bargaining purposes."). Chairman Pope notes that the parties' arguments to the court in *DHS* did not in any way concern Executive Order 12,171 and § 7103(b)(1), which are the central focus of this case, so the court's rejection of different arguments in *DHS* is not relevant here. *See also* note 25.
[55] *E.g.*, Dissent at 11 (citing *Lackland Air Force Base Exch., Lackland Air Force Base, Tex.*, 5 FLRA 473 (1981)); *id.* at 12 (citing *U.S. Dep't of the Air Force, Ogden Air Logistics Ctr., Hill Air Force Base, Utah*, 36 FLRA 748 (1990)).
[56] *P.R. Air Nat'l Guard, 156th Airlift Wing (AMC), Carolina, P.R.*, 56 FLRA 174, 182 (2000) (Chairman Wasserman dissenting in part) (citing *Pritzker v. Yari*, 42 F.3d 53, 73 (1st Cir. 1994) (the unambiguous language of a statute may not be ignored, even if its application to particular facts evokes a "sympathetic reaction")).
[57] 5 U.S.C. § 7114(a)(2)(B).

the Statute unless there has been (among other things) action by a "representative of the [A]gency,"[58] we find that there was no violation of § 7114(a)(2)(B) in this case. As a result, there is no basis for finding that the Respondent violated the Statute as alleged, and we dismiss the complaint.

The GC also contends that the Judge erred in failing to make specific findings regarding "the degree to which AFOSI's investigation . . . was coordinated with the Respondent."[59] But, as the operation of Executive Order 12,171 supported dismissing the complaint regardless of the degree of coordination between AFOSI and the Respondent, the Judge did not err in declining to make specific findings regarding any coordination of the investigation.

V. Order

We dismiss the complaint.

[58] *Id.*
[59] Exceptions at 3.

Member DuBester, dissenting:

I respectfully disagree with my colleagues' determination that Executive Order (EO) 12,171 and § 7103(b)(1) of the Federal Service Labor-Management Relations Statute (the Statute)[1] nullify an employee's right to union representation under § 7114(a)(2)(B) of the Statute when an investigator from the Air Force Office of Special Investigations (AFOSI) conducts an investigatory interview regarding a routine disciplinary matter. The majority's resolution misses an opportunity to give effect to all of the statutory provisions involved. Moreover, the majority ignores clear indications in the Statute, and parties' understanding of it in the years immediately following its enactment, that the rights the majority would sweep aside should be protected. And the majority's opinion departs from longstanding Authority and judicial precedent preserving this important employee right even where investigators and similar personnel are themselves "excluded" in one way or another from the Statute's rights and protections.

I am guided at the outset – and throughout my analysis – by the Statute's fundamental nature. It is clear from its "[f]indings and purpose" that Congress enacted the Statute to establish and protect employee rights.[2] Congress' findings in § 7101(a) highlight the importance of "the right of employees to organize, bargain collectively, and participate through labor organizations . . . in decisions which affect them."[3] And § 7101(b) highlights the importance of "prescrib[ing] certain rights and obligations of the employees of the Federal Government."[4]

Because Congress enacted the Statute to establish and protect employee rights, only a statutory provision of compelling clarity should suffice to nullify any of those rights. The majority finds – erroneously – that § 7103(b)(1) is such a provision. The majority holds that an employee who, under § 7114(a)(2)(B), would ordinarily have a "*Weingarten*" right to union representation at an investigatory interview, loses that right if the interview is conducted by an "agency or subdivision [excluded] from coverage under [the Statute]" by a presidential executive order under § 7103(b)(1). Purporting to rely on the Statute's "plain and unambiguous"[5] language, the majority concludes that "[b]ecause there can be no violation of § 7114(a)(2)(B) . . . unless there has been . . . action by a 'representative of the [A]gency,'" and because § 7103(b)(1) "preclude[s] finding AFOSI to be a 'representative of the [A]gency,'" "there was no violation of § 7114(a)(2)(B) in this case."[6]

Contrary to the majority, I do not find the statutory language to be unambiguous. The majority finds AFOSI excluded from the Statute's coverage for all purposes. But § 7103(b)(1) does not say this. The question that § 7103(b)(1)'s plain language does not answer is whether an "excluded" agency is excluded from the Statute's coverage in every respect, or only with respect to its own functions and employees. Put differently, although § 7103(b)(1) allows the President to "exclud[e an] agency . . . from coverage" of the Statute, it does not explain how to reconcile that exclusion with rights that the Statute grants employees of other agencies not "excluded," and who are thereby fully entitled to the Statute's protections. Placing too much reliance on this ambiguous statutory language, the majority overlooks "[t]he cardinal principle of statutory construction": "[T]o save and not to destroy."[7] "It is our duty 'to give effect, if possible, to every clause and word of a statute,' . . . rather than to emasculate an entire section," as the majority's interpretation requires.[8]

Giving effect to every clause and word of the Statute, I would find that § 7103(b)(1) and EO 12,171 exclude AFOSI and its employees from the Statute's rights and obligations, but do not prevent AFOSI from acting as a representative under § 7114(a)(2)(B) of an agency not "excluded" from the Statute.

That an AFOSI investigator may act as "a representative of [an] agency"[9] not "excluded" from the Statute is not a novel idea. In the years immediately following the Statute's enactment and the issuance of EO 12,171, this was not just the prevailing view – it was the *only* view – of the Executive Order's effect on AFOSI's status and functions under the Statute. In 1980, and only two months after President Carter issued EO 12,171, the FLRA's General Counsel issued a complaint in an Air Force case involving an AFOSI investigator, *Lackland Air Force Base Exchange, Lackland Air Force, Texas* (*Lackland*).[10] The complaint alleged that the base exchange committed an unfair labor practice (ULP) when it denied an employee's request for union representation at an investigatory interview conducted by an AFOSI investigator. The agency argued that the AFOSI investigator was not acting as the agency's representative. But there was no issue raised

[1] 5 U.S.C. § 7103(b)(1).
[2] *Id.* § 7101.
[3] *Id.* § 7101(a)(1).
[4] *Id.* § 7101(b).
[5] Majority at 5.
[6] *Id.* at 9.
[7] *United States v. Menasche*, 348 U.S. 528, 538 (1955) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)).
[8] *Id.* at 538-39 (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882)).
[9] 5 U.S.C. § 7114(a)(2)(B).
[10] 5 FLRA 473, 487 (1981).

before the Administrative Law Judge (ALJ) or the Authority concerning EO 12,171 or AFOSI's "exclusion" from the Statute under § 7103(b)(1). The ALJ thoroughly analyzed § 7114(a)(2)(B)'s legislative history, the then-recent Supreme Court decision in *NLRB v. J. Weingarten, Inc.* (*Weingarten*),[11] and the importance of § 7114(a)(2)(B)'s union-representation right,[12] and found that the agency committed a ULP. The Authority agreed.[13] There was no court appeal. The only credible explanation for the positions taken – and not taken – by the parties in *Lackland* is that all of the parties – and the Authority – understood clearly that EO 12,171 and § 7103(b)(1) were not intended to preclude the AFOSI investigator from acting as a "representative of the agency" when the investigator conducted the interview.

This common understanding of the EO and § 7103(b)(1) reflected in *Lackland* was confirmed approximately ten years later by a pair of cases involving AFOSI. In 1990, the Authority considered a similar issue in another case involving an AFOSI investigator, *U.S. Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah* (*Ogden*).[14] Coincidentally, the same agency and union were involved in *Ogden* as are involved in the instant case. The ALJ in *Ogden* found, and the Authority agreed, that the agency committed a ULP by violating § 7114(a)(2)(A) of the Statute because the agency did not provide the union with an opportunity to be present during a "formal discussion" involving an AFOSI investigator functioning as a "representative of the agency."[15] Again, there was no court appeal.

In a second case involving AFOSI, the *McChord Air Force Base* case,[16] an Authority ALJ ruled that AFOSI committed a ULP when one of its investigators placed unlawful restrictions on a union representative's participation at a § 7114(a)(2)(B) interview.[17] The ALJ found, among other things, that the AFOSI investigator was acting as "a representative of the agency."[18] Neither the Air Force nor AFOSI sought review by the Authority or appealed to the courts.

Again, in both cases – but not surprising given what appears to have been the parties' common understanding – there was no issue raised before the ALJ or the Authority concerning EO 12,171 or AFOSI's "exclusion" from the Statute under § 7103(b)(1).

Also noteworthy is that numerous courts have found that investigators "excluded" from the Statute's coverage in ways other than by executive order can nevertheless act as "representatives of the agency" for § 7114(a)(2)(B) purposes. The Supreme Court reconciled such an exclusion with the *Weingarten* right in the *NASA* case.[19] Affirming the Authority, the Court held that even though investigators from an agency's Inspector General's office are excluded from the Statute's representational and collective-bargaining rights and protections under § 7112(b)(7) because of their investigatory functions, such investigators can still function as "representatives of the agency" at investigatory interviews.[20] Explaining further, the D.C. Circuit recently stated: "The *Weingarten* right embodied in § 7114(a)(2)(B) is an overriding federal protection that takes precedence over the [investigator's] right to engage in collective bargaining under the [Statute] and the OIG's authority to pursue investigations under the IG Act."[21] When the issue is whether an investigator is "a representative of the agency," the relevant inquiry, in the Supreme Court's view, is – simply – whether the investigator's work "is performed with regard to, and on behalf of, the particular agency in which [the IG] is stationed."[22]

NASA reflects longstanding Authority and judicial precedent holding that investigators employed by an agency's investigatory component can act as "representatives of the agency" for *Weingarten* rights purposes under § 7114(a)(2)(B). In one of the earlier cases addressing this issue, the Authority found that an investigator from the Department of Defense's Defense Criminal Investigative Service (DCIS) "was acting as a 'representative of the agency' . . . within the meaning of [§] 7114(a)(2)(B)" when the DCIS investigator examined bargaining-unit employees as part of a criminal investigation conducted by local police.[23] Affirming the Authority, the Third Circuit in *Defense Criminal Investigative Service, DOD v. FLRA* (*DCIS*) held that finding the investigator a "representative of the agency" was "eminently reasonable in light of the congressional objective behind § 7112(a)(2)(B)."[24] The court explained: "It is apparent from the face of the [S]tatute that Congress wanted federal employees to have the

[11] 420 U.S. 251 (1975).
[12] *Lackland*, 5 FLRA at 482-85.
[13] *Id.* at 473.
[14] 36 FLRA 748 (1990).
[15] *Id.* at 749.
[16] *U.S. Dep't of the Air Force, Office of Special Investigations, McChord Air For Base, Tacoma, Wash.*, 1990 WL 120323 (ALJ 1990).
[17] *Id.* at *5.
[18] *Id.* at *2.
[19] *NASA v. FLRA*, 527 U.S. 229, 234 (1995) (*NASA*).
[20] *Id.* at 246.
[21] *U.S. DHS, U.S. CBP v. FLRA*, 751 F.3d 665, 670 (2014).
[22] *NASA*, 527 U.S. at 240.
[23] *DOD, DCIS*, 28 FLRA 1145, 1149 (1987), *aff'd*, 855 F.2d 93 (3d Cir. 1988) (*DCIS*).
[24] *DCIS*, 855 F.2d at 98.

assistance of a union representative when they were placed in a position of being called upon to supply information that would expose them to the risk of disciplinary action."[25]

In 1990, the Authority relied on the court's *DCIS* decision when it concluded[26] that an OIG investigator acted as "a representative of the agency" under § 7114(a)(2)(B) while conducting an investigatory interview, even though the investigation "was under the direction and control of the office of the U.S. Attorney and the FBI."[27] The ALJ noted, in findings the Authority adopted, the court's holding that "we do not find § 7114(a)(2)(B) and the mandate of the [IG's office] so clearly irreconcilable that we are willing to imply an exception [to employee *Weingarten* rights] based solely on the enactment of the IG Act."[28]

Even a federal circuit court that concluded, before *NASA*, that OIG investigators *did not* act as agency representatives under § 7114(a)(2)(B), nevertheless *rejected* the notion that the investigators' exclusion from the Statute's representational and collective-bargaining rights under § 7112(b)(7) "renders them exempt from . . . provisions [of the Statute] that guarantee protections to other employees who are subject to collective bargaining."[29] Finding this argument "flawed," the court stated: "Congress could well have decided that OIG agents should not be included in bargaining units and yet also decided that when OIG agents interrogate employees who enjoy the protections of the [Statute] in general and a collective[-]bargaining agreement in particular, the [investigating] agents must permit attendance of a union representative."[30]

Similarly, finding that other kinds of "excluded" personnel are not barred from acting as "representatives of an agency" under § 7114(a)(2) is also part of the Authority's well-established case law. For example, in *Defense Logistics Agency, Defense Depot Tracy, Tracy, California*,[31] the Authority held that a contractor hired by an agency to conduct orientation meetings regarding the agency's employee assistance program "was functioning as the 'representative of the agency'" because the agency arranged and "maintained sufficient control over the[] sessions so that it cannot disentangle itself from the actions of [the contractor]."[32]

Applying the same principle, the Authority held in *SSA, Office of Hearings & Appeals, Regional Office, Boston, Massachusetts*,[33] that contractors employed by an agency to conduct interviews to help investigate an EEO complaint were "representatives of the agency" because they were conducting the interviews "at the [r]equest and on behalf of the [agency]."[34] And more recently, in *Pension Benefit Guaranty Corporation, Washington, D.C.*,[35] the Authority reached the same conclusion regarding a contractor conducting EEO interviews, because the contractor was "performing a function that otherwise would have been performed by the agency," and the agency exercised the requisite control over the situation.[36]

These cases have a common theme – that there is no statutory preclusion of an entity or individual not otherwise entitled to enjoy the Statute's rights and protections from still acting as a "representative of the agency." The dispositive inquiry is whether the agency that is covered by the Statute is using the individual as its representative, not whether the individual is covered, or excluded from coverage.

Finally, the majority's conclusion that an AFOSI investigator may not act as "a representative of the agency" is also wrong as a matter of policy and common sense. AFOSI's mission is "[t]o identify, exploit[,] and neutralize criminal, terrorist[,] and intelligence threats to the Air Force, Department of Defense[,] and U.S. Government."[37] Most, if not all, of the dozens of agency subdivisions "excluded" from the Statute along with AFOSI by EO 12,271 have similar missions. And their "exclusion" reflects a common concern – to protect national security.

There is no greater purpose of government than to protect the national security of our country and its citizens. However, this is not a sufficient reason to deny employees covered by the Statute the rights and protections that Congress intended them to have. This case does not involve national security issues. It involves an employee who was allegedly "observing pornography" on his work computer – a serious but routine disciplinary

[25] *Id.* at 98-99.
[26] *U.S. DOL, Mine Safety & Health Admin.*, 35 FLRA 790 (1990).
[27] *Id.* at 801-02 (ALJ dec.).
[28] *Id.* at 803 (quoting *DCIS*, 855 F.2d at 100).
[29] *FLRA v. DOJ*, 137 F.3d 683, 687 (2d Cir. 1997), *vacated*, 527 U.S. 1031 (1999).
[30] *Id.* at 690.
[31] 39 FLRA 999 (1991).
[32] *Id.* at 1030; *see id.* at 1013 (agreeing with the ALJ's findings).
[33] 59 FLRA 875 (2004).
[34] *Id.* at 880.
[35] 62 FLRA 219 (2007).
[36] *Id.* at 223-24.
[37] Air Force Office of Special Investigations, http://www.osi.af.mil/main/welcome.asp (last visited Jan. 28, 2015).

matter.[38] Section 7103(b)(1)'s focus is categorically different. The investigation in this case is exactly the kind of investigation to which Congress intended § 7114(a)(2)(B)'s representational right to apply. In these circumstances, another "fundamental canon of statutory construction" is instructive: "[T]hat the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[39] Giving effect to every clause and word of the Statute, "read in their context," AFOSI, though not itself covered by the Statute, was acting as the agency's representative when its investigator interviewed the employee. The employee was therefore entitled to the rights under § 7114(a)(2)(B) that the Authority and the courts have for so long recognized as fundamental and important. Accordingly, I dissent.

[38] Judge's Decision at 2 (quoting Tr. at 45) (internal quotation mark omitted).

[39] *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)) (internal quotation marks omitted).

Office of Administrative Law Judges

DEPARTMENT OF THE AIR FORCE
OGDEN AIR LOGISTICS CENTER
HILL AIR FORCE BASE, UTAH
Respondent

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1592
Charging Party

Case No. DE-CA-08-0046

Hazel E. Hanley
For the General Counsel

Phillip G. Tidmore
R. Mina Gawaran
D. Cornell Evans
For the Respondent

Richard L. Thomas
Tiffany Malin, Esq.
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

This case arose under the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), Part 2423. The Regional Director of the Denver Region issued a Complaint and Notice of Hearing on October 5, 2009, based upon an unfair labor practice (ULP), charge filed against the Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah on November 20, 2007, by the American Federation of Government Employees, Local 1592, amended on December 27, 2007. The complaint alleges that the Air Force Office of Special Investigations (AFOSI), denied Joseph Ptacek, Jr.'s request to have his Union representative present at an examination. (G.C. 1(c) at 2-3). The General Counsel asserts that by denying Ptacek's request, the Respondent failed to comply with § 7114(a)(2)(B) of the Statute and thus committed a ULP in violation of § 7116(a)(1) and (8) of the Statute. (G.C. 1(c) at 2-3). The Respondent filed an Answer to the complaint on November 2, 2009, and an Amended Answer on November 25, 2009. (G.C. Ex. 1(d)(k)). The Respondent denied that it had violated the Statute.

On November 30, 2009, the Respondent filed a Motion for Protective Order related to an un-redacted copy of an AFOSI Report of Investigation. (G.C. Ex. 1(l)). On December 4, 2009, the General Counsel filed a Motion to modify the proposed protective order. (G.C. Ex. 1(o)). The Respondent disagreed with a portion of the General Counsel's Motion. (G.C. Ex. 1(p)). The Respondent's motion was granted at the hearing held in Ogden, Utah, on March 4, 2010. (Tr. at 204).

At the hearing, all parties were represented and afforded a full opportunity to be heard, produce relevant evidence, and examine and cross-examine witnesses. After the hearing, the General Counsel and Respondent filed timely post hearing briefs that were duly considered. Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Department of the Air Force, Air Force Materiel Command (AFMC), Ogden Air Logistics Center, Hill Air Force Base (Respondent/Agency), is an agency under § 7103(a)(3) of the Statute. (G.C. Ex. 1(c)(k)). The American Federation of Government Employees, Council 214 (the Council), is a labor organization under § 7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at the AFMC. (G.C. Ex. 1(c)(k)). The American Federation of Government Employees, Local 1592 (Charging Party/Union) is an agent of the Council for the purpose of representing employees at the Respondent within the previously described bargaining unit. (*Id.*) Joseph Ptacek, Jr., was an employee under § 7103(a)(2) in the previously described bargaining unit. (G.C. Ex. 1(c)(k)).

Joseph Ptacek's career at Hill Air Force Base (Hill) began in 1988 and started "spiraling down" in 2005, due to problems at work and home. (Tr. at 37-39). By 2007, Ptacek was engaging in behavior that led to several disciplinary actions. In February 2007, Ptacek received counseling regarding "inappropriate remarks to female co-workers." (G.C. Ex. 5 at 11; Tr. at 42). In June 2007, Ptacek was suspended for saying that he was going to "'wring [a supervisor's] neck,'" and for having

asked a co-worker "inappropriate questions of a sexual nature." (G.C. Ex. 5 at 10-11, 13; Tr. at 43-45). Then, on August 20, 2007, Ptacek was "caught observing pornography" on his computer. (*Id.* at 45). When Barbara Simbro, a supervisor of Ptacek, heard about this, she sent Ptacek home, placed him on administrative leave, and prevented him from accessing Hill. (*id.* at 24, 45, 47, 128-29; G.C. Ex. 2 at 1).

Acting under the advice of Hill's labor and employment office, Simbro asked Hill's information technology department to confirm whether Ptacek had pornography on his computer. (Tr. at 84-85; G.C. Ex. 4 at 5). An employee in Hill's information technology office informed Simbro she believed that Ptacek might have accessed "child pornography sites." (*Id.* at 85). A confidential source in the IT office reported this to the Air Force Office of Special Investigations (AFOSI). (*id.* at 146).

The parties' dispute pertains in large part to the AFOSI's status under the Statute, so I note here that the AFOSI investigates felony-level crimes for the Inspector General, Office of the Secretary of the Air Force. (*id.* at 180, 193-94). It is the mission of the AFOSI to investigate and counter criminal, terrorist, and espionage threats to Air Force personnel and resources. In 1979, President Carter invoked § 7103(b) of the Statute to exclude the AFOSI, as well as other agencies and subdivisions involved in "intelligence, counterintelligence, investigative, or national security work," from "coverage under the Chapter 71 of Title 5 of the United States Code."[1] Executive Order 12171, 44 Fed. Reg. 66,565 (Nov. 19, 1979) (E.O. 12171). E.O. 12171 has been in effect since 1979, and applies to the AFOSI.

On August 27, 2007, AFOSI Special Agent Vincent Politte took over the investigation. (*id.* at 85, 146-47, 150; G.C. Ex. 4 at 4). As part of the investigation, Politte and other AFOSI agents interviewed a number of Hill employees. (G.C. Ex. 4 at 5, 8, 10-12). While interviewing Simbro, Politte asked if he could seize Ptacek's computer. Simbro granted Politte's request. (G.C. Ex. 4 at 5; Tr. at 86, 102, 151-52). Politte then sent Ptacek's computer to the Defense Computer Forensics Laboratory (DCFL) in Maryland for analysis. (G.C. Ex. 4 at 14; Tr. at 161-62). Politte received a report from DCFL in early November 2007. (G.C. Ex. 4 at 14). The report found no evidence of child pornography on Ptacek's computer. (*id.*). However, the report found that Ptacek's computer contained "deleted internet history referencing [Ptacek's] Google searches," including searches for: "mother + son + sex + pictures;" "mom + son + sex;" "'teen + hotties;" and "free + incest + sex + stories + pics + free + mother + teen + sex." *Id.* (internal quotation marks omitted).

With this information in hand, Politte determined that it was time to interview Ptacek. Politte asked Simbro to arrange for Ptacek to be interviewed at Hill by the AFOSI. (Tr. at 129, 200). At Simbro's request, Kenneth Williams, Ptacek's immediate supervisor, contacted Ptacek and directed him to meet him at the base for an interview with the AFOSI. (*Id.* at 47, 129). Ptacek complied, and, on November 8, 2007, he and his Union representative, Richard Thomas, met Williams at the Hill AFB visitors' center. (G.C. Ex. 4 at 4; Tr. at 16, 47-48, 130). Williams drove Ptacek to the AFOSI's building, and Thomas followed behind in his own vehicle. (Tr. at 16-17, 48, 130-32)..

The three met Politte at the AFOSI's building where one of two things happened. According to both General Counsel witnesses, Ptacek asked Politte if Thomas could attend the interview as Ptacek's Union representative. (Tr. at 17, 49). The request, Ptacek testified, was the "first thing out of my mouth." (*Id.* at 49). Politte, according to Ptacek and Thomas, denied Ptacek's request. (*id.* at 17, 49). The Agency's witnesses who testified on this matter had a different recollection. According to Politte, Williams, and AFOSI Special Agent David Zenquiz, Ptacek did not ask for Union representation. (*id.* at 131, 154, 156 169-70, 200). Thomas himself "wanted to come into the interview room," Politte testified, but Ptacek made no such request. (*Id.* at 154). Politte further testified that he refused Thomas' request, telling him that the interview was a "criminal matter and not an employment relations matter." (*Id*).

After one of the two exchanges occurred, Politte allowed Ptacek to consult for a few minutes with Thomas before the interview began. (*id.* at 17-18; 49-50, 140, 154). Ptacek then entered the interview room, where Politte conducted the interview and Zenquiz took notes. Thomas and Williams were not present during the interview. (*id.* at 148).

The interview began with Politte informing Ptacek that he was free to leave the interview at any time. (*id.* at 52, 155). Ptacek, who is the only witness to have described the substance of the interview in detail testified

[1] Section 7103(b) of the Statute states, in pertinent part, that:

> (1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that--
> (A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and
> (B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

that Politte mentioned some "pornographic verbs" from Ptacek's internet searches. (*id.* at 51, 52-55, 154-57, 168-71). Politte asked Ptacek if he "went into pornography [on] the computer." (*Id.* at 52). Ptacek responded, saying that he was "testing the firewall that they had [at Hill] because [he] was bored." (*Id.*) Ptacek explained to Politte that he would "sometimes . . . just put in a word there – it [didn't] have to be pornographic, just any kind of word, and see what popped up." (*Id.*) Ptacek further explained that if "anything bad popped up," he'd "delete it," because he "didn't want to be in trouble for pornographic situations." (*Id.*).

Politte then went over Ptacek's disciplinary history and asked Ptacek: "[H]ow do you think the general[at Hill is going to] feel with somebody like you working for him? You're not going to be able [to be] working . . . for very long." (*Id.* at 54). Ptacek felt that Politte was "very coercive, very direct[,] and very cruel." (*Id.*) Ptacek testified that he tried to leave at one point during the interview, but that Politte stated to him: "[we're] not done with you yet." (*Id.* at 75).

After interviewing Ptacek for a time, Politte and Zenquiz left the interview room for about half an hour. (*id.* at 54, 154). Politte testified that he "[didn't] recall if [he and Zenquiz] called the base legal office to ask about the Union representative or if [they] spoke to a more experienced agent" during this break. (*Id.* at 154). While Politte and Zenquiz were gone, Ptacek testified that he tried to leave while the agents were out, but that the interview room door was locked. (*Id.* at 54). After the agents returned, Ptacek was fingerprinted. Then Ptacek was permitted to leave. (*id.* at 156, 55, 170).

The investigation concluded and in late January 2008, the Agency proposed removing Ptacek from the Agency. (*id.* at 56; G.C. Ex. 2 at 1). After discussing the matter, the parties agreed to let Ptacek continue to work at the Agency so long as he abided by the terms of a last-chance agreement, signed in early March 2008. (G.C. Ex. 3 at 1-2). The agreement made clear that the Agency would remove Ptacek if he continued to use his computer inappropriately. (*id.* at 1). About a month after signing the last-chance agreement, Ptacek used his computer inappropriately. (Tr. at 22, 57-58, 88-90). Faced with impending removal from the Agency, Ptacek resigned. (Tr. at 22, 37, 76, 89-90.

DISCUSSION AND ANALYSIS

Position of the Parties

General Counsel

The General Counsel asserts that the Agency violated § 7114(a)(2)(B) when the AFOSI refused Ptacek's request for Union representation.[2] (G.C. Br. at 5, 22-24). As such, the General Counsel asserts, the Agency committed a ULP in violation of § 7116(a)(1) and (8) of the Statute.[3] (*Id.* at 22-24, 31-32).

The General Counsel contends that § 7114(a)(2)(B) was violated because: (1) Politte and Zenquiz conducted an examination of Ptacek in connection with an investigation; (2) Politte and Zenquiz were representatives of the Agency; (3) Ptacek reasonably believed that the examination could result in disciplinary action against him; (4) Ptacek asked Politte to allow Thomas, his Union representative to be present during the examination; and (5) Politte denied Ptacek's request for Union representation.

The General Counsel acknowledges "various Authority decisions" indicating that, under E.O. 12171, the AFOSI "may never be subject to the jurisdiction of the FLRA." (G.C. Br. at 23). But, the General Counsel argues that E.O. 12171 "means only that [the] AFOSI cannot participate in the Federal Labor-Management Relations Program[.]" (G.C. Br. at 31). That is, while AFOSI agents have "'no right to form, join, or assist any labor organization . . . [or to] be protected in the exercise of such right'" the General Counsel contends AFOSI agents must still adhere to the requirements set forth in § 7114(a)(2)(B). (G.C. Br. at 31) (quoting 5 U.S.C. § 7102)[4]. To support this claim, the General Counsel compares AFOSI agents to supervisors, asserting that both, for example, cannot be represented in labor organizations, but that both must

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[2] Section 7114 of the Statute states, in pertinent part:

> (a)(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.

[3] Section 7116 of the Statute states, in pertinent part:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> . . . .
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

[4] Section 7102 of the Statute states, in pertinent part, that "[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right."

"comply with the Statute when acting as representatives of agencies." (G.C. Br. at 31) (citing 5 U.S.C. § 7112).[5]

The General Counsel further contends that AFOSI Agent Politte's denial of Ptacek's request for Union representation constitutes a violation of § 7114(a)(2)(B) on the part of the Agency. (G.C. Br. at 22-23). Specifically, the General Counsel asserts that E.O. 12171 "does not . . . insulate [the Agency] from [ULP] liability where, as here, it can be shown that AFOSI [a]gents acted on behalf of (and as the representatives of) [the Agency]." (G.C. Br. at 23). The General Counsel also asserts that E.O. 12171 does not mean that the AFOSI can "refuse to comply with [the Statute's] provisions when acting as a representative of the [Agency]." (G.C. Br. at 31). To support these assertions, the General Counsel relies on *U.S. Dep't of the Air Force, Ogden Air Logistics Ctr., Hill AFB, Utah*, 36 FLRA 748 (1990) (*Ogden*). In *Ogden*, the General Counsel asserts, the Authority "held . . . [the Agency] responsible for the conduct of" AFOSI agents and the Authority "did not apply any exemption" under E.O. 12171 to "absolve [the Agency] from [ULP] liability. . . ." (G.C. Br. at 24). However, the General Counsel acknowledges, the respondent in *Ogden* "did not raise the Executive Order exemption claim[.]" (G.C. Br. at 24). Nevertheless, the General Counsel asserts, the Agency should be liable for the AFOSI's actions. (*Id.* at 24, 32). In this connection, the General Counsel asks for "mindful[ness] of the Supreme Court's admonition . . . that adoption of a limited reading of 'representative of the agency' could 'erode the right [of Union representation] by encouraging the use of investigative conduits outside the employee's bargaining unit[.]'" (G.C. Br. at 24) (quoting *NASA v. FLRA*, 527 U.S. 229, 234 (1999) (*NASA*)).[6] Further, the General Counsel argues, failing to hold the Agency responsible for the AFOSI's actions would "thwart the Congress' intent to protect federal employees under examination." (*Id.* at 32) (citing *NASA*, 527 U.S. at 234).

Having argued that the Agency can be liable for the AFOSI's actions generally, the General Counsel asserts that the Agency is liable for the AFOSI's actions here. This is so, the General Counsel contends, because there was a high level of "collaboration" between the Agency and the AFOSI during the Ptacek investigation. (G.C. Br. at 24) (citing *U.S. DOJ, Fed. BOP, FCI, Forrest City, Ark.*, 57 FLRA 787, 790 (2002) (*FCI*). To support this contention, the General Counsel asserts that the Agency was "involved directly in all but nine of some [thirty-four] steps in [the] AFOSI's investigation[.]" (G.C. Br. at 25, 11). These "steps" include: (1) Simbro consulting with Hill's labor and employment relations office; (2) Simbro asking Hill's IT office to analyze Ptacek's computer; (3) a Hill employee contacting the AFOSI about possible child pornography on Ptacek's computer; (4) Simbro directing Williams to have Ptacek come to Hill for the interview with AFOSI; and (5) the AFOSI interviewing Simbro and a number of other Hill employees. Additionally, the General Counsel asserts that because the AFOSI's investigation found "no evidence of child pornography," the AFOSI was not conducting a criminal investigation. (*Id.* at 26). Instead, the General Counsel argues that the AFOSI was "essentially . . . Personnel's agent . . . in effecting the removal of Ptacek." (*Id.*).

Respondent

As an initial matter, the Respondent asserts that Ptacek did not request Union representation and that Ptacek's rights under § 7114(a)(2)(B) were thus never triggered. (Resp. Br. at 19).

Even assuming that Ptacek did request Union representation, the Respondent asserts that there was no ULP committed because E.O. 12171 exempts the AFOSI from the requirements of the Statute. (Resp. Br. at 10, 14) (citing *U.S. Attorney's Office, S. Dist. of Tex., Houston, Tex.*, 57 FLRA 750 (2002)). Additionally, the Respondent asserts that the Statute's legislative history supports a conclusion that the Statute does not apply to the AFOSI. (Resp. Br. at 11-14).

Further, the Respondent asserts that there is no basis for holding the Respondent liable for the AFOSI's actions. In this regard, the Respondent asserts that the General Counsel's reliance on *Ogden* is misplaced because the "exempt status of [the] AFOSI was neither raised nor addressed in that case." (Resp. Br. at 15, 16) (citing non-precedential decision of Administrative Law Judge Devaney, in *Ogden Air Logistics Ctr., Hill AFB, Utah*, Case No. DE-CA-60922 (1997), ALJD No. 97-46, 1997 WL 798919 (Oct. 9, 1997) (*Air Logistics Center*)). Similarly, the Respondent asserts that the General Counsel's reliance on *NASA* is misplaced because the investigative component at issue in *NASA* was "not exempt from coverage of the

[5] Section 7112 of the Statute states, in pertinent part:

> (b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes–
> (1) . . . any management official or supervisor;
> . . . .
> (6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security[.]

[6] The General Counsel asserts that the Court admonished against a certain reading of § 7114(a)(2)(B). (G.C. Br. at 24). In fact, the passage quoted by the General Counsel paraphrases the rationale given by the Authority in the underlying decision. *See NASA*, 527 U.S. at 234 (citing HQ, *NASA, Wash., D.C.*, 50 FLRA 601, 615 n.12 (1995)).

[Statute]." (Resp. Br. at 15 n.2). Additionally, the Respondent argues that holding it liable for the AFOSI's actions would "violate the principles underlying" § 7103(b) of "preventing undue interference with criminal and national security investigations." (*Id.* at 15, 16) (citing *U.S. DOJ v. FLRA*, 39 F.3d 361, 369 (D.C. Cir. 1994) (*DOJ v. FLRA*)).

In the alternative, the Respondent asserts that it cannot be held liable for the actions of the AFOSI because there was not a significant level of collaboration in the Ptacek investigation between the Respondent and the AFOSI. (Resp. Br. at 17-18) (citing *FCI*, 57 FLRA at 787; *Ogden*, 36 FLRA at 764-68; *Lackland AFB Exchange, Lackland AFB, Tex.*, 5 FLRA 473, 486 (1981) (*Lackland*)).

DISCUSSION

As an initial matter, the parties dispute whether Ptacek requested Union representation. Based in large part on the demeanor of the witnesses, I credit the testimony of Ptacek and Thomas on this issue over the testimony of Politte, Zenquiz, and Williams. In this connection, I find it highly unlikely that Ptacek would bring his Union representative to the examination and not request that his Union representative be permitted to attend the examination. Additionally, I find that Politte's statement, that he called either an attorney or a supervisor to "ask about the Union representative" supports a conclusion that Ptacek asked for Union representation. (Tr. at 154). Accordingly, I find that Ptacek requested Union representation.

With this factual dispute resolved, I address the General Counsel's claim that the Respondent violated § 7114(a)(2)(B) when AFOSI Agent Politte denied Ptacek's request for Union representation. To resolve the General Counsel's claim, I consider two questions: (1) whether AFOSI Agent Politte was subject to § 7114(a)(2)(B) when he denied Ptacek's request for Union representation; and (2) if not, whether the Respondent violated § 7114(a)(2)(B) when Politte denied Ptacek's request.

Whether AFOSI Agent Politte Was Subject to § 7114(a)(2)(B)

Section 7103(b)(1) of the Statute permits the President to exclude an agency or agency subdivision from coverage under the Statute if the President has determined that: (1) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work; and (2) the provisions of the Statute cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations. 5 U.S.C. § 7103(b)(1)(A), (B). President Carter invoked the authority granted under § 7103(b) when he issued Executive Order 12171, in 1979. *See* E.O. 12171. President Carter determined that the AFOSI "ha[s] as a primary function intelligence, counterintelligence, investigative, or national security work." E.O. 12171, §§ 1-01, 1-206(k). President Carter also determined that "Chapter 71 of Title 5 of the United States Code cannot be applied to" the AFOSI in a "manner consistent with national security requirements and considerations." (E.O. 12171, § 1-101). Based on these determinations, President Carter ordered that the AFOSI be "excluded from coverage under Chapter 71 of Title 5 of the United States Code," i.e., the Statute. (*id.*). I interpret the President's direction that the AFOSI be "excluded from coverage" under the Statute to mean that the AFOSI and its agents are excluded from coverage under § 7114(a)(2)(B). The Executive Order therefore precludes a finding that the AFOSI or its agents can violate § 7114(a)(2)(B) or for that matter, § 7116(a)(1) and (8). *Cf. AFMC*, 66 FLRA at 596 (ALJ Decision) (E.O. 12171 precludes a finding that the AFOSI violated § 7116(a) while conducting a criminal investigation). Further, I find that since an AFOSI agent is excluded from coverage under § 7114(a)(2)(B), an AFOSI agent cannot be a "representative of the agency" under § 7114(a)(2)(B).

While there is an absence of precedential decisions interpreting E.O. 12171 as it pertains to § 7114(a)(2)(B), *see, e.g.*, *U.S. Dep't of the Air Force, AFMC, WRALC, Robins AFB, Ga.*, 66 FLRA 589, 591 (2012) (*AFMC*) (finding it unnecessary to address whether the agency could be held liable for the AFOSI's actions); *see also id.* at 598 (ALJ Decision), my interpretation of E.O. 12171 is consistent with several non-precedential decisions interpreting the Order. In *Air Logistics Center*, Administrative Law Judge Devaney found that the AFOSI the "requirements of [§ 7114(a)(2)(B)] may not be imposed on [the AFOSI]." Similarly, in an unpublished decision, the United States Court of Appeals for the Federal Circuit stated that although the "Federal Labor-Management Relations Program does generally require that an agency give an employee the opportunity to have union representation during certain types of examination," Executive Order 12171 "clearly exempts [the AFOSI] and other investigative agencies from this statutory provision." *Lawson v. Dep't of the Air Force*, No. 98-3399, 1999 WL 594536, at *1 (Fed. Cir. Aug. 6, 1999) (unpublished decision). I have previously found that under E.O. 12171, AFOSI agents are "excluded from all requirements and limitations imposed by the Statute[.]" *AFMC*, 66 FLRA at 596 (ALJ Decision). Further, I noted that President Carter "determined that [the] AFOSI should be exempt from coverage of the Statute while conducting criminal investigations and [this]

exemption precludes [the AFOSI] from violating § 7116(a) while doing so." (Id. at 596).

The General Counsel raises two related arguments to the contrary. First, the General Counsel argues that E.O. 12171 merely excludes the AFOSI from *some* aspects of the Statute, such as those pertaining to representation by a labor organization. (G.C. Br. at 31, 23). But E.O. 12171 is not so limited; it does not exclude the AFOSI from coverage of only *some* of "Chapter 71 of Title 5 of the United States Code;" it excludes the AFOSI from coverage of "Chapter 71 of Title 5" in its entirety. (E.O. 12171). Second, the General Counsel asserts that since the Statute treats AFOSI agents and supervisors similarly in some regards, the Statute must treat AFOSI agents and supervisors similarly in all regards. (G.C. Br. at 31). As such, the General Counsel argues, AFOSI agents are, like supervisors, "representative of agencies" under § 7114(a)(2)(B). (*id.* at 31). Logically, of course, the fact that AFOSI agents and supervisors are alike in some regards does not mean that the two are alike in all regards. Moreover, AFOSI agents and supervisors generally are not alike. AFOSI agents have as a primary function "intelligence, counterintelligence, investigative, or national security work," E.O. 12171, and therefore are excludable from coverage under § 7114(a)(2)(B). 5 U.S.C. § 7103(b). Supervisors, at least those in the General Counsel's example, do not perform such investigative and national-security-related functions and thus are not excludable from coverage under § 7114(a)(2)(B). 5 U.S.C. § 7103(b). Accordingly, the fact that a supervisor can constitute a "representative of the agency" under § 7114(a)(2)(B) does not indicate that an AFOSI agent can constitute "representative of the agency" under § 7114(a)(2)(B).

Based on the foregoing, I find that E.O. 12171 excludes the AFOSI from coverage under the Statute, including § 7114(a)(2)(B). Accordingly, as discussed above, I find that AFOSI Agent Politte was not subject to, and did not violate § 7114(a)(2)(B) when he denied Ptacek's request for Union representation. Further, I find that Politte was not a "representative of the agency" under § 7114(a)(2)(B).

Whether the Agency Violated § 7114(a)(2)(B) When AFOSI Agent Politte Denied Ptacek's Request for Union Representation

The General Counsel asserts that the Agency violated § 7114(a)(2)(B) when AFOSI Agent Politte denied Ptacek's request for Union representation. (G.C. Br. at 22-24, 31-32). In this regard, the General Counsel asserts that: (1) E.O. 12171 "does not . . . insulate [the Agency] from [ULP] liability where, as here, it can be shown that AFOSI [a]gents acted on behalf of (and as the representatives of) [the Agency]," (G.C. Br. at 23); and (2) E.O. 12171 does not mean that the AFOSI can "refuse to comply with [the Statute's] provisions when acting as a representative of the [Agency]," (G.C. Br. at 31).

As explained above, E.O. 12171 precludes the possibility that the AFOSI could violate § 7114(a)(2)(B). *See* E.O. 12171; *cf. AFMC*, 66 FLRA at 596 (ALJ Decision) (E.O. 12171 precludes a finding that the AFOSI violated § 7116(a) while conducting a criminal investigation). Accordingly, AFOSI Agent Politte did not violate § 7114(a)(2)(B) when he denied Ptacek's request for Union representation. Because Politte did not violate § 7114(a)(2)(B) when he denied Ptacek's request for Union representation, and no other act is alleged to have violated § 7114(a)(2)(B), there was no violation of § 7114(a)(2)(B) and, therefore, there is no basis for finding that the Respondent violated § 7114(a)(2)(B). Or, to put it more in the terms used by the General Counsel, because Politte was excluded from coverage under § 7114(a)(2)(B), Politte was not a "representative of the agency" under § 7114(a)(2)(B) when he denied Ptacek's request for Union representation. And because Politte was not a representative of the agency, the Respondent has no liability for Politte's alleged violation of § 7114(a)(2)(B).

This understanding of the meaning and scope of E.O. 12171 is the only reasonable reading of the Order and of § 7103(b). If the General Counsel's view was correct, that is, if a parent agency could commit a ULP through the act of an excluded subdivision, then the parent agency would be forced to make an odd choice: either it could permit the subdivision to ignore the requirements of the Statute while the parent agency suffered countless ULP charges, or it could direct the subdivision to adhere to the requirements of Statute, including § 7114(a)(2)(B), and effectively ignore the President's determination that the Statute "cannot be applied to" the subdivision "in a manner consistent with national security requirements and considerations." E.O. 12171. Such a dilemma is not what Congress intended when it gave the President the power to exclude agencies and subdivisions from coverage under the Statute. *See AFMC*, 66 FLRA at 600 (ALJ Decision). Further, if the parent agency resolved such a dilemma by directing the excluded subdivision to abide by the requirements of the Statute the work of that excluded subdivision would be impeded even though the purpose of § 7103(b) exception was to provide investigative entities with an unencumbered ability to conduct expedient criminal and national-security-related investigations. *See AFMC*, 66 FLRA at 599-600.

Moreover, the General Counsel's arguments do not explain why the Agency should be liable for

AFOSI Agent Politte's denial of Ptacek's request for Union representation. The General Counsel asserts that the Authority found that this Agency was liable for the actions of the AFOSI, in *Ogden*, 36 FLRA at 748. (G.C. Br. at 24). But as the General Counsel acknowledges, there was no claim in *Ogden* that the AFOSI was excluded from coverage under the Statute by E.O. 12171, *see Ogden*, 36 FLRA at 748; *see also id.* at 764-68 (ALJ Decision); *cf. FCI*, 57 FLRA at 790 (no claim of investigators being excluded from coverage of the Statute under § 7103(b)). As such, *Ogden* does not hold that the Agency is liable for the actions of investigators excluded from coverage under the Statute. *See Ogden*, 36 FLRA at 764-68 (ALJ Decision). The General Counsel also asserts that *NASA* should control the outcome of this case. (G.C. Br. at 24, 31). But unlike *Ogden*, *NASA*, did not involve investigators excluded from coverage under the Statute. *NASA*, 527 U.S. at 231-33; *see also* E.O. 12171. Accordingly, nothing in *NASA* indicates that an Agency is liable for the actions of investigators who are excluded from coverage under the Statute.

The General Counsel further asserts that adopting a "limited reading of 'representative of the agency'" in § 7114(a)(2)(B) could "'erode the right [of Union representation].'" (G.C. Br. at 24) (quoting *NASA*, 527 U.S. at 234). As explained above, the exclusion of the AFOSI from coverage under the Statute means that an AFOSI agent cannot be a "representative of the agency" under § 7114(a)(2)(B). With regard to the General Counsel's broader point regarding the "erosion" of employee rights and the "thwarting" of Congress' intent, the General Counsel's quibble is with Congress for drafting § 7103(b), and with President Carter for issuing E.O. 12,171. *See AFMC*, 66 FLRA at 601 (ALJ Decision). As for the General Counsel's claim that the AFOSI found no evidence of child pornography and thereby became "essentially . . . Personnel's agent," (G.C. Br. at 26), the General Counsel has not shown that the AFOSI was acting beyond its mandate to investigate felony-level crimes. Further, the General Counsel has not demonstrated that the AFOSI will do so in the future. *Cf. AFMC*, 66 FLRA at 600 (discussing the limited role of the AFOSI).

Based on the foregoing I find that the Respondent did not violate § 7114(a)(2)(B) and, therefore, did not commit a ULP in violation of § 7116(a)(1) and (8) of the Statute.

CONCLUSION

I find no violation of § 7114(a)(2)(B) of the Statute, and no commission of a ULP in violation of § 7116(a)(1) and (8) of the Statute. Accordingly, I recommend that the Authority issue the following Order:

ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, D.C., March 19, 2013

CHARLES R. CENTER
Chief Administrative Law Judge