

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

OALJ 99-36

WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF TREASURY

UNITED STATES CUSTOMS SERVICE

Case Nos. DE-CA-80886

CUSTOMS MANAGEMENT CENTER ARIZONA

DE-CA-80887

UNITED STATES DEPARTMENT OF TREASURY

DE-CA-80897

UNITED STATES CUSTOMS SERVICE

DE-CA-80898

OFFICE OF INTERNAL AFFAIRS

TUCSON, ARIZONA

Respondents
and

NATIONAL TREASURY EMPLOYEES UNION

NATIONAL TREASURY EMPLOYEES UNION CHAPTER 116

Charging Party

Dyann E. Medina, Representative

For the Respondent

Walter E. Dresslar, Esquire

For the Charging Party

Nadia N. Khan, Esquire

For the General Counsel

Before: Eli Nash Jr.

DECISION

Statement of the Case

This proceeding arose under the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7101-7135, and the Authority's Rules and Regulations 5 C.F.R. §§ 2411-2472. The proceeding was initiated by four unfair labor practice charges, as amended, filed against the United States Department of Treasury, United States Customs Service, Customs Management Center Arizona (herein called Respondent CMC)⁽¹⁾ and the United States Department of Treasury, United States Customs Service, Office of Internal Affairs, Tucson, Arizona (Respondent OIA), by the National Treasury Employees Union (NTEU or Union) and the National Treasury Employees Union, Chapter 116 (NTEU Chapter 116 or Union).

The Consolidated Complaint alleges that the Respondents violated section 7116(a)(1) of the Statute by: 1) initiating, conducting, and/or assisting the United States Department of Labor (herein called DOL), Office of Labor Management Standards (herein called OLMS), in conducting an investigation into internal union financial matters; 2) requiring bargaining unit employees as part of the investigation, to sign Office of Internal Affairs, Information Nondisclosure Agreements (herein called nondisclosure agreements), which prohibited employees from speaking or consulting with any union representatives; and 3) telling bargaining unit employees that they were prohibited, as part of the investigation, from speaking or consulting with any union representative.

A hearing was held in this matter on April 29, 1999, in Tucson, Arizona, at which time all parties were afforded a full opportunity to be heard, examine and cross examine witnesses, and introduce evidence. The parties filed timely post-hearing briefs which have been carefully considered herein.

Findings of Fact

Respondent OIA, is an activity and/or component of the U.S. Customs Service, Tucson, Arizona. The Union is the exclusive representative of a bargaining unit of U.S. Department of Treasury, U.S. Customs Service employees appropriate for collective bargaining. NTEU Chapter 116, is an agent and affiliate of the NTEU for purposes of representing employees in the bargaining unit at CMC.

Sometime in 1996, OLMS began conducting a criminal investigation into internal union financial matters involving certain representatives of NTEU Chapter 116. Title 29 of the United States Code sets out OLMS's authority with regard to the Labor-Management Reporting and Disclosure Act (LMRDA) at 29 U.S.C. § 401 *et seq.* OLMS is responsible for administering and enforcing most of the LMRDA which governs private sector labor organizations. OLMS also administers provisions of the Civil Service Reform Act, pursuant to 5 U.S.C. § 7120 relating to standards of conduct for Federal sector labor organizations. OLMS regulations that

implement 5 U.S.C. § 7120 are found at 29 C.F.R. Parts 457-59. These regulations incorporate by reference certain provisions of the LMRDA to Federal sector labor organizations including the standards of fiduciary responsibilities for labor organizations. See 5 C.F.R. § 458.50. Randall Perry was the OLMS investigator assigned to conduct the investigation. The Respondent did not conduct a parallel investigation.

Customs Senior Special Agent, Stephan Gintz, testified that in September 1996, while on duty, he contacted OLMS in response to an allegation he received regarding the Union.⁽²⁾ Gintz further testified that on November 13, 1997, he was contacted by Perry who requested his assistance in obtaining certain Customs records pertaining to a Union representative and Customs employee who had allegedly misappropriated Union funds. Gintz says that he subsequently provided the requested records to Perry. According to Gintz, Perry contacted him again on January 23, 1998, and requested additional Customs records. Authority to cooperate and assist OLMS can be found in 29 U.S.C. § 527, which provides as follows:

In order to avoid unnecessary expense and duplication of functions among Government agencies, the Secretary may make such arrangements or agreements for cooperation or mutual assistance in the performance of his functions under this chapter and the functions of any such agency as he may find to be practicable and consistent with law. The Secretary may utilize the facilities or services of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services of any of its employees, with the lawful consent of such department, agency, or establishment; and each department, agency, or establishment of the United States is authorized and directed to cooperate with the Secretary and, *to the extent permitted by law*, to provide such information and facilities as he may request for his assistance in the performance of his functions under this chapter. . . . (Emphasis added).

Additionally, Gintz claims that he subsequently received approximately seven calls from Perry requesting that he accompany him to interview bargaining unit employees and to visit various sites. Gintz acknowledged that it is a requirement of his job to document his use of time and activities. However, Gintz testified that only two Reports of Investigations were created to reflect OLMS's request for assistance. Additionally, Gintz stated that no records were created to reflect OLMS's alleged oral requests for assistance.

Gintz acknowledged that he accompanied Perry to interview bargaining unit employees, but says that he did so in order to retain custody of the Customs documents which the employees were questioned about and also because Perry requested his presence. Gintz admitted that he did not have any Customs documents during the interview of bargaining unit employee Larry Parrott. Gintz conceded that he could have made copies of the Customs travel vouchers and time and attendance records and given them to Perry had Perry requested. Gintz seemingly contradicted his testimony and claimed that the time and attendance records were excluded from the types of documents that could be released from his custody. Gintz also denied that he contacted employees to arrange the interviews even though Perry requested that he do so. Finally, Gintz asserted that he did not take any action based on any information he may have learned by assisting the OLMS investigator.

A. Case No. DE-CA-80886

Employee Nancy Ferguson was interviewed by Gintz and Perry in July 1998. At that time, Ferguson was a Customs Inspector in the Nogales, Arizona Office. She was also the Vice President of NTEU Chapter 116. Ferguson was told by her supervisor, Jesus Cruz, to report to the Customs Management Center in Tucson,

Arizona, on July 8, 1998, to meet with a representative of the OIA and a representative of OLMS. No other information was provided to Ferguson regarding the nature of the meeting. Subsequently, Ferguson contacted Gintz regarding the meeting. In response to being told by Gintz that OLMS was conducting an investigation, Ferguson informed Gintz that she did not want to speak to him. Ferguson testified that Gintz told her that she really needed to talk to him, that it was in her best interest to talk to them, and that he really felt that she should be there. Gintz denied telling Ferguson that it was in her best interest to attend the meeting. Ferguson further testified that Gintz did not tell her that the OIA was not conducting its own investigation.

On the day of the interview, Ferguson reported to the Customs Management Center in Tucson, Arizona. She met with Gintz and Perry in a conference room. Perry advised Ferguson that he was conducting an investigation into the activities of NTEU and that he was going to show her some documents. In response to Ferguson's query as to whether she had to answer their questions and participate in the interview, Ferguson recalled that Gintz stated that she did not; however, both Perry and Gintz then informed her that she had a fiduciary duty to cooperate, that she could be held responsible, and that she would be guilty since she knew something was going on.

Gintz denied telling Ferguson that she did not have to participate during the interview. Gintz also denied that he told Ferguson she would be guilty of something if she did not cooperate in the investigation. Ferguson testified that she was not clear whether Gintz told her she could leave; however, Gintz testified that he did not tell her she could leave at any time. When Ferguson requested a union representative, she was told by Perry and Gintz that she could not have a representative because the documents she was being shown pertained to potential grand jury testimony. Perry continued by showing Ferguson numerous internal union documents. Perry also showed Ferguson an NTEU check register as well as NTEU canceled checks. Ferguson was questioned by Perry regarding her knowledge of these documents. Gintz confirmed that he was present during the review of these internal union documents. Additionally, Ferguson was asked to review travel vouchers submitted to NTEU and Customs.

The review of the travel vouchers lasted between 30-45 minutes. Following a short break, Gintz retrieved a nondisclosure agreement and gave it to Ferguson. Gintz testified that it was his supervisor's idea to use the nondisclosure agreement. Ferguson asserted that Gintz informed her that she could not talk to anyone regarding the contents of the meeting. Ferguson reiterated that she was told by Gintz and Perry that she needed to sign the agreement and they again emphasized her responsibility to cooperate. At some point, Ferguson specifically requested to talk to Walter Dresslar, NTEU Assistant Counsel, or Robert Tobias, NTEU National President. Both requests were denied by Gintz and Perry. Ferguson agreed to sign the nondisclosure agreement with the understanding that she could discuss the matter with her spouse and a private attorney. Ferguson stated that she signed the nondisclosure agreement because she was told by Gintz and Perry that she could be held responsible and could be found to be just as guilty as the person under investigation if she did not see all of the evidence and did not do something about it. Further according to Ferguson, Gintz told her that it was to her benefit to sign it.

Although Gintz claimed he did not handle any internal union documents, Ferguson testified that Perry and Gintz then proceeded to show her more documents. Some of the documents shown to her by Gintz included canceled NTEU checks pertaining to the Port Recreation Fund to which NTEU had previously provided contributions.⁽³⁾ Gintz and Perry questioned Ferguson about these expenditures. Ferguson was also questioned about NTEU expenditures for a water cooler. Ferguson testified that Gintz participated in this line of questioning and also indicated that he would be accompanying Perry to verify whether the cooler was purchased. In addition, Ferguson stated that she was questioned by Gintz and Perry about the use of an ATM

machine by Ronald Mann, Chief Steward of NTEU Chapter 116, and that Gintz indicated that he would accompany Perry to verify the location of the machine. Likewise, Ferguson stated that Gintz participated in questioning her regarding an NTEU check which reimbursed a union official for alleged personal expenses. Ferguson further said that Gintz admitted to accompanying Perry to question an NTEU official's father regarding an NTEU check that had been written to him. Ferguson testified that Gintz also admitted to interviewing an NTEU Chapter 116 accountant, whom Perry asserted was the Chief Steward's daughter. Ferguson also testified that Gintz admitted to accompanying Perry to visit other third parties with whom NTEU had conducted business in the past.

According to Ferguson, Gintz actively participated in the meeting by assisting Perry to retrieve documents and, in the latter part of the meeting, in questioning her regarding the nature of the expenditures.⁽⁴⁾ Gintz denied that he questioned Ferguson during the meeting. When the meeting ended at approximately 5:30 p.m. according to Ferguson, Perry informed her that she could contact Gintz if she needed to talk to someone or remembered anything else. It is undisputed that Gintz and Perry both took notes during the meeting. Perry indicated that they would review the notes later. Gintz testified that he never told Ferguson why he was taking notes or what he was going to do with them.

The next day, Ferguson asked and received permission from Gintz to discuss the contents of the July 8, 1998, interview with David Lehman, another employee who was interviewed. Sometime around August 13, 1998, Ferguson received a memorandum from Gintz telling her that the nondisclosure agreement was rescinded.

Ferguson testified that she cooperated in the OLMS investigation based on Gintz's involvement. Ferguson also stated that it was her understanding that the terms of Article 41, Section 7 of the collective bargaining agreement between NTEU and Customs pertaining to OIA interviews applied, and that she had to cooperate under penalty of disciplinary action. Ferguson further testified that she would have declined to be interviewed had she been contacted only by Perry.

B. Case No. DE-CA-80887

On July 9, 1998, Perry and Gintz conducted an interview of bargaining unit employee David Lehman, a Customs Inspector in Sasabe, Arizona. Lehman also serves as a Steward/Treasurer of NTEU Chapter 116. Sometime in early July 1998, Lehman's supervisor, Mike Kring, informed Lehman that the Office of Internal Affairs and the OLMS were conducting an investigation and that they would be contacting him to schedule a meeting. Kring provided no other details regarding the nature of the investigation. Thereafter, on July 7, 1998, Perry visited Lehman at his residence. Perry introduced himself and sought to speak with Lehman in connection with the investigation he was conducting. Lehman refused to have any discussions with Perry. Although Gintz denied that he ever contacted Lehman, an interview was scheduled for July 9, 1998, at Customs Management Center in Tucson, Arizona. According to Lehman, Gintz was responsible for scheduling that meeting.

On the day of his interview, Lehman reported to the Customs Management Center where he met with Perry and Gintz for almost the entire day. Perry informed Lehman that he was conducting an investigation and that Gintz was assisting him in the investigation. Gintz gave Lehman a nondisclosure agreement and told him to

sign the form.⁽⁵⁾ Lehman maintained that Gintz also informed him that the form prohibited him from discussing anything they were going to show him with anyone because the documents were possible grand jury evidence. Lehman testified that after he signed the nondisclosure agreement, Perry and Gintz showed him copies of NTEU checks and Customs travel vouchers. Approximately five or six documents were within the control of Customs. Lehman stated that Gintz participated in questioning him regarding his knowledge of the expenditures. Gintz testified that he did not show Lehman any internal union documents, but admitted that he was present during the review of these documents. Gintz also insisted that he did not question Lehman on any matter regarding the investigation. Besides the travel vouchers, Lehman was questioned about NTEU checks and vouchers which were allegedly used to pay the personal expenditures of a union official, such as house repairs and credit card bills. Lehman also noted that Gintz took notes while Lehman answered the questions. Gintz testified that he never told Lehman why he was taking notes or what he was going to do with them. Lehman, as did Ferguson, requested to speak to a union representative during the meeting. Lehman's request was denied by Perry and Gintz.

That same evening, Perry and Gintz visited Lehman at his residence to obtain copies of some NTEU executive board minutes. Subsequently, around August 13, 1998, Lehman received a memorandum from Gintz informing him that the nondisclosure agreement was rescinded.

Lehman testified that he cooperated with the OLMS investigation because it was his understanding that since the OIA was involved he was required to cooperate pursuant to Article 41, Section 7 of the collective bargaining agreement between NTEU and Customs. Finally, Lehman testified that Gintz did not inform him that he did not have to participate in the interview or that he was free to leave at any time.

Interview of Bargaining Unit Employee Joseph Barber

Gintz and Perry interviewed Joseph Barber sometime in August 1998. Barber is employed as a Canine Enforcement Officer for Customs Service in Sweetgrass, Montana. Barber is a member of NTEU Chapter 116, and in 1996 he served as its Interim Treasurer. In August 1998, Perry and Gintz paid an unannounced visit to Barber's residence in Montana.⁽⁶⁾ Perry requested a meeting with Barber the following day at his hotel to discuss matters pertaining to Barber's tenure as the Interim Treasurer.

The following morning, August 18, 1998, Barber met with Perry and Gintz at a local hotel where they met in a hotel room. Perry introduced himself and indicated that Gintz' presence was in a supporting role. Gintz did not mention to Barber that the OIA was not conducting its own investigation. Gintz also did not tell Barber that he did not have to participate in the interview or that he could leave at any time. Gintz did, however, give Barber a nondisclosure agreement and a Witness Interview Notification form and told him to sign the forms, which he did. Gintz did not recall giving Barber a nondisclosure agreement to sign. Barber recalled that Gintz and Perry informed him that he could not discuss the contents of the interview with anyone, except Lehman, who had already been interviewed. Perry informed Barber of the nature of the OLMS investigation and showed him copies of receipts which correlated to checks written on the NTEU Chapter 116 account. Some of the receipts consisted of personal expenses of a union official, including expenses for house repairs and construction. Barber was also shown the personal credit card statement of a union official and the corresponding union check which was allegedly used to pay the bill. Perry questioned Barber about his knowledge of these expenses. Gintz, according to Barber, showed him travel vouchers which had been submitted to Customs by a union official while Perry showed him corresponding checks from the union's

account reimbursing the official for what appeared to be identical expenses. Approximately 10 to 15 minutes were spent reviewing documents within the control of Customs; the meeting lasted about 3 hours. Barber testified that, to his knowledge, the nondisclosure agreement is still in effect.

C. Case No. DE-CA-80898

During the course of the investigation, Gintz and Perry also interviewed bargaining unit employee Larry Parrott. Parrott is a Customs Inspector in San Luis, Arizona. He also serves as a Steward of NTEU Chapter 116. On or around July 29, 1998, Perry telephoned Parrott at his residence and requested to interview Parrott. Parrott declined to meet with Perry because he needed to retrieve his truck which had broken down on the way home. Perry offered to take Parrott to his truck and Parrott agreed. Perry did not discuss the nature of the proposed interview. When Perry arrived at Parrott's residence shortly thereafter, he was accompanied by Gintz. Parrott was not aware that Gintz would be present for the interview. According to Parrott, had he known Gintz was going to be present he would not have agreed to the interview since OIA agents are not allowed to visit employees at their residence. Specifically, Article 41, Section 9 of the collective bargaining agreement between NTEU and Customs Service provides, in pertinent part, that absent extenuating circumstances, employees will not be interviewed at their homes.⁽⁷⁾ Upon their arrival, Parrott placed his tools in the vehicle and then got into the front passenger seat. Parrott testified that he proceeded with the interview because he needed a way to get to his truck and because it was his understanding that he had to cooperate since OIA was involved in the investigation, pursuant to Article 41, Section 7 of the collective bargaining agreement between NTEU and Customs Service. Perry advised Parrott that he had some questions regarding four NTEU checks which had been written to him by the Chief Steward. While Perry told Parrott that Gintz was assisting in the investigation, he did not indicate the nature of the assistance. Gintz, who was sitting in the back seat, presented Parrott with two forms and told him to sign the forms.⁽⁸⁾ They were a nondisclosure agreement and a Witness Interview Notification form. Gintz explained to Parrott that the Witness Interview Notification form was contractually required.⁽⁹⁾ Gintz also stated that pursuant to the nondisclosure agreement, Parrott could not discuss the contents of the interview with anyone without prior approval from the OIA.

Gintz neither told Parrott that he did not have to participate in the interview or that he could leave at any time. After Parrott signed the forms, Perry proceeded to question Parrott regarding his knowledge of the NTEU checks. Parrott explained that the checks were for legitimate expenses, such as office supplies and reimbursement for union-related travel. Perry questioned Parrott further about his knowledge of the use of union funds to buy alcohol or pay for Christmas parties. Parrott denied any knowledge of the purchase of alcohol and explained that in the past, NTEU Chapter 116 had contributed to a fund which was then used to organize the Christmas social. Parrott also explained that NTEU Chapter 116 now organizes its own social event. During the interview, Gintz asked clarifying questions such as whether a certain union official had taken some of the food or alcohol purchased for the social event for personal use.⁽¹⁰⁾ The interview lasted 20 to 30 minutes. At the conclusion of the interview, Perry and Gintz drove Parrott to his truck. Parrott testified that to his knowledge, the nondisclosure agreement was never rescinded.

D. Case No. DE-CA-80897

On November 10, 1998, Walter Dresslar, Assistant Counsel for NTEU, submitted a data request CMC, to verify whether Respondents had provided transportation in the form of a government car and aircraft to Perry during the course of his investigation. On November 19, 1998, Dresslar received a response to the data request which admitted that the Respondents had provided transportation to Perry.

Gintz testified about transportation provided to Perry during the course of the OLMS investigation. Gintz recalled that Customs provided an aircraft for Perry's use. Specifically, Gintz admitted that a Customs aircraft was used to fly Perry to Montana.⁽¹¹⁾ Gintz claimed that the aircraft was needed to secure eight large boxes of evidence containing documents which had to remain in his custody, as well as Perry's grand jury material. Gintz testified that the documents that were required to remain in his control consisted of travel vouchers and time and attendance records. One and a half boxes contained solely Customs documents. Gintz further testified that the use of the aircraft was his supervisor's idea. Gintz denied providing Perry with a government car at any time during the investigation and there is no direct evidence indicating that Respondents did provide automobile transportation to OLMS.

Interview of Bargaining Unit Employee Ronald Mann

During the investigation, Gintz and Perry also contacted bargaining unit employee Ronald Mann. Mann is employed as a Senior Customs Inspector for Customs Service in San Luis, Arizona. He also serves as the Chief Steward and Secretary of NTEU Chapter 116. Perry telephoned Mann at his residence regarding the OLMS investigation on July 29, 1998. Mann previously dealt with Perry regarding the investigation before this telephone call. Prior to July 29, Mann had already spoken with Perry on several occasions and had already supplied Perry with requested union records. At the time of the call, Gintz was also on the telephone.⁽¹²⁾ Gintz identified himself and Mann asked Gintz if OIA was conducting an investigation. Gintz responded that OIA was not conducting an investigation. Mann then asked Perry if the investigation was criminal in nature. Upon learning that the investigation was criminal, Mann declined to speak with Perry and Gintz and ended the call. The call lasted 5 to 8 minutes. Shortly thereafter, Gintz called Mann at his residence and requested that Mann reconsider his decision not to talk to him and Perry. Mann again inquired whether OIA was conducting an investigation. When Gintz confirmed that OIA was not conducting its own investigation, Mann ended the call. The call lasted 3 to 5 minutes. Gintz testified that he called Mann to serve as a "middleman" at Perry's request since Mann would not talk to Perry.

Three days later, Perry and Gintz visited Mann at his work site to serve him with a subpoena. Gintz testified that Perry requested his presence when visiting Mann at the work site, because he was entering a Customs facility. Although Gintz admitted that the subpoena did not have to be served during duty hours, clearly Perry was in control of the investigation and was responsible for making the decision on when to serve the subpoena. Mann was notified by a fellow employee that an OIA agent was there to see him. Mann found Perry and Gintz in the lobby at which time Perry presented Mann with a subpoena for union financial records. Several employees and managers witnessed the conversation. Mann accepted the subpoena and returned to his office. Mann testified that Perry and Gintz stayed in the work area for approximately 30 minutes before leaving in a government car.

Interview of Bargaining Unit Employee Cecilia Prince

Gintz and Perry also interviewed bargaining unit employee Cecilia Prince. Prince is employed as a Seized Property Specialist for Customs Service in San Luis, Arizona. She is a member of NTEU Chapter 116, but she does not hold any office in NTEU. Sometime in August 1998, Perry and Gintz made an unannounced visit to Prince's work site. Perry informed Prince that they wanted to ask her some questions relating to the Port Recreation Fund for which she served as bookkeeper. Prince retrieved the records pertaining to the fund which contained the fund checkbook, as well as a case file consisting of various deposit slips, copies of checks, and records of social events which were sponsored by the fund. The records also contained contributions to the fund made by NTEU Chapter 116. Prince explained to Gintz and Perry that, in the past, NTEU Chapter 116 contributed to the fund. According to Prince, both Perry and Gintz reviewed the records and appeared to be particularly interested in the portion of the records containing NTEU Chapter 116 canceled checks. Gintz denied that he looked at the records during the interview. The review of the records lasted about 5 minutes. Neither Gintz nor Perry explained to Prince why it was necessary to verify the legitimacy of the records.

Search of the Union's Office

During the course of the investigation, in November 1998, Gintz accompanied Perry to Customs Service in Nogales, Arizona. While there, Gintz requested entry into NTEU Chapter 116's office. Gintz and Perry spent 5 minutes in the office conducting an inventory of the computer equipment. Ferguson testified that the Assistant Port Director told her that he granted Gintz access to the union office because he assumed it was an OIA matter. Ferguson further testified that the Assistant Port Director also told her that he would not have permitted Perry access to the union office had he requested permission on his own.

Analysis and Conclusions

The General Counsel and NTEU argue that the totality of Respondent's conduct demonstrates that it violated section 7116(a)(1) of the Statute by interfering with, restraining, and coercing employees in the exercise of rights protected under the Statute. Citing *Federal Bureau of Prisons, Office of Internal Affairs, Washington, DC*, 53 FLRA 1500, 1508-11 (1998)(*BOP*) where a special agent "took precautions to avoid questioning employees about internal Union business" which conduct was found not to have violated the Statute. The General Counsel maintains that the boundaries for deciding whether an agency impermissibly becomes involved in internal union matters have already been established. In its view, the instant Respondent did not take the necessary steps to limit its exposure to internal union matters in these consolidated matters. The record evidence confirms that Gintz was present during the interviews of employees during which only a minimal portion of the interview pertained to documents within the control of Customs. In addition, Gintz was present during the interviews of bargaining unit employees Parrott and Prince, which pertained solely to internal union matters and were unrelated to Customs Service. Further, Gintz accompanied the OLMS investigator to interview other third parties regarding their dealings with the Union. Thus, it appears that Gintz did not remove himself from any of those interviews and clearly did not "take pains not to trespass on union business." With respect to the second factor set out in *BOP*, the record reveals that Gintz actively participated

in the questioning of some employees regarding internal union matters beyond the scope of Customs documents, such as asking questions about NTEU canceled checks and NTEU check register.

Respondent asserts that it was acting only at the directive of the OLMS. In support, the Respondent introduced two records of conversations showing that OLMS asked Respondent to provide Customs documents concerning two particular representatives of NTEU Chapter 116. The General Counsel asserts that there was no corroboration of Respondent's position, other than Gintz' testimony, disclosing any OLMS requests for assistance beyond the provision of documents. Gintz remembered that his participation in the OLMS investigation beyond the provision of documents was done pursuant to oral requests from the OLMS investigator. The General Counsel asserts that there is no plausible explanation for why there were no records of these oral requests, considering Gintz' testimony that his job required him to record the use of his time and his activities. I disagree with the General Counsel that the absence of a record here undermines the credibility of Respondent's position. In the first place, my reading of the two requests are that they were not limited to a request for documents but sought assistance from Gintz. Although the type of "assistance" that the OLMS investigator sought was not outlined in the requests, it is clear that OLMS needed and was entitled by law to obtain help beyond the mere supplying of documents. Secondly, the assistance that Gintz provided, such as helping OLMS obtain a place to interview individual witnesses, and helping in scheduling interviews when employees were reluctant to be interviewed by OLMS were well within the purview of legitimate assistance that Customs, in my opinion, could and did provide in this investigation. Thus, it does not seem reasonable to me for one to find that because there were no records of the time Gintz spent on assisting OLMS that his testimony should be totally discredited.

I agree however, with the General Counsel's opinion that, even assuming OLMS requested Respondent's assistance during its investigation, Respondent's statutory obligation did not cease to exist. Thus, an agency still must meet its obligation to bargain with an exclusive representative, even where the subject matter under negotiation is exclusively controlled by an outside entity. In *American Federation of State, County and Municipal Employees, AFL-CIO, Local 2477 et al.*, 7 FLRA 578, 587 (1982) *enforced sub nom. Library of Congress v. FLRA*, 699 F.2d 1280 (D.C. Cir. 1983)(*AFSCME*), the Authority held that an agency must bargain with the union over otherwise negotiable proposals to the extent of its ability, which may include making a recommendation to the entity which has ultimate control over the matter under negotiation. In *AFSCME*, it is also noted that the agency's argument that it did not have exclusive control of the matter under negotiation and thus, was under no obligation to negotiate, was rejected. Respondent raised a similar argument in this case which is also rejected. Respondent here contends in essence, that because OLMS requested its assistance, it no longer had any obligation under the Statute. *AFSCME* clearly favors the General Counsel's view that the Respondent is obligated to comply with the Statute, even where an investigation is being made by an outside entity, to the *extent required by law*, which in this case would mean that Respondent would have to take necessary steps to at least limit its exposure to internal union matters. Thus, my view is that Respondent cannot validly claim that its actions here were simply compliance with an OLMS request for assistance and it was therefore relieved of any responsibility to comply with its statutory obligation. It is not reasonable, in my view, because the issue here is not simply whether Respondent was relieved of a responsibility, but rather, when giving the requested assistance whether Respondent took the necessary precautions to avoid exposure to internal union matters. The evidence in this case clearly shows that Respondent did not do so.

As previously stated, the Authority has already said that an agency must take such necessary steps and precautions and refrain from engaging in a course of conduct which would produce a chilling effect on the exercise of employees' rights to serve as union representatives. This effect is even more obvious where agency actions create the perception that it may oversee internal union matters, including alleged wrongdoing by

employees acting in their capacity as union representatives. *See U.S. Department of the Treasury, Customs Service, Washington, DC*, 38 FLRA 1300, 1310 (1991)(Authority held that the agency violated section 7116(a)(1) of the Statute by threatening a union representative with discipline if he did not provide information he obtained during the course of representing an employee, and that such threat tended to have a chilling effect on both employees seeking assistance and serving as union representatives); *see also, Department of the Army, Fort Bragg Schools*, 3 FLRA 364 (1980) (agency violated the Statute by attending organizational meetings conducted by the union); *see also, Social Security Administration*, 7 FLRA 823, 830 (1982)(agency violated the Statute by being present in the union's office while representational functions were being conducted); *see also, U.S. Naval Supply Center, San Diego, California*, 21 FLRA 792, 806 (1986)(agency violated the Statute by unnecessarily observing the activities of a union steward).

Respondent also argues that its actions did not violate the Statute because it has not taken any action against employees based upon the information learned through its participation in the OLMS investigation. Respondent however, does not deny that it was privy to numerous internal union financial matters and documents. In effect, Respondent argues that no harm has resulted from its conduct. The core of this case is not that actual harm resulted, but rather, that participation of the OIA agent and the restrictions place on employees ability to communicate with their exclusive representative interfered with, restrained, or coerced employees in the exercise of their rights protected under the Statute. As already noted, Respondent does not contest that the use of Customs nondisclosure forms by Gintz was improper. I find that this restriction was unjustified, and was indeed a part of the total conduct alleged by the General Counsel to have violated the Statute. Equally, the restriction placed on employees by not allowing them to talk with a union representative was a breach of the Statute. Accordingly, I find that certain of Respondent's conduct herein violated Section 7116(a)(1) of the Statute.

The investigation in this case involved a criminal investigation by OLMS not involving potential discipline by Customs. It is the General Counsel's position that the actions of Gintz collectively and separately violated section 7116(a)(1) of the Statute. Specifically, it is alleged that the following actions by Respondent violated the Statute: scheduling interviews with bargaining unit employees on behalf of the OLMS investigator; using authority as an Agent of the OIA to compel the cooperation of bargaining unit employees; attending interviews of bargaining unit employees, and actively participating in the interview including questioning the employees regarding internal union matters; accompanying the OLMS investigator to serve a bargaining unit employee with a subpoena; accompanying the OLMS investigator to visit various third parties with whom the union had previous business dealings; using authority as an agent of OIA to gain access to the union's office; and finally, providing transportation to the OLMS investigator in the form of a government aircraft and government car.

Section 7102 protects each employee in the exercise of the rights to form, join, or assist a labor organization, or to refrain from any such activity, without fear of penalty or reprisal. Section 7116(a)(1) of the Statute provides that it is an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of any such right.

The Authority has held that the standard for determining whether a Respondent's statement or conduct violates section 7116(a)(1) of the Statute is an objective one. The question is whether, under the circumstances, the statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. Although the circumstances surrounding the making of the statement are taken into consideration, the standard is not based on the subjective perceptions of the employee or the intent of the employer. *See U.S. Department of Agriculture, U.S.*

Forest Service, Frenchburg Job Corps, Mariba, Kentucky, 49 FLRA 1020, 1034 (1994)(*Frenchburg*).

The record reflects that the Respondent, through Gintz, was present during the interview of employee Ferguson by the OLMS investigator Perry, in his investigation into internal union financial matters. Respondent also confirms that during interviews Gintz required employees to sign a nondisclosure agreement which prohibited them under penalty of disciplinary action, from discussing the content of their interviews with anyone without prior authorization from the OIA. Furthermore, the record reveals that Gintz verbally warned Ferguson not to discuss the content of the meeting with anyone, including representatives of NTEU. Such a blanket prohibition on communicating with representatives of the union as established by the nondisclosure agreements employees signed, interfered with Ferguson's rights under section 7102 of the Statute.

In *Norfolk Naval Shipyard, Portsmouth, Virginia*, 5 FLRA 788, 804 (1981)(*Norfolk*), the Authority found a similar restriction on the right of employees to consult with the union to have violated the Statute. Such a bar violated the Statute because it was an obvious interference with their right to communicate with, and to seek the union's assistance and representation. Similarly, in *Department of the Air Force, Air Force Logistics Command, Sacramento Air Logistics Center, McClellan Air Force Base, California*, Case No. 9-CA-80198, ALJDR No. 82 (1989)(adopted without precedential significance) it was reasoned that the placement of such a restriction interfered with the employee's statutory right to contact the steward.

The above decisions are consistent with the Authority's recent decision in *Federal Bureau of Prisons, Office of Internal Affairs, Washington, DC*, 54 FLRA 1502 (1998)(*FBOP*). While the latter case involved the scope of the union's representation rights under section 7114(a)(2)(B) of the Statute, it makes clear that a blanket restriction on consulting or seeking the assistance of an exclusive representative is prohibited. In this regard, the Authority stated that there is a presumption that a union can designate the individual it wants as its representative during a *Weingarten* examination which can only be rebutted upon a demonstration that "special circumstances" exist that warrant the preclusion of a particular individual from serving as the union's designated representative. Accordingly, the above-cited cases support the General Counsel's position that Respondent's proscription of discussions with *any* representative of the union is overly broad and, therefore, violates the Statute.

The Respondent contends that it imposed the restriction in order to prevent any harm to the union which it speculated would result if bargaining unit employees learned about the nature of the OLMS investigation. Respondent's intent, however laudable, is not relevant to a finding of a violation. As stated in *Frenchburg*, the intent of the employer is not determinative where the evidence establishes, as here, that the Respondent's statements or conduct interfered with Ferguson's right to seek the assistance of the union.

I agree with the Respondent that the evidence in this case does not show that Gintz initiated or conducted an investigation regarding Union matters. At best, Gintz contacted OLMS based on a call he received from an employee. It is in my view, the individual who called Gintz to relay information about the Union, is responsible for initiating the investigation. Gintz, in his official capacity simply contacted the proper authority in that matter. In my opinion, such a scenario does not amount to initiation of an action against the Union.

Additionally, I find that Respondent did not violate the Statute by providing interview space or in aiding the OLMS investigator by contacting employees and setting up interviews. Further, I find no merit in the allegation that Gintz traveled with Perry to meet with employees or in escorting Perry onto Customs property to serve a subpoena. While the evidence is compelling that Gintz went into the Union office with Perry, there is no evidence that he was privy to any union documents or that on this visit he took an excursion into internal union business. The three instances noted herein occurred on Customs property and Perry necessarily would have needed some assistance in gaining entrance had Gintz not accompanied him. In this regard, it is clear from the record that Perry would not have been able to gain access to the Union's office without Gintz.

With regard to the allegations that Customs supplied transportation in the form of automobiles and an aircraft to the OLMS investigator, I find no validity. There is no direct record evidence that Customs supplied automobiles to the OLMS investigator. Thus, the evidence offered amounts to speculation on the part of employees that Customs automobiles were used by OLMS in its investigation. There is also no record evidence that the aircraft used by OLMS was done as an accommodation but, instead was used to transport numerous Customs records from Arizona to Montana. Its use in this regard appears reasonable to the undersigned. Accordingly, I find that the General Counsel did not prove by a preponderance of the evidence that Customs supplied any transportation to OLMS other than the aircraft used to transport Customs documents in the possession of Gintz several states away. Consequently, I find that Respondent did not violate section 7116(a)(1) of the Statute by providing transportation for the OLMS investigator.

Respondent does not dispute the allegations in consolidated complaint as they relate to the nondisclosure agreements that Gintz initially required employees to sign. In fact, Respondent admits that the use of the nondisclosure agreements by Gintz was not appropriate. Further, the nondisclosure agreements at issue have already been rescinded. Since there is no dispute that the nondisclosure agreements were improperly used, I find that their use violated section 7116(a)(1) of the Statute. Such usage lends support to the General Counsel's position that requiring employees to sign the nondisclosure agreements helped to create the impression that OIA was an integral part of this investigation and further, that employees could face discipline by Customs. Couple the nondisclosure forms with Gintz' review of internal union documents during the interview, one could reasonably find that some of his actions had a chilling effect on bargaining unit employees.

During the investigation, Gintz contacted at least one employee, Lehman, to schedule an interview with OLMS. The record also shows that Ferguson, Lehman and Parrott feared disciplinary action by Customs if they did not cooperate in the investigation. Their reasons were, in their view, supported by the collective bargaining agreement.

It is also not disputed that Gintz was present during the interviews of Ferguson, Lehman, Parrott, Barber, Prince, and Mann. It is equally clear that Gintz was present when questions were asked about internal union documents, such as NTEU canceled checks, NTEU check register, and various other documents pertaining to purchases made by NTEU Chapter 116. Furthermore, Gintz was shown to have asked questions concerning internal union matters.

In all the circumstances of the case, I find that the totality of Respondent's conduct violated section 7116(a)(1) of the Statute in this consolidated case by interfering with, restraining, or coercing employees in the exercise of their rights under the Statute. Specifically, Respondent violated the Statute by prohibiting bargaining unit employees from speaking or consulting with representatives of the union which interfered

with their rights under section 7102 of the Statute to communicate with, and to seek the assistance and representation of the Union.

Furthermore, I find that Respondent violated section 7116(a)(1) of the Statute by failing to take the necessary steps and precautions to limit its exposure to internal union matters during its participation in the OLMS investigation, consistent with the factors outlined in the Authority's decision in *Federal Bureau of Prisons, Office of Internal Affairs, Washington, DC*, 53 FLRA 1500 (1998).

Accordingly, it is recommended that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the U.S. Department of Treasury, U.S. Customs Service, Office of Internal Affairs, Tucson, Arizona, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute (the Statute) by prohibiting them, as part of an investigation, from speaking or consulting with any representatives of the National Treasury Employees Union and National Treasury Employees Union, Chapter 116.

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

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

(a) Take appropriate measures to ensure that the Office of Internal Affairs Special Agents do not encroach on internal union affairs or internal union business when requested to assist the U.S. Department of Labor, Office of Labor-Management Standards, in conducting its investigation.

(b) Rescind any existing internal affairs information nondisclosure agreements which were signed by bargaining unit employees that prohibited them from speaking or consulting with the National Treasury Employees Union.

(c) Post at its facilities where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, the shall be

signed by the Director, U.S. Customs Service, Office of Internal Affairs, Tucson, Arizona, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.⁽¹³⁾

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Denver Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, August 31, 1999.

Eli Nash, Jr.

Administrative Law Judge

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

The Federal Labor Relations Authority has found that the U.S. Customs Service, Office of Internal Affairs, Tucson, Arizona, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute by prohibiting them, as part of an investigation, from speaking or consulting with any representatives of the National Treasury Employees Union and National Treasury Employees Union, Chapter 116.

ORDER

WE WILL take appropriate measures to ensure that the Office of Internal Affairs Special Agents do not encroach on internal union affairs or internal union business when requested to assist the U.S. Department of Labor, Office of Labor-Management Standards, in conducting its investigation.

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

WE WILL rescind any existing restrictions which totally prohibit bargaining unit employees from speaking or consulting with any representatives of the National Treasury Employees Union.

(Activity)

Date: _____ By: _____

(Signature)

(Title)

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

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

1. There is no evidence that CMC had any responsibility for the action herein. If anything Title 29 of the United States Code relieves CMC from responsibility since there is no evidence that its involvement in this matter, if any, could be viewed only as cooperating and assisting DOL in an investigation conducted under the LMRDA. I agree with Respondent that CMC is neither a responsible party nor a parent organization in this matter. It is noted that CMC and OIA are separate and distinct entities within Customs. Thus, CMC oversees and directs Customs-related functions and operations at the port of entry within Arizona, while the OIA is responsible for conducting administrative and criminal investigative allegations about employee misconduct. There is no evidence that CMC has any authority or supervision over special agents or other employees of OIA. Further, the DOL investigation did not involve CMC matters but, rather, the Union's fiduciary duties as a Union. Nor is there any evidence that the information gathered by DOL was passed on to CMC for any action. CMC's participation in this matter seems limited and in my opinion, its actions were consistent with 29 U.S.C. § 527. Since there is no evidence that CMC's involvement was other than cooperation and assistance as prescribed by law, I conclude that the Consolidated Complaint as it relates to CMC should be dismissed.

Accordingly, the undersigned recommends dismissal of the complaint with regard to Respondent CMC. Consequently, the Respondent referred to hereafter, is Customs OIA.

2. Gintz testified that calls received while on duty, including complaints, must be entered into a computer log and sent to his supervisor.
3. The Port Recreation Fund consists of the revenue generated from the vending machines located at the Port of San Luis. The fund is used for various recreational and social activities for all employees at the Port, including employees from other agencies.
4. Ferguson observed that Gintz was well aware of the various types of documents involved as evidenced by the ease with which he retrieved the documents.
5. Gintz denied that he told Lehman to sign the agreement, but claimed that he told Lehman to sign it if he agreed with it. Gintz also stated that he explained to Lehman that the nondisclosure agreement was being used to protect the union.
6. Barber testified that it is not customary for the OIA agents to visit employees at their residence. Gintz confirmed that he accompanied Perry and further stated that he did so because he knew Barber for some time.
7. Article 41, Section 9 of the agreement became effective in approximately July 1998; however, similar language was contained in the previous agreement. Gintz also testified that he generally provides employees with 24 hours of notice prior to meeting with them.
8. Gintz testified that he told Parrott to sign the forms if he agreed with them.
9. Gintz testified that the witness interview form is required to be given to bargaining unit employees during third-party interviews pursuant to the collective bargaining agreement between NTEU and Customs.
10. Gintz denies that he questioned Parrott on any matter regarding the investigation.
11. The parties stipulated that Respondent provided Perry with the use of an aircraft in August 1998, to interview Barber in Montana.
12. Mann stated that OIA agents are generally not allowed to contact employees at their residence.
13. It is also recommended that the consolidated complaint as it relates to the U.S. Department of Treasury, U.S. Customs Service, Customs Management Center Arizona, be dismissed.