UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

PENSION BENEFIT GUARANTY CORPORATION WASHINGTON, D.C. Respondent and	Case No. WA-CA-03-0620
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, SEIU, AFL-CIO, LOCAL R3-77 Charging Party	

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been submitted to the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

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

Any such exceptions must be filed on or before **JUNE 6, 2005**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW., 2nd Floor
Washington, DC 20005

RICHARD A. PEARSON
Administrative Law Judge

Dated: May 6, 2005
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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MEMORANDUM DATE: May 6, 2005

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: PENSION BENEFIT GUARANTY CORPORATION
WASHINGTON, D.C.

Respondent

and Case No. WA-CA-03-0620

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, SEIU, AFL-CIO, LOCAL R3-77

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the Stipulation of Facts, exhibits, motions and related pleadings, and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges OALJ

05-27 WASHINGTON, D.C.

PENSION BENEFIT GUARANTY CORPORATION WASHINGTON, D.C. Respondent and	Case No. WA-CA-03-0620
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, SEIU, AFL-CIO, LOCAL R3-77 Charging Party	

Gerard M. Greene, Esquire
For the General Counsel

Raymond M. Forster, Esquire
Karen R. Esser, Esquire
For the Respondent

Jennifer Wasserstein, Esquire
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. Chapter XIV, Part 2423. The case was submitted in accordance with section 2423.26(a) of the Rules and Regulations, based on a waiver of a hearing and a stipulation of facts by the parties.

On December 31, 2003, the Authority's General Counsel issued an unfair labor practice complaint, alleging that the Respondent violated section 7116(a)(1) and (8) of the Statute, when a contractually retained EEO investigator held formal discussions with eleven bargaining unit employees concerning a formal EEO complaint filed by another employee against the Respondent, without providing the Charging Party notice or an opportunity to be represented at those

discussions, as required by section 7114(a)(2)(A) of the Statute. The Respondent filed an answer admitting some of the factual allegations but denying that its conduct violated the Statute.

A hearing was scheduled, but prior to the hearing the parties entered into a Stipulation of Facts and agreed that a hearing was not necessary. The hearing was therefore canceled. The parties have agreed that the Stipulation of Facts, the exhibits attached thereto, the formal papers and briefs, and an Offer of Proof from the Respondent constitute the entire record in this case. Based on this record, I make the following findings of fact, conclusions of law, and recommendations. The findings of fact represent my summary and organization of the stipulated facts, and the facts established by the exhibits, that are material to the disposition of the allegations of the complaint. References to the Stipulation of Facts will be cited as "Stip. at" the appropriate paragraph.

FINDINGS OF FACT

The Pension Benefit Guaranty Corporation (Respondent or Agency) is an agency within the meaning of 5 U.S.C. § 7103(a)(3). Since 1999, the National Association of Government Employees, SEIU, AFL-CIO (NAGE) has been the exclusive representative of a unit of the Agency's employees. At all times relevant to this case, NAGE Local R3-77 (the Union or Charging Party) has been an agent of NAGE for purposes of representing employees at the Agency, and it is a labor organization within the meaning of 5 U.S.C. § 7103(a)(4).

At all relevant times, the Agency and NAGE maintained in effect the pertinent terms and conditions of an expired collective bargaining agreement (CBA) (Agency Exhibit 12).[1] Article 5 of that agreement concerns Equal Employment Opportunity (EEO) at the Agency and provides, among other things, for the Union's involvement in the formulation of an Affirmative Employment Program Plan and requires that corrective actions "taken as a result of formal resolution of EEO complaints . . . be consistent with the provisions of [the CBA], unless compelling reasons exist for waiving them." Agency Exhibit 12 at 10, 11. Article 55 of the CBA sets forth a grievance procedure that permits employees to raise allegations of race, sex and other types of discrimination either under the negotiated grievance procedure or under the Federal sector complaint processing

[1] The CBA was negotiated by the Agency and NAGE's predecessor as exclusive bargaining representative.

regulations promulgated by the Equal Employment Opportunity Commission (EEOC) at 29 C.F.R. Part 1614, but not both.

In accordance with the EEOC regulations and its Federal Sector Complaints Processing Manual (EEO-MD-110) (Agency Exhibit 1), the Respondent maintains a program, administered through its EEO Office, that provides for the "prompt, fair and impartial processing of EEO Complaints." Stip. at 5; *compare* 29 C.F.R. § 1614.102(a)(2) *and* PBGC Directive PM 30-4, §§ 7(e) and 13 (Agency Exhibit 2 at 12-14, 18-21). The employees who work for the Agency's EEO Office have a duty and responsibility to be neutral. Stip. at 5. Stanley Hecht, a Senior Counsel and Equal Employment Opportunity Neutral Attorney for the Agency, provides legal advice to the EEO Office and its staff. *Id.* Pursuant to EEO-MD-110, agencies have the option of conducting the investigations of formal EEO complaints filed against them with their own EEO staff or of contracting out the investigations, but in any case the agencies remain "responsible for the content and timeliness of the investigations." EEO-MD-110, Chapter 5, Section V.A. The Respondent has chosen to contract out the investigation of formal discrimination complaints. Stip. at 3, and Agency Exhibits 3 and 5.

On August 28, 2002, Ruby M. Taylor, a bargaining unit employee, filed a formal complaint of discrimination with the Agency's EEO Office, alleging discrimination on the bases of race, color, national origin, sex, age and reprisal. Ms. Taylor also alleged that she had been sexually harassed, and she named two Union stewards as her representative.

Attorney Hecht (acting in this case also in place of the EEO Manager, who had recused herself) processed Ms. Taylor's EEO complaint and signed a memorandum authorizing Ira B. Kirschbaum, one of several independent contractors utilized by Respondent for this purpose, to conduct an investigation of Taylor's EEO complaint. The memorandum (Agency Exhibit 5) advised PBGC employees to "provide complete cooperation" to the investigator and stated that employees were "required to furnish testimony under oath, without a pledge of confidence, about matters pertaining to the complaint." *Id.* It also authorized Kirschbaum to use PBGC supplies, copying machines, telephones and assigned office space. The contract under which Kirschbaum was retained did not authorize him to resolve, or seek to resolve, the EEO complaint, or to make or inquire into making any changes in the conditions of employment of any employees in relation to his investigation. Stip. at 5. He was required to provide oral

or written progress reports weekly to Hecht, to develop a complete factual record on the issues relevant to Taylor's complaint, and ultimately to submit the complete investigative file (including a summary of investigation but no findings or conclusions) to the Agency. Agency Exhibit 3.

After interviewing and obtaining affidavits from Ms. Taylor[2] and the primary Agency official who was the subject of the complaint in the fall of 2002, and after requesting that Taylor and the Agency identify other potential witnesses, Kirschbaum interviewed and obtained affidavits from several management witnesses and eleven bargaining unit employees, on an individual basis. In an email dated December 24, 2002, Kirschbaum asked Hecht for the phone numbers and email addresses of several of these employees and also asked whether he should contact them directly or through Hecht. Stip. at 7; Agency Exhibit 8. Mr. Hecht replied that he would alert the employees that Kirschbaum would be contacting them, and Hecht then sent email notices to this effect to each of the named employees. Agency Exhibits 8 and 9. The notices advised the employees that they could contact a Union representative or the Agency's attorney, if they wished.

Mr. Kirschbaum then began contacting the employees to arrange the interviews, which were conducted between January 10 and February 5, 2003. Stip. at 8. In advance of each interview, he sent each witness a list of the questions he intended to ask, so they would have time to prepare. Agency Exhibit 8. He conducted four of the interviews by telephone during regular work hours, and he conducted the remaining seven interviews in person in a vacant office on the second floor of Respondent's building at 1200 K Street, in Washington, D.C. The interviewee was the only person present with Kirschbaum at each interview. The interviews, whether by telephone or in person, were scheduled in advance and ranged from 15 to 45 minutes in duration. Mr. Kirschbaum tape-recorded each interview with permission from each witness and thereafter sent the tapes to an outside transcription service, which prepared written statements from the tapes. Kirschbaum forwarded the transcribed statements to the respective employees for their review and signature, and he advised the employees they could make any changes they felt appropriate. Stip. at 8.

Mr. Kirschbaum did not notify the Union or the Respondent of the specific dates and times of the interviews he conducted with the eleven bargaining unit employees.

[2] The interview with Taylor is not an issue in this case.

None of the eleven employees contacted a Union representative, the Agency's advocate or Mr. Hecht in advance of their interviews. Stip. at 14.

When Kirschbaum completed his investigation, he sent his Report of Investigation, including a 19-page summary of the investigation, verbatim copies of all witness statements (including questions and answers and handwritten revisions by witnesses), and other documents to the Agency's EEO Office, which then sent a copy to Ms. Taylor's representatives and to the Agency's attorney-advocate on April 24, 2003. Agency Exhibit 4 is a complete copy of this report.

Pursuant to the EEOC Regulations, Ms. Taylor had the choice, upon receipt of the Report of Investigation, of requesting a hearing and decision from an EEOC administrative judge or an immediate final decision from the PBGC. 29 C.F.R. § 1614.108(g). Instead, Taylor filed a civil action against the Agency, alleging employment discrimination, in the United States District Court for the District of Columbia on August 19, 2003.

With the Stipulation of Facts, the Agency submitted an Offer of Proof, requesting that I also consider information that Union officials employed at the Agency have on occasion been named as alleged discriminating officials in formal EEO complaints filed by other employees. The General Counsel and the Union argue that this information is immaterial and object to its admissibility. In agreement with the General Counsel and the Union, I reject the Offer of Proof as both factually and legally irrelevant.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

The General Counsel alleges that Kirschbaum's interviews with the eleven bargaining unit employees were formal discussions within the meaning of section 7114(a)(2)(A), and that the Union was accordingly entitled to advance notice of the interviews and the opportunity to be represented. In its brief, the General Counsel discusses the statutory elements of a formal discussion and cites the evidence demonstrating that each of the four elements was satisfied in these interviews. The Respondent admits that the Union was not notified of the interviews, but it argues

that the interviews were not formal discussions requiring such notice. Respondent disputes each of the statutory elements, but it focuses most of its efforts on the question of whether Kirschbaum was a "representative of the agency."

First, the General Counsel submits that the interviews were "discussions," as that term is applied in the decisions of the Authority. A "discussion" is synonymous with a "meeting," and no actual discussion need occur. Moreover, the Authority has frequently held that telephonic discussions are not distinguishable from in-person meetings, if the formality criteria are met. *See, e.g. Veterans Administration Medical Center, Long Beach, California*, 41 FLRA 1370, 1379-80 (1991). The Agency, however, argues that the interviews here were an "investigation" rather than a meeting, in that no actual exchange of information occurred.

Second, the General Counsel argues that the totality of the circumstances surrounding the interviews demonstrates that they were "formal." Citing the illustrative indicia of formality often invoked by the Authority, the G.C. notes that Kirschbaum scheduled the interviews in advance, used the same line of questioning with each witness, tape-recorded and made transcripts of the interviews, and conducted them in an office removed from the employees' work area. Attendance at the interviews was mandatory, and the witnesses' testimony was taken under oath. The Respondent does not dispute these factors but argues that the interviews were informal, because no resolution was contemplated and no action was permitted.

The third required element under 7114(a)(2)(A) is that the discussion must be between "one or more representatives of the agency and one or more employees in the unit". Clearly, the eleven employees interviewed here were in the bargaining unit represented by the Union; but the parties dispute whether the EEO investigator, Mr. Kirschbaum, was a representative of the PBGC. Citing the Authority's recent decision in *Social Security Administration, Office of Hearings and Appeals, Boston Regional Office, Boston, Massachusetts,* 59 FLRA 875 (2004) (*SSA Boston*), the General Counsel states that that case is indistinguishable from the instant case. While Kirschbaum may have been an outside contractor acting in an ostensibly "neutral" capacity, he was acting at the direction and control of the Agency and he was carrying out the Agency's statutory responsibility of investigating formal EEO complaints. In the words of EEO-MD-110, at Chapter 5, Section V.A.:

> Agencies are responsible for conducting an appropriate investigation of complaints filed against them. An agency may contract out an investigation or may arrange for another agency to conduct the investigation, but the agency remains responsible for the content and timeliness of the investigation.

Thus, the General Counsel argues, Kirschbaum represented the PBGC for purposes of allowing the Union to participate in his interviews.

The Agency, however, emphasizes the portions of the EEOC regulations and Management Directive which require neutrality and impartiality from each covered agency's EEO Office in general, and from the EEO investigator in particular. The EEO Office must be separate from those portions of the Agency which carry out or give advice on personnel actions, and the EEO Director and his or her staff must report directly to the head of the Agency, in order to preserve their actual and apparent independence and to maintain the confidence of both managers and employees. The EEO investigator must remain impartial, and he or she may not decide the merits of the complaint, a function that remains solely with the Agency head.

In this respect, the Respondent distinguishes the instant case from most earlier decisions of the Authority, particularly the Luke Air Force Base cases -- *Luke Air Force Base, Arizona*, 54 FLRA 716 (1998) (*Luke I*); *U.S. Department of the Air Force, Luke Air Force Base, Arizona*, 58 FLRA 528 (2003)(*Luke II*) -- and *U.S. Department of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Delaware*, 57 FLRA 304 (2001) (*Dover*), *enf'd*, 316 F.3d 280 (D.C. Cir. 2003). In those and other cases, the EEO meetings in question were settlement or mediation-conciliation conferences, usually presided over by an ostensibly-neutral outside contractor who sought to bring the parties together to resolve the EEO complaint; usually a personnel official or member of the complainant's chain of command was also present. Respondent argues that the conciliator's role in those cases was much more active and much less neutral than the role of Mr. Kirschbaum and other EEO investigators, whose actions are controlled by 29 C.F.R. § 1614.108 and who have no authority to seek to resolve, or even to determine the merits of, the complaint. The PBGC asserts that Kirschbaum was truly neutral and should not be viewed as the representative of the Agency for purposes of section 7114(a)(2)(A).

The Respondent recognizes that this argument was expressly rejected by the Authority in *SSA Boston*. It insists, however, that *SSA Boston* was wrongly decided, in that the Authority relied on two decisions that are legally distinguishable and ignored the "critical differences" between EEO mediation-conciliation sessions and EEO investigations. Respondent further argues that the Authority's view of the role of EEO investigators, as reflected in its *SSA Boston* ruling, "directly conflicts" with EEOC regulations prohibiting EEO investigators from serving in any way as an agency representative. Respondent urges the Authority to defer to the EEOC's statutory expertise in determining the conduct of EEO investigations, and it argues that requiring the participation of union officials at EEO investigatory interviews will radically transform the investigation into an adversarial process, contrary to the EEOC's intent. Where a union's rights under 7114(a)(2)(A) directly conflict with EEO law, Respondent says the conflict must be resolved in favor of EEO law, which in its view requires that the EEO investigator not act as an agency representative.

Regarding the fourth statutory element of a formal discussion, the General Counsel cites the Authority's analysis, expressed most recently in *Dover,* for the proposition that EEO complaints pursued through a statutory procedure are "grievances" within the meaning of 7114(a)(2)(A). 57 FLRA at 308-10. On the other hand, the Respondent compares EEO complaint investigations to management investigations and argues that they are not grievances.

Finally, both the General Counsel and the Respondent discuss the "intent and purpose" of section 7114(a)(2)(A), which guide the Authority in examining whether the elements of a formal discussion are present in each case. The General Counsel notes that the CBA gives the Union a significant role in promoting EEO at the Agency, and Ms. Taylor had designated two Union stewards as her representative in her EEO complaint. The allegations of the complaint are of vital concern to all employees, and thus the Union had a strong representational interest in participating at Kirschbaum's interviews of the eleven unit employees. The Respondent, however, cites case law indicating that a union's role in statutory appeals proceedings is more limited than in grievances under the negotiated grievance procedure, and it further argues that the presence of the Union at Kirschbaum's interviews would have significantly altered and complicated the nature of those sessions, making them adversarial and defeating their underlying fact-finding purpose.

If the Respondent is found to have violated the Statute, the General Counsel asks, among other things, that Respondent be ordered to notify outside contractors conducting EEO investigations of the Union's right to participate in interviews, and to post a notice signed by its EEO Director. Requiring Respondent to notify outside contractors is particularly necessary, in the G.C.'s view, because it is the Respondent which directs the EEO investigations conducted by those contractors.

Analysis

Section 7114(a)(2)(A) of the Statute provides:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at–
>
> > (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment[.]

A union is entitled to representation under section 7114(a)(2)(A) only if all elements of that section exist. There must be (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more unit employees or their representatives; (4) concerning any grievance or any personnel policy or practice or other general condition of employment. *Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California*, 29 FLRA 594, 597-98 (1987) (*McClellan*). In examining these elements, the Authority is guided by the intent and purpose of section 7114(a)(2)(A), which is to provide a union with an opportunity to safeguard its interests and the interests of bargaining unit employees, as viewed in the context of the union's full range of responsibilities under the Statute. *General Services Administration*, 50 FLRA 401, 404 (1995) (*GSA*). This is not a separate element of the statutory analysis, but rather a "guiding principle that informs our judgments in applying the statutory criteria." *Id.* at 404 n.3.

When the parties were preparing to litigate this case, it appeared to fit within a gap in the developing case law concerning the role of unions in formal EEO complaints: are EEO investigators "representatives of the agency"? As noted by the Respondent, most of the recent EEO formal discussion

cases had involved mediator-conciliators, who actively attempted to settle the complaints and who usually worked in conjunction with the parties' representatives, or individuals who combined mediation or dispute resolution with investigation. It was not clear whether officials who performed only EEO investigations would be viewed in the same way. But just as the parties were finalizing the Stipulation of Facts here, the Authority issued its *SSA Boston* decision, which appears to resolve the principal legal issue posed in the case at bar. What remains for me is to apply the statutory criteria to the facts of this case and evaluate how *SSA Boston* and other decisions govern the outcome. Since the focus of the case was on the question of whether the EEO investigator was a representative of the PBGC, I will discuss that issue last.

Were the Interviews Discussions?

While Respondent poses a *pro forma* denial that the Kirschbaum interviews were discussions within the meaning of section 7114(a)(2)(A) (see Respondent's brief at 27, footnote 20), the facts and law leave little doubt that they were. Each interview lasted between 15 and 45 minutes, and the transcripts of the interviews in the Report of Investigation show that they involved numerous questions and answers relating to possible sexual harassment in the division where the eleven employees worked. Contrary to the Respondent's assertion, there certainly was a detailed exchange of information, from the witnesses to the investigator. To qualify as a discussion, there did not need to be any debate between the participants. *See Department of Defense, National Guard Bureau, Texas Adjutant General's Department, 149th TAC Fighter Group (ANC)(TAC), Kelly Air Force Base*, 15 FLRA 529, 532-33 (1984).

Were the Interviews Formal?

In *General Services Administration, Region 9*, 48 FLRA 1348, 1355 (1994), the Authority stated:

> In determining whether a discussion is formal within the meaning of section 7114(a)(2)(A), we have advised that the totality of the circumstances presented must be examined, but that a number of factors are relevant: (1) the status of the individual who held the discussions; (2) whether any other management representatives attended; (3) the site of the discussions; (4) how the meetings for the discussions were called; (5) how long the discussions lasted; (6) whether a formal agenda was established for the

discussions; and (7) the manner in which the discussions were conducted.

These factors are illustrative, and other factors may be identified and applied as appropriate in a particular case. *See F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149, 157 (1996), where the Authority noted that in some cases the purpose of the meeting (for instance, interviews of employees in preparation for MSPB hearings) is sufficient in itself to establish formality.

Looking at the circumstances of Kirschbaum's interviews, most of the facts weigh in favor of a finding of formality. Mr. Kirschbaum was highly organized in his manner of preparing for and conducting the interviews, even though some of the more superficial trappings of formality were absent. While the location of the interviews in a neutral office (or on the telephone), away from supervisors, was meant to reassure the witnesses and put them at ease, it was clear to the participants that their statements were being recorded for the purpose of becoming part of a formal investigative record, which could in turn become part of court proceedings. He gave the witnesses a list of his questions in advance, which is akin to an agenda. He advised the witnesses that they were testifying under oath; the interviews were tape-recorded and transcribed; and the witnesses were asked to review and edit the transcript for accuracy before signing. The witnesses were required to attend the interviews and answer the questions. Kirschbaum's status outside the Agency chain of command, and the absence of any supervisors, legal or HR personnel, are indications of informality, but they are far outweighed by the other factors cited above. Overall, it was clear to the witnesses that they were being questioned for the purpose of making a formal administrative record, and thus it must be concluded that the discussions (whether telephonic or in person) were formal.

Did the Interviews Concern a Grievance?

Although the Respondent disputes the contention that these interviews "concerned a grievance or personnel policy or practices or other general condition of employment," it has offered little to support that argument. This precise issue has been thoroughly litigated in recent years, however, and the Authority has made its position clear, most recently and thoroughly in the majority opinion in *Dover*, that formal EEO complaints processed under 29 C.F.R. Part 1614 or other statutory appeal procedures constitute "grievances" within the meaning of the Statute. The Ninth Circuit in *Luke I* (208 F.3d 221), and Chairman Cabaniss in

her dissenting opinion in *Dover* (57 FLRA at 312-14), have similarly articulated their reasons for viewing such complaints not to be grievances, but it is the Authority's holding that is binding here.

Ms. Taylor had filed a formal EEO complaint, and Mr. Kirschbaum was interviewing unit employees as part of his investigation into that complaint. Her complaint constituted a grievance within the meaning of the Statute, and his interviews were discussions concerning that grievance. The General Counsel has therefore met its burden of proof on this element of its case.

Was Kirschbaum a Representative of the Agency?

The short answer to this question, based on *SSA Boston*, is yes: Kirschbaum's status and actions are factually and legally indistinguishable from those of the EEO investigators in the *SSA Boston* case, and so the holding of that case is binding and applicable here.

I feel it is important to examine the issue more fully, however, because *SSA Boston* was a case of first impression on this specific issue, and because the extensive factual record in the case at bar raises significant questions in my mind as to whether the "intent and purpose" of section 7114 (a)(2)(A) are furthered by requiring EEO investigators to allow unions to participate in such interviews. Mechanically applying the statutory formula does not fully address these questions.

Analyzing the Respondent's arguments for excluding the Union from EEO investigation interviews is clouded by the fact that agencies have been resisting the application of section 7114(a)(2)(A) to all aspects of the EEO process, for virtually the entire history of the Authority, using many different legal theories. As the Authority has rejected each theory, agencies have raised new ones. In *Internal Revenue Service, Fresno Service Center, Fresno, California*, 7 FLRA 371 (1981), *rev'd sub nom. IRS, Fresno Service Center v. FLRA*, 706 F.2d 1019 (9 Cir. 1983), the agency's EEO counselor held a precomplaint conciliation conference with the complainant, her representative, and her supervisor, in order to resolve the complaint. The Authority held that the conference met the criteria of a formal discussion under 7114(a)(2)(A), but the Court of Appeals disagreed. The Ninth Circuit based its decision on both the informality of the EEOC's procedures prior to the filing of a formal complaint and on the theory that statutory appeal procedures such as EEO complaints do not fit 7114(a)(2)(A)'s meaning of "grievance." 706 F.2d at 1023-25. The "grievance" theory

was reiterated by the Ninth Circuit when it reversed the Authority again in *Luke I* and by Chairman Cabaniss in her *Dover* dissent, but as noted earlier, this has been rejected by the Authority and by the D.C. Circuit.

After *IRS Fresno*, agencies tried repeatedly, and unsuccessfully, to extend the "grievance" theory to MSPB appeals and other statutory procedures. The Authority and the courts have consistently held, however, that when agencies interview unit employees in preparation for arbitration, unfair labor practice and MSPB hearings, they must allow the union to participate. *See, e.g., Department of Veterans Affairs, Department of Veterans Affairs Medical Center, Denver, Colorado v. FLRA*, 3 F.3d 1386 (10 Cir. 1993), *aff'g* 44 FLRA 768 (1992) and 44 FLRA 408 (1992); *National Treasury Employees Union v. FLRA*, 774 F.2d 1181 (1985)(*NTEU v. FLRA*), *rev'g* 15 FLRA 423 (1984); *see also, U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution (Ray Brook, New York)*, 29 FLRA 584, 589-90 (1987) (*Ray Brook*) (Authority adopts the legal analysis of *NTEU v. FLRA*, on which it had previously fluctuated). Even the Ninth Circuit, the only Circuit to exclude EEO complaints from the coverage of section 7114(a)(2)(A), has held that MSPB and other statutory appeals are grievances within the meaning of this section. *Department of Veterans Affairs Medical Center, Long Beach, California v. FLRA*, 16 F.3d 1526 (9 Cir. 1994), *aff'g* 41 FLRA 1370 (1991). In *United States Immigration and Naturalization Service, United States Border Patrol, El Paso, Texas*, 47 FLRA 170, 184-87 (1993) (*INS El Paso*), the Authority held that the union was entitled under 7114(a)(2)(A) to participate at a formal MSPB deposition, but it deferred to the MSPB's regulations and the Federal Rules of Civil Procedure in limiting the union's role at the deposition. Noting that a union's institutional role in statutory appeals is "more restricted" than in negotiated grievances,[3] the Authority determined that the agency acted appropriately in allowing a union representative to be present but not to ask or object to questions.

Within the EEO sphere, agencies have raised a variety of factual and legal arguments for excluding unions from discussions and meetings with EEO complainants. Citing 29 C.F.R. Part 1614, promulgated by the EEOC in 1992, which required Federal agencies to establish alternative dispute resolution and "impartial" complaint investigation procedures independent of the agency's operational management, some agencies have argued that the mandatory

[3] *See, Ray Brook*, 29 FLRA at 590, and *NTEU v. FLRA*, 774 F.2d at 1189 n.12.

participation of unions in this process would undermine the purposes of the EEOC regulations. For instance, in *Marine Corps Logistics Base, Barstow, California*, 52 FLRA 1039 (1997), the agency unsuccessfully argued that its general counsel was not required to notify the union when he met with an EEO complainant to negotiate a settlement agreement of his complaint. Other agencies arranged for outside contractors to both investigate and conciliate EEO complaints, and they argued that meetings held by the mediator/investigator with the complainant and agency officials were not subject to the union participation requirements of 7114(a)(2)(A). The agencies asserted (as the PBGC does here) that the presence of a union representative at mediation/investigation sessions would conflict with EEOC regulations and the Alternative Dispute Resolution Act, citing as precedent the Authority's recognition in *Ray Brook* that a union's institutional role in statutory appeals is "more restricted" than its role in negotiated grievance procedures and that it would consider the potential conflict between a union's rights under 7114 (a)(2)(A) and a complainant or other party's rights under alternative statutory procedures. 29 FLRA at 590. In *INS El Paso* (an MSPB rather than an EEO case), the Authority utilized a similar rationale for deferring to MSPB regulations and to the Federal Rules of Civil Procedure and for limiting the union's role at formal depositions, but in *Luke I* and *Dover*, the Authority found no such basis under EEOC regulations or the ADRA for excluding the union from EEO mediation/investigations sessions. 54 FLRA at 732-33; 57 FLRA at 310.

This abbreviated history illustrates that discussions concerning EEO complaints occur in a variety of factual circumstances, and the role of the person conducting the meeting may vary considerably, even when that person is a "neutral third party" acting as a "facilitator" in a nonconfrontational manner. *See Luke I*, 54 FLRA at 729. Even when the agency has contracted with an outside party to conduct the investigation, the investigator sometimes has considerable authority to involve himself in the resolution of the complaint. Evaluating the status of an EEO investigator therefore requires a close examination of the specific role assigned to the investigator in each case.

Here, Investigator Kirschbaum, like all contract investigators retained by the Respondent, was authorized by the Respondent to work in PBGC offices, use agency computers and phones, and to obtain agency assistance in scheduling interviews. Like the investigators in *SSA Boston*, he was carrying out the PBGC's statutory obligation to investigate EEO complaints, and PBGC employees were obligated to

cooperate with him. But he was not authorized to resolve or try to resolve the complaint, or to make any changes in the terms of employment of the complainant or any of the witnesses. He was to summarize the witnesses' testimony and the other evidence he gathered, but he was not authorized to make any findings on the merits of the complaint. In all material respects, Kirschbaum's role was essentially the same as the EEO investigators in *SSA Boston*, and I can see no basis for distinguishing the two cases.

The Authority in *SSA Boston* cited two cases supporting its conclusion that the investigators were representatives of the agency. In *Defense Logistics Agency, Defense Depot Tracy, Tracy, California*, 39 FLRA 999 (1991) (*Defense Depot Tracy*), the Authority held that an outside contractor hired to operate the agency's Employee Assistance Program was a representative of the agency in conducting a series of orientation sessions to employees about the program. While emphasizing that an agency cannot, by contracting out a job, relieve itself of responsibility for actions its own officials would be required to perform, the Authority also noted that an agency personnel specialist also attended the orientation sessions, introduced the contractor, and answered questions from employees.

There are two problems with analogizing *Defense Depot Tracy* to situations involving EEO investigations: the facts of the former case are quite different, and there is a considerable body of statutory and regulatory law mandating the impartiality of an EEO investigator, while there are no such controls on the status or activities of an EAP counselor. It is certainly true, as noted in both *Defense Depot Tracy* and *SSA Boston*, that an agency should not be able to absolve itself of the statutory obligations of section 7114(a)(2) merely by contracting out a job. Indeed, the key to whether a union should be entitled to participate at an EEO investigatory interview (or at a meeting held by an EAP counselor) is not whether the investigator is an outside contractor or an employee of the agency, but whether the investigator is <u>truly representing</u> the agency for the purposes underlying section 7114(a)(2). In this respect, the facts of *Defense Depot Tracy* are not analogous to the case at bar. The EAP counselor met with employees along with a personnel official of the agency, in an agency training room, and both individuals answered employee questions. The role of the counselor at the orientation sessions was indistinguishable from that of the agency official. On the other hand, while Kirschbaum's interviews were conducted at Respondent's headquarters building, they were in a vacant office apart from those of Respondent's management, and the only people present at the interviews

were Kirschbaum and the witness. Moreover, as I noted above, there are EEOC regulations mandating impartiality on the part of the investigator which offer at least a degree of confidence in the investigator's independence from the Agency. Although Federal statute (5 U.S.C. § 7904) requires agencies to offer employee assistance programs to employees, there is no provision in OPM regulations (5 C.F.R. §§ 792.101-105) for those EAP counselors to be independent of the agency's chain of command; on the contrary, an employee's failure to cooperate with his counselor may subject him to disciplinary action (5 C.F.R. § 92.105(c)).

In *SSA Boston*, the Authority also relied on the Supreme Court's decision in *NASA v. FLRA*, 527 U.S. 229 (1999) (*NASA*). In *NASA*, the Supreme Court upheld the Authority's conclusion that an investigator from NASA's Office of Inspector General (OIG) was a "representative" of NASA within the meaning of section 7114(a)(2)(B), and that the agency therefore committed an unfair labor practice when the investigator did not permit an employee's union representative to fully participate in a "Weingarten" interview. The Authority and the Court rejected NASA's argument that because OIG was not part of the organization which had a collective bargaining relationship with the union, and because Congress intended Inspectors General to have a broad degree of independence from the managers of the agencies they investigate, OIG investigators should not be considered "representatives" of their agencies. With respect to the language of the Inspector General Act concerning the IG's independence, as well as the concern that agencies might erode employees' statutory rights by assigning investigations to entities outside the agency chain of command, the issues posed by the *NASA* decision indeed are similar to those in *SSA Boston* and the case at bar. And unlike the situation with EAP counselors, the quasi-independent status of OIG investigators bears a closer statutory resemblance to that of EEO investigators.

Nonetheless, I believe there are sound reasons for distinguishing between the status of EEO and OIG investigators, and for interpreting "representative of the agency" differently in 7114(a)(2)(A) cases than for 7114(a)(2)(B). The Authority has long emphasized that paragraphs (A) and (B) of section 7114(a)(2) establish separate rights and serve distinct purposes. *Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina*, 32 FLRA 222, 230 (1988) (*Charleston*); *McClellan*, 29 FLRA 594 at 600 (1987). Moreover, as noted earlier, in applying the elements of a 7114(a)(2)(A) case we are to be guided by the specific purpose and intent of the section: to provide a union with an opportunity to safeguard its interests and the

interests of bargaining unit employees, as viewed in the context of a union's full range of statutory responsibilities. *GSA*, 50 FLRA at 404; *McClellan*, 29 FLRA at 598. In *Charleston*, the Authority held that in 7114(a)(2)(B) cases an employee's right to a Weingarten representative was based on his status at the time of the interview, whereas in 7114(a)(2)(A) cases it looked to the employee's status at the time of the events giving rise to the formal discussion. 32 FLRA at 230-31, citing *Nuclear Regulatory Commission*, 29 FLRA 660 (1987) (*NRC*). Specifically, since paragraph (B) is designed to make sure that an employee will be able to confront his employer effectively and articulately in an interview which could result in his being disciplined, he should be represented by the union to which he belonged at the time of the interview, not at the time of the underlying incident for which he was being questioned. On the other hand, *NRC* involved an EEO complaint filed by an employee who was not in a bargaining unit. The agency later sought to hold a formal discussion with her regarding her EEO complaint, at which time she had been transferred into a unit. The Authority held in *NRC* that the union had no institutional interest in participating in that meeting, since the meeting related to events occurring when the complainant was not in the bargaining unit.

In the case at bar, the institutional interests of the Union in attending interviews conducted by an EEO investigator are also different from an employee's Weingarten interest at an interview that may result in disciplinary action. Regardless of whether the investigator is employed by OIG or agency management or an outside contractor, the employee facing discipline has a need for union assistance in confronting his interrogator. But when neutral employees (who are not faced with potential discipline) are questioned by an EEO investigator about another employee's EEO complaint, it seems to me that the union's institutional interests in participating at that interview are tenuous at best, especially given the regulatory barriers that have been erected by the EEOC to ensure the impartiality of the investigator and the investigator's separation from the operational and legal components of the agency. As mandated by Respondent's internal directives and by EEOC regulations and directives, neither the PBGC's advocate nor Ms. Taylor's supervisors had any part in the processing of her complaint, and management officials were not permitted to attend the Kirschbaum interviews. Unlike the meetings in *Luke* and *Dover*, Kirschbaum could not engage in any settlement discussions or negotiations of any sort, nor could he suggest any action that might affect any employee's working conditions. While

it is true that Kirschbaum was asking the witnesses about alleged sexual harassment of a bargaining unit member, and this was a subject of significant interest to the Union, nothing occurred at the actual interviews that required the Union to safeguard, even when viewing the Union's statutory responsibilities broadly.[4] The Union might legitimately want to obtain a copy of the investigator's final report, but it did not need to attend the interviews.

I would agree that the Union would have a right to participate if Kirschbaum had indeed "taken sides" with PBGC management or acted as its advocate, but in the context of the EEOC regulations and the PBGC directives Kirschbaum's role was considerably more even-handed than that. Although I do not agree with Respondent that the EEOC regulations or EEO-MD-110 pose a "direct conflict" with section 7114(a)(2)(A) or require the Authority to find that Kirschbaum was not a "representative of the agency," I do believe that they should be accorded substantial deference, and that an effort should be made to harmonize the EEO and FLRA processes. *See, INS El Paso*, 47 FLRA at 186-87; *Ray Brook*, 29 FLRA at 590. In interpreting "representative of the agency" under the Statute for purposes of EEO investigations, it is

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[4] For purposes of comparison, the Federal courts have allowed unions to intervene in EEO lawsuits when employers and EEO plaintiffs tried to settle the lawsuits on terms that adversely affected provisions in their collective bargaining agreement. *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 508 (1986); *U.S. v. City of Hialeah*, 140 F.3d 968, 975-83 (11th Cir. 1998); *Howard v. McLucas*, 782 F.2d 956, 958-59 (11th Cir. 1986)(the latter case specifically involved a Federal employee union). The negotiation of settlement provisions encroaching on terms of a CBA directly affects the institutional interests of the union and warrants formal intervention by the union under the Federal Rules of Civil Procedure. Similarly, when an individual is authorized by a Federal agency to mediate or try to settle a formal EEO complaint under 29 C.F.R. Part 1614 (as in *Luke* and *Dover*), the potential impact of that settlement on other bargaining unit employees and on the terms of the CBA implicates significant institutional interests of the union. But when (as in this case) the individual is authorized only to interview employees and to record what they know about the allegations of a complaint, the presence of the union will not safeguard the union's interests or those of its members in any significant way. Whatever the employees say at those interviews will be reflected in the final report of investigation, which the Union received in this case as a matter of course.

relevant that EEOC regulations expressly require, among other things, that the investigator be impartial and that agencies may not influence the conduct or substance of the investigation. Although Kirschbaum was subject to the Respondent's control for administrative purposes,5 neither the PBGC's EEO Office nor its advocate in the Taylor case had the ability to direct or control the substance of Kirschbaum's investigation or final report. It is also significant that the PBGC's advocate in the Taylor complaint was not permitted to attend the Kirschbaum interviews. The Union is seeking a status that management itself did not have, and such a status would have transformed the interview into something quite different. Kirschbaum's intent was to interview each witness in isolation from the parties to the underlying complaint, in an effort to obtain the witness' unshaded perspective of the events in dispute; that purpose would have been undermined equally if a Union representative, or the complainant or the PBGC management advocate had been present. Thus, in the context of Ms. Taylor's EEO complaint, it appears to me that Kirschbaum was not acting as a representative of the Respondent, but rather as a neutral. This is quite different from the prosecutorial role taken by the OIG investigator in *NASA*, and from the personnel function served by the EAP counselor in *Defense Depot Tracy*. Because it seems to me that the investigator was acting essentially as a neutral in this process, I believe the Union's presence at the Kirschbaum interviews is neither beneficial to the EEO process nor required by our Statute.

As I noted at the start of this section, the facts of this case are indistinguishable from those of *SSA Boston*, in which the Authority held that the EEO investigator was a representative of the agency, and that the agency had therefore committed an unfair labor practice by failing to notify the union and to allow it to participate in the interviews. Although I (for the reasons stated above) might reach a different conclusion, in the absence of *SSA Boston*, I am bound to apply the rulings of the Authority. Based on *SSA Boston*, I must therefore conclude that Kirschbaum was a representative of the Agency. Thus it was the Agency's responsibility to instruct Kirschbaum to notify the Union in advance of each interview and to allow it to participate. The Respondent, through its contract with McCauley & Associates (Agency Exhibit 3), controls the manner in which investigations are conducted, and it can direct McCauley to instruct its investigators to notify the Union before interviewing unit employees (see Agency Exhibit 7). By

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5 Cf. SSA Boston, 59 FLRA at 880.

failing to do so, the Respondent is liable for Kirschbaum's exclusion of the Union.

Accordingly, all of the statutory elements of a formal discussion under section 7114(a)(2)(A) were satisfied, and the Respondent violated section 7116(a)(1) and (8) by its actions.

In light of this unfair labor practice, the remedy proposed by the General Counsel is appropriate. In addition to ceasing and desisting from conducting formal interviews without affording the Union an opportunity to participate, the Respondent's EEO Director should instruct all persons authorized to investigate formal EEO complaints to notify the Union and give it an opportunity to attend interviews with bargaining unit employees. Respondent should also post a notice to this effect. This is essentially the same remedy imposed in *SSA Boston*, 59 FLRA at 881.

Based on the above findings and conclusions, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the Pension Benefit Guaranty Corporation (the Respondent) shall:

1. Cease and desist from:

(a) Conducting formal discussions with bargaining unit employees represented by the National Association of Government Employees, SEIU, AFL-CIO, Local R3-77 (the Union) concerning any grievance or any personnel policy or practices or other general conditions of employment, including investigatory interviews in connection with formal EEO complaints, without affording the Union an opportunity to be represented at the formal discussions.

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

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

(a) Notify in writing all persons, including independent contractors and subcontractors, authorized to

investigate formal EEO complaints on behalf of the Respondent, of the right of the Union to notice and an opportunity to attend interviews held with bargaining unit employees as required by the Statute.

(b) Post at its facility at 1200 K Street, NW, Washington, DC, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Respondent's EEO Director and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all 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.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Boston Regional Office, Federal Labor Relations Authority, Thomas P. O'Neill Federal Building, 10 Causeway Street, Suite 472, Boston, MA 02222, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, May 6, 2005.

RICHARD A. PEARSON
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 Pension Benefit Guaranty Corporation (PBGC) violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT conduct formal discussions with bargaining unit employees represented by the National Association of Government Employees, SEIU, AFL-CIO, Local R3-77 (the Union) concerning any grievance or any personnel policy or practices or other general conditions of employment, including investigatory interviews in connection with formal EEO complaints, without affording the Union an opportunity to be represented at the formal discussions.

WE WILL notify, in writing, all persons, including independent contractors and subcontractors, authorized to investigate formal EEO complaints on behalf of the PBGC, of the right of the Union to notice and an opportunity to attend interviews held with bargaining unit employees as required by the Statute.

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

_____
Pension Benefit Guaranty Corporation

Date:_____ By:_____
(Signature) (EEO Director)

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, Boston Regional Office, Federal Labor Relations Authority, whose address is: Thomas P. O'Neill Federal Building, 10 Causeway Street, Suite 472, Boston, MA 02222, and whose telephone number is: 617-424-5730.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. WA-CA-03-0620, were sent to the following parties:

_____

CERTIFIED MAIL:	**CERTIFIED NUMBERS:**
Gerard M. Greene Counsel for the General Counsel Thomas P. O'Neill Federal Building 10 Causeway Street, Suite 472 Boston, MA 02222	**7000 1670 0000 1175 5417**
Raymond M. Forster Karen R. Esser Pension Benefit Guaranty Corporation 1200 K Street, NW, Suite 340 Washington, DC 20005	**7000 1670 0000 1175 5424**
Jennifer Wasserstein NAGE, SEIU, AFL-CIO 317 South Patrick Street Alexandria, VA 22314	**7000 1670 0000 1175 5431**

Dated: May 6, 2005
Washington, D.C.