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Do Agency Employees Have a Right to Union Representation When Questioned by an OIG Investigator? An Analysis of NASA v. FLRA

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PREVIEW of United States Supreme Court Cases, pages 345–348.

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This case involves the interpretation of, and interplay between, two federal statutes—the Inspector General Act and the Federal Service Labor-Management Relations Statute (FSLMRS). The Inspector General Act creates independent and objective units within federal departments and agencies for the purpose of conducting audits of, and investigations into, the programs and operations of these departments and agencies. Each Office of Inspector General (OIG) within a federal agency is headed by an inspector general who is appointed by the president and may be removed from office only by the president. In performing its functions, the OIG reports to, and is under the general supervision of, the head of the federal agency within which the office is located, but an agency head cannot prohibit or prevent the OIG from initiating, carrying out, or completing an investigation or audit.

The FSLMRS grants federal employees the right to join labor unions and engage in collective bargaining with agency management. It is an unfair labor practice for a federal employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the statute. Section 7114 of the FSLMRS grants employees the right to union representation at "any examination of an employee by a representative of the agency in connection with an investigation" in which the employee reasonably believes the examination may result in disciplinary action.

Issues

The Supreme Court is asked to determine two questions arising from the interplay between these statutes. When an investigator from the OIG conducts an investigatory interview of an agency employee, is the investigator a "representative of the agency" so as to trigger the employee's right to union representation at the interview? If so, is the

(Continued on Page 346)

NASA v. Federal Labor Relations Authority
Docket No. 98-369

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From: The Eleventh Circuit

Case at a Glance

This case raises the question of whether the Office of Inspector General, a division within many federal agencies responsible for independently auditing agency practices, is acting as a representative of the agency when it conducts investigatory interviews of agency employees, so as to trigger the employee's right to union representation.

federal agency itself liable for committing an unfair labor practice if the investigator fails to grant the employee his or her rights under §7114?

FACTS

In 1993, the Office of Inspector General for NASA (NASA-OIG) received information from the FBI that a NASA employee at the Marshall Space Flight Center in Huntsville, Ala., was suspected of sending documents threatening bodily harm to co-workers. An investigator from NASA-OIG contacted the suspected employee to set up an interview. The suspected employee was a member of a bargaining unit represented by Local 3434 of the American Federation of Government Employees ("the union"). The employee requested both legal and union representation at the interview, and the investigator agreed.

At the beginning of the interview, the investigator informed the participants that certain ground rules would apply. Specifically, the investigator said that the union representative was present as a witness and was not to interrupt the question-and-answer process. The union representative was also informed that he was subject to being called as a witness for the government. The union representative objected to the rules, but the investigator said that he would move the interview elsewhere if the union representative did not "maintain himself." Moreover, at several points during the interview, the investigator challenged the union representative's conduct when he attempted to represent the employee.

The union subsequently filed a charge with the Federal Labor Relations Authority (FLRA)—the agency responsible for enforcing the FSLMRS—alleging that both NASA and NASA-OIG had violated the FSLMRS by interfering with the union's right to take an active role during the examination of the employee. A hearing was held before an administrative law judge of the FLRA. The judge found that NASA-OIG was acting as a "representative of the agency" when it was conducting the employee interview and that it had committed an unfair labor practice by interfering with the union's ability to participate in the interview. The judge dismissed the charge against NASA itself, finding that there was no evidence that NASA was responsible for the violation.

Upon appeal of the administrative law judge's decision to the FLRA, the FLRA agreed that the NASA-OIG investigator was "a representative of the agency" and that the ground rules established for the interview were contrary to the rights guaranteed by §7114. The FLRA disagreed with the judge's findings as to NASA's liability and found that NASA was responsible for the actions of the NASA-OIG investigator.

The U.S. Court of Appeals for the Eleventh Circuit enforced the FLRA's decision, deferring to the FLRA's interpretation that "representative of the agency" as used in §7114 includes inspector general investigators. The court also found NASA liable for the unfair labor practice on the theory that it exercises supervisory authority over NASA-OIG and therefore had a duty to ensure that the OIG complies with the requirements of the FSLMRS. *FLRA v. NASA*, 120 F.3d 1208 (11th Cir. 1997).

The Supreme Court granted certiorari on Nov. 2, 1998.

ANALYSIS

The FSLMRS guarantees an employee's right to union representation during an investigative interview only when the interview is conducted by a "representative of the agency." Thus, if a police officer were to interview an employee to determine whether the employee had embezzled employer funds, the employee would not be entitled to union representation. The police officer is not acting as a representative of the employer; he or she is not employed by the employer and acts independently of the employer's interests. On the other hand, if a security guard employed by the employer were to interview an employee to determine if the employee had stolen money, the right to union representation would attach. The security guard is employed by the employer and conducts the investigation on behalf of the employer; he or she is acting as the employer's representative. The OIG occupies a position somewhere between a police officer and a security guard.

NASA points to the fact that the inspector general is appointed by the president and may be removed only by the president as evidence of the OIG's independence from agency management. Moreover, the Inspector General Act expressly provides that agency management cannot interfere with an OIG investigation. This independence is necessary to insulate the OIG from management attempts to cover up its own fraud or ineffectiveness and thus ensures the OIG can carry out its mission. The results of an OIG investigation are reported to Congress and the head of the agency involved, but the OIG does not impose punishment. It is up to the agency itself to determine the appropriate sanction based on the investigative findings. The structure

and purpose behind the OIG show that it does not act as a representative of the agency when it conducts its investigations but is acting independently.

The FLRA counters that the OIG does not have unlimited independence from the agency. OIG investigators are, in fact, employees of the agency. The Inspector General Act specifically provides that the OIG operates under the general supervision of the agency head. Information uncovered during an OIG investigation may be provided to agency supervisors to use for agency purposes. Moreover, the OIG receives assistance from agency management in conducting its investigations. The OIG does not have the authority to compel employee testimony; it relies on agency management to threaten employees with discipline for refusing to cooperate. This relation between the agency and OIG indicates that OIG is acting as a "representative of the agency" when it conducts its investigation.

The American Federation of Government Employees (AFGE) notes that the term representative as used throughout the FSLMRS designates a person who acts for, or on behalf of, a federal agency. NASA-OIG is authorized to act for NASA in conducting investigatory interviews. Indeed, it is the responsibility of the OIG to keep the agency informed of problems and abuses and to recommend corrective action. Information obtained during the investigation is given to other administrative units within the agency so that they can take appropriate disciplinary action. In this particular case, the NASA-OIG investigator threatened the employee with discipline if he did not cooperate in the investigation. By invoking NASA's disciplinary authority, the investigator clearly showed he was acting as a representative of the agency.

Secondly, NASA contends that the underlying purpose in providing for union representation at investigatory interviews suggests that a "representative of an agency" means a representative of the agency management that has a collective bargaining relationship with the union. The purpose of the FSLMRS is to regulate the relationship between union-represented employees and the agency management that deals with the union in collective bargaining.

The rationale for providing union representation rights is not only to safeguard the particular employee, but to protect as well the interests of the entire bargaining unit and make certain the employer does not abuse its power. Union representation is designed to redress the imbalance of economic power between the worker and management. Since the OIG does not contain the bargaining unit to which the employee under investigation belongs, it cannot abuse its power vis-à-vis that bargaining unit. Its independence means it does not side with either the worker or management and thus cannot be part of any equation to redress an imbalance of power between those entities.

The OIG itself does not have a collective bargaining relationship with any union. OIG employees are expressly excluded from being part of a union-represented bargaining unit. Thus, OIG is not a representative of the agency for collective bargaining purposes and therefore cannot be considered an agency representative for purposes of asserting §7114 rights.

The FLRA states that narrowly focusing on the collective bargaining relationship in defining the scope of the term "representative of the agency" misconstrues the policy behind §7114. A primary purpose for union representation at investigatory interviews is to provide protection for employees at risk of agency disciplinary action. When the interrogation is conducted by an entity located within the agency, which shares the information obtained with the agency, the need for protective representation is evident. The rights under §7114 pertain so long as the person conducting the interview represents the agency, regardless of whether the investigator and employee are employed within the same administrative unit of the agency. While the elimination of inequality in bargaining power is a concern underlying §7114, the primary rationale is to protect against the risk of disciplinary action.

Lastly, NASA argues that imposing a union representation requirement on an OIG investigatory interview would interfere with the OIG's ability to carry out its investigative functions. The Inspector General Act was designed to ensure that no restrictions are placed on the OIG's freedom to investigate. The presence of a union representative and the concomitant role the representative plays would result in just such restrictions. The presence of a union representative would undermine the ability of the OIG to maintain the confidentiality of the investigation.

Moreover, the right to union representation has been held to include the right to be informed in advance of the subject matter of the interview, the right to halt the interview and consult with the union representative outside the hearing of the investigator, and the right to negotiate 48 hours advance notice of an

(Continued on Page 348)

interview. The application of these rights in the context of an OIG investigation would disrupt the investigative process and place restrictions on how the investigation is conducted, contrary to the intent of the Inspector General Act.

On the other hand, the FLRA contends that compliance with §7114 will not unduly restrain the conduct of the investigation. The FLRA argues, contrary to NASA's assertion, that the Inspector General Act does not impose a confidentiality duty on the OIG. As the AFGE points out, even if there is a duty of confidentiality with regard to the investigation, the interview itself cannot be confidential. There is no restriction placed on the employee to prevent him or her from discussing the interview. Nor is there any basis for concluding that the presence of a union representative poses any greater threat to the integrity of the investigation than the presence of the employee's attorney, whose presence in such interviews is uncontested. The possibility that circumstances could arise in which union representation would inappropriately interfere with the OIG investigation does not require a blanket denial of the right to representation under all circumstances. The FLRA has the administrative expertise to tailor the application of the right on a case-by-case basis depending on the particular facts involved.

On the issue of NASA's liability for OIG's conduct, NASA asserts there is no basis for holding NASA itself liable. NASA-OIG is independent from the head of NASA. There is no statutory authority for the agency head to prescribe the procedures OIG must follow in conducting investigations. Indeed, the agency head is prevented by the Inspector General Act from interfering in the investigation. So, even if the NASA-OIG investigator's conduct in restricting the ability of the union representative to participate in the investigatory interview interfered with the employee's rights under §7114, NASA itself is not liable.

The FLRA counters that NASA-OIG is a unit within NASA. As part of their general supervision of OIG, agency heads are responsible to advise OIG of pertinent obligations imposed by Congress in the FSLMRS and to inform investigators not to engage in conduct that interferes with employee rights under the law. Such general supervision with regard to legal obligations would not interfere with the conduct of OIG investigations. Holding the agency liable for the conduct of the OIG investigators will further the purposes behind the FSLMRS by ensuring compliance with the rights guaranteed by the statute.

Significance

Nearly 60 federal departments or agencies have OIGs. Given the broad scope of authority to conduct both criminal and administrative investigations within the agencies in which they operate, OIG investigations can potentially have an impact on thousands of federal workers. Whether a worker has access to union representation when confronted by an OIG investigator can mean the difference between protecting one's rights and effectively responding to interrogation or being overwhelmed and cornered. Even an articulate and educated individual is unevenly matched against a trained investigator. The possibility for legal representation may not be a viable option for many employees, given the cost associated with retaining counsel. The Court's decision in this case can either strengthen the federal government's hand in rooting out abuses by limiting the ability of workers to seek assistance during investigations or provide protection for workers from possible abusive investigatory tactics.

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Amicus Briefs

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