

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
DALLAS REGION**

**United States Department of Justice
Federal Bureau of Prisons
Federal Detention Center
Houston, Texas**

- Activity

and

Case No. DA-RP-09-0015

**American Federation of Government Employees, AFL-CIO
Council of Prison Locals
Local 1030**

- Petitioner/Labor Organization

DECISION AND ORDER

Pursuant to Section 2422.1 of the Rules and Regulations of the Federal Labor Relations Authority (Authority), a petition was filed seeking to clarify a unit of certain employees of the United States Department of Justice, Federal Bureau of Prisons (Agency), Federal Detention Center, Houston, Texas (Activity), represented by the American Federation of Government Employees (AFGE), AFL-CIO (Petitioner or Union). Pursuant to the provisions of Section 7105(e)(1) of the Federal Service Labor-Management Relations Statute (Statute), the Authority has delegated its powers in connection with the subject case to the undersigned Regional Director. A hearing was held before a Hearing Officer of the Federal Labor Relations Authority on March 9 and 10, 2010. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Upon the entire record in the case, including the post-hearing briefs submitted by the parties, I find and conclude as follows:

I. STATEMENT OF THE CASE

On July 7, 2009, the Petitioner filed a petition in the above-numbered case with the Dallas Regional Office of the Federal Labor Relations Authority seeking a unit clarification to determine whether the position of Special Investigative Support (SIS) Technician, GS-0303-08, should be included in the existing certified nationwide consolidated bargaining unit of professional and non-professional employees represented by the Union.¹ On January 7, 2010, a Notice of Hearing issued, setting a

¹ The parties stipulated and agreed that the position of Information Technology Specialist (Computer Specialist), GS-2210-11, currently occupied by Jarrod W. Miller, is included in the nationwide consolidated bargaining unit of professional and non-professional employees represented by the Union.

March 9, 2010, hearing date.

On March 31, 2006, in Case No. WA-RP-06-0016, a certification was issued by the Regional Director of the San Francisco Regional Office certifying the Union as the exclusive representative of the following unit of employees:

Included: All professional and nonprofessional employees, including all Central Office employees, of the Bureau of Prisons and Federal Prisons Industries, Inc., U.S. Department of Justice.

Excluded: All Central Office temporary employees on appointments not to exceed 90 days; management officials; supervisors; and employees described in 5 U.S.C. 7112(b)(2),(3),(4),(6) and (7).

II. ISSUE

Whether, pursuant to 5 U.S.C. 7112(b)(7), the position of SIS Technician GS-0303-08, currently occupied by Joel S. Gonzalez² and Damon Michael St. Amant, should be excluded from the bargaining unit set forth above for which AFGE is the exclusive representative, because the SIS Technicians are primarily engaged in investigative functions relating to individuals employed by the Activity whose duties directly affect the internal security of the Activity and the SIS Technicians' duties are undertaken to ensure that those employees' duties are discharged honestly and with integrity?

The Activity asserts that the SIS Technician position should be excluded from the bargaining unit pursuant to Section 5 U.S.C. 7112(b)(7) of the Statute because the SIS Technicians are primarily engaged in investigative functions relating to the work of individuals employed by the Activity whose duties directly affect the internal security of the Activity and the SIS Technicians ensure that those employees' duties are discharged honestly and with integrity.

The Union maintains that the employees who occupy the SIS Technician position are not primarily engaged in investigative functions relating to the work of individual employees of the Activity whose duties directly affect internal security of the Activity and the SIS Technicians duties are not undertaken to ensure those employees' duties are discharged honestly and with integrity. Therefore, the Union contends that the SIS Technicians should not be excluded from the bargaining unit, pursuant to Section 5 U.S.C. 7112(b)(7) of the Statute.

Inasmuch as the parties have agreed, this position is included in the bargaining unit, and I have approved the stipulation, this position will not be addressed further.

2 The parties did not object to Joel S. Gonzalez, providing representative testimony for the duties of all employees at the Activity who hold the SIS Technician, GS-0303-08, position, including Damon Michael St. Amant.

III. FINDINGS OF FACT³

The mission of the United States Department of Justice (Department of Justice), which is administered by the Office of the Attorney General and the Deputy Attorney General, is to represent the rights and interests of the American people. The Activity operates within the province of the Office of the Deputy Attorney General and its mission is to protect society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient, and appropriately secure, and that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens. The Activity falls within the Bureau of Prison's South Central Region in which Jerry Maldonado is the Regional Director. The Chief Executive Officer of the Activity is Warden Joseph D. Driver. Driver supervises the Associate Warden of Programs, Dedra Willis, and Willis supervises Captain Scott Fauver. Fauver supervises Special Investigative Agent (SIA) Diego Leal, who supervises the Activity's Special Investigative Support (SIS) Office.

The Activity's SIS office is responsible for conducting local investigations within the Activity. In overseeing the SIS office investigations, Leal supervises a GS-11 SIS Lieutenant, a GS-9 SIS Lieutenant, the SIS Office telephone monitors, and the two SIS Technicians. As the SIA and supervisor of the SIS office, it is Leal's responsibility to conduct investigations within the Activity and submit his findings to the Agency's Office of Internal Affairs (OIA). Leal's submissions to the OIA include recommendations regarding whether the investigation shows that there has been a violation of law or the Agency's rules and/or regulations. The OIA makes the final determination regarding any alleged violation and if the OIA sustains an investigation with a recommendation that a violation has occurred at the Activity, then the OIA submits the case to the Warden so that he can make a determination regarding the resulting discipline. However, if the OIA does not sustain a recommendation that a violation has occurred or sustains a recommendation that there was no violation, then the investigation concludes at the OIA.

As supervisor of the SIS office, Leal assigns the SIS Technicians their work duties. The SIS Technicians assist Leal in conducting the above investigations by performing specific assigned tasks regarding those investigations. In this regard, Leal does not normally assign the SIS Technicians a complete case to investigate. Both Leal and Gonzalez testified that Gonzalez has only been assigned one independent investigation in January 2010, and the investigation had not been resolved by the time of the hearing.

SIS Technician Gonzalez testified that 75% of an SIS Technician's work time is spent on investigative duties. Gonzalez testified that approximately 25% of his duty time was spent on staff investigations and approximately 50% of his duty time was spent on

³ Consistent with the Authority's determination in *Dep't of Hous. & Urban Dev., Wash., D.C.*, 35 FLRA 1249, 1256-1257 (1990), the eligibility determinations herein are based on testimony and other evidence establishing what an employee's actual specific duties were at the time of the hearing, rather than on speculation regarding what those duties might be in the future. While a position description may be useful in making a unit determination, it is not controlling.

inmate investigations. SIA Leal estimated that the time spent by González on staff investigations could be as high as 35% of his duty time. The investigations that the SIS Technicians participate in regarding the Activity's staff include determining the accuracy of the staffs' reports concerning incidents within the Activity, whether staff have been compromised, whether staff have used excessive force, or whether the staff have properly supervised inmates, including their placement of particular inmates within the Activity. In addition, the SIS Technicians also participate in investigations to determine whether the employees have used profanity, were absent without leave (AWOL), misused travel vouchers, or have lost items within the Activity's facility, such as their keys.

The SIS Technicians' investigative duties involve assisting Leal in completing chain of custody forms in order to allow Leal to place those items into evidence. They are required to control evidence and preserve crime scenes, including photographing weapons and/or securing evidence. The SIS Technicians interview inmates and staff, take notes, and prepare affidavits as a result of those interviews. The SIS Technicians draft incident reports, SIS investigative reports, threat assessments, intelligence reports, timelines of offences, and emails.

The SIS Technicians participate in the Activity's intake screening of inmates. In this regard, the SIS Technicians photograph inmates who are determined to be included in a security-threat group, have a history of sexual assault, or have a history of assaulting or compromising staff, and then enter that information into the Agency's database. The SIS Technicians review documents regarding inmates, monitor inmate emails, serve as the inmate urinalysis coordinator and search inmates' cells. The SIS Technicians review the Activity's visitation sheet to determine who is visiting the inmates. They review medical reports when employees or inmates have to be medically assessed. The SIS Technicians review and process the Activity's central file documentation regarding inmates. The SIS Technicians review the Activity's commissary account records and participate in searches of the inmates' cells to confirm that what the inmates have purchased at the commissary matches the contents of the inmates' cells.

The SIS Technicians draft reports for the Activity's Disciplinary Hearing Officer to show how the investigation was conducted by the SIS Office. The SIS Technicians prepare for Office of Inspector General (OIG) proceedings by reviewing and preparing videos. The SIS Technicians may be called to testify at criminal trials regarding inmates.

The SIS Technicians use the Agency's True Intel System database to report incidents at the Activity, investigate the financial history of inmates, investigate the inmates' commissary account, and investigate the telephone numbers the inmates call outside the Activity. The SIS Technicians also use the Federal Bureau of Prison's Adult Internal Management System (AIMS) database to review older incidents that have occurred at the Activity. The SIS Technicians train other employees to use the True Intel System database, the Activity's camera system, in SIS Office procedures, and crime scene preservation procedure.

The SIS Technicians also perform traditional correctional officer duties, including supervising inmates to make sure that they are adhering to Activity policy and procedures, and assume correctional duty posts as needed by the Activity. SIS Technician Gonzalez testified that appropriately 25% of his work time is spent on these duties.

IV. ANALYSIS

Whether, pursuant to 5 U.S.C. 7112(b)(7), the position of SIS Technician GS-0303-08, currently occupied by Joel S. Gonzalez and Damon Michael St. Amant, should be excluded from the bargaining unit set forth above for which AFGE is the exclusive representative, because the SIS Technicians are primarily engaged in investigative functions relating to individuals employed by the Activity whose duties directly affect the internal security of the Activity and the SIS Technicians' duties are undertaken to ensure that those employees' duties are discharged honestly and with integrity?

Section 7112(b)(7) of the Statute excludes from a bargaining unit any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity. 5 U.S.C. §7112(b)(7).

Section 7112(b)(7) of the Statute clearly excludes from bargaining units employees engaged in audit or investigative work whose functions are undertaken to ensure that the duties of the individual employees being audited or investigated are discharged "honestly and with integrity." This exclusion is not limited to employees who perform investigations relating to "fraud, waste and abuse." *U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Marion, Ill.*, 55 FLRA 1243 (2000). (The Authority instructed the Regional Director to "consider whether the Legal Assistant's investigations of allegations that employees have used excessive force or have violated the civil rights of inmates constitute investigation of whether such employees have performed their duties honestly and with integrity.")

In *U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, McCreary, Pine Knot, Ky.*, 63 FLRA 153 (2009) (*BOP Pine Knot*), the Authority upheld the Regional Director's determination that SIS Technicians spending between 10% and 20% of their work time on investigation or audit functions relating to staff misconduct did not satisfy the "primarily engaged" requirement of section 7112(b)(7) of the Statute. In this regard, despite the agency's assertions that the SIS Technicians discover staff misconduct when conducting inmate investigations, the Authority held that the agency had not established that inmate investigations constitute the investigation of the agency's employees. The Authority noted that the word "primarily" is capable of a range of meanings extending from "first or chief to substantially." The Authority applied the

standard in *Am. Fed'n of Gov't Employees, Local 3529, 57 FLRA 633 (2001) (AFGE Local 3529)*, that employees are not excluded from a bargaining unit within the scope of 7112(b)(7) if "the preponderance" of their duties do not involve investigative functions set forth in that section of the Statute. *BOP Pine Knot* at 155-156. (citing *AFGE Local 3529* at 638; *Obremski v. Office of Pers. Mgmt.*, 699 F.2d 1263, 1270 (D.C. Cir. 1983) (the court interpreted an OPM statute to find that an employee who spent thirty percent of his time doing work related to detention "would not be primarily engaged" in detention)).

In this case, the record indicates that the SIS Technicians participate in investigations of Activity employees regarding matters such as whether staff have been truthful concerning incidents that occur at the Activity; AWOL; employees being compromised by inmates; the use of excessive force by employees; work strikes; employees losing their keys (which concerns issues involving access to the Activity or keys being used as weapons); and the use of profanity by staff.⁴ While these investigations clearly related to the "work of individuals employed by an agency whose duties directly affect the internal security of the agency" and are "undertaken to ensure that the duties are discharged honestly and with integrity," the SIS Technicians are not primarily engaged in staff investigations. See, *BOP Pine Knot* at 155-156.

In this regard, the record indicates that the SIS Technicians "chief" work duty or a "substantial" amount of their work duties involve inmate investigations. SIS Technician Gonzalez, as well as SIA Leal, testified that, at most, 25-35% of the SIS Technicians work time involve staff investigations. Spending between 25-35% of work time on investigation or audit functions relating to staff misconduct does not satisfy the "primarily engaged" requirement of Section 7112(b)(7) of the Statute. *Id.* at 155-156.

The Activity argues that the investigations that the SIS Technicians participate in regarding inmates always have the potential of implicating the Activity's employees and, thus, those investigations involve employees. However, both SIS Technician Gonzalez and SIA Leal testified that when an inmate investigation implicates one of the Activity's employees, the Activity begins a new investigation and those investigations were included in the estimates of the staff investigations given during the hearing. Accordingly, the amount of work time that the SIS Technicians devote to investigations regarding the Activity's employees is insufficient to establish that the SIS Technicians are "primarily engaged" in those investigations.

The exhibits entered into the record corroborate Gonzalez' and Leal's testimony that the SIS Technicians are primarily engaged in investigating inmates. In this regard, the duties set forth in Gonzalez' position description primarily involve inmates and all the duties in Gonzalez' performance evaluation and the SIS Technician's most recent Post Orders involve duties concerning inmates. The Activity maintains that these documents

⁴ At hearing, the parties disputed whether the investigation of profanity impacted the internal security of the Activity or were conducted to ensure that the employees discharged their duties honestly and with integrity. I have determined that the inclusion of such investigations in the discussion above does not establish that the SIS Technicians are "primarily engaged" in investigations concerning the Activity's employees.

are not all inclusive in describing the SIS Technicians' duties. However, the majority of the specific investigatory duties about which Gonzalez and Leal testified the SIS Technicians perform, such as participating in inmate screening, finger printing inmates, reviewing inmates' profiles, monitoring inmate phone calls, monitoring inmate emails, drafting threat assessments, reviewing visitation sheets, reviewing commissary account records, reviewing court documents, reviewing central file documentation regarding inmates, photographing inmates, searching cells, and conducting urinalysis, involve duties regarding inmates. Accordingly, the exhibits and Gonzalez' and Leal's supporting testimony demonstrate that the SIS Technicians' duties primarily involve investigations concerning inmates and not employees of the Activity.

Accordingly, the SIS Technicians are not excluded, pursuant to Section 7112(b)(7) of the Statute, from the bargaining unit of employees employed by the Activity and represented by the Union. In this respect, the employees currently occupying the SIS Technician position are not primarily engaged in investigation or audit functions relating to the work of individuals employed by the Activity whose duties directly affect the internal security of the Activity and the SIS Technicians duties are not undertaken to ensure those employees' duties are discharged honestly and with integrity.⁵

V. CONCLUSION

Based on the above, I conclude that the Special Investigative Support Technician, GS-0303-08, position is not excluded from the consolidated bargaining unit of professional and non-professional employees represented by the Union pursuant to Section 5 U.S.C. §7112(b)(7) of the Statute and that the position, which is currently occupied by Joel S. Gonzalez and Damon Michael St. Amant, should be included in the unit.

⁵ To the extent that the Activity also sought to exclude the SIS Technician position pursuant to the appropriate unit criteria, the Activity has raised no issue that there has been a change affecting the continued appropriateness of the unit, such as changes in the agency's organization or operations, or that the existing unit is otherwise inappropriate, and has not asserted or provided any other basis to address an appropriate unit determination. Section 7112(b) of the Statute provides that no bargaining unit may be considered appropriate for purposes of exclusive recognition if it includes employees who fall into any of the exclusionary categories described therein. Any determination to include or exclude the position at issue in this proceeding, which is based on the application of 5 U.S.C. §7112(b), does not affect the continued appropriateness of the existing unit. Under Section 7112(a) of the Statute, the Authority has held that consideration of the appropriate unit criteria is not necessary to determine whether positions at issue are excluded under Section 7112(b). *AFGE Local 3529* at 636-637. The Authority held that nothing in Section 7112(b) suggests or requires that the Authority consider or apply the appropriate unit criteria under Section 7112(a) in determining solely whether employees satisfy the statutory exclusions under Section 7112(b). *Id.* In determining whether positions at issue in a clarification of unit petition satisfy the statutory exclusions under Section 7112(b), the Authority has applied other criteria based on the specific categories of employees excluded by Section 7112(b). See, e.g., *Dep't of the Navy, Automatic Data Processing Selection Office*, 7 FLRA 172, 177 (1981); *U.S. Dep't of Labor, Office of the Solicitor, Arlington Field Office*, 37 FLRA 1371, 1376-77, 1383 (1990); *Dep't of the Treasury, Internal Revenue Serv., Wash., D.C. & Internal Revenue Serv., Cincinnati Dist., Cincinnati, Ohio*, 36 FLRA 138, 144 (1990). None of the standards applied under Section 7112(b) involve appropriate unit criteria. Accordingly, the Activity's appropriate unit arguments do not provide a basis to exclude the SIS Technician position from the bargaining unit.

VI. ORDER

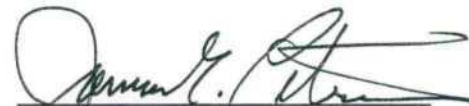
The parties are hereby advised that pursuant to §2422.32 of the Authority's Rules and Regulations, absent the timely filing of an application for review of this Decision and Order with the Authority, or one filed and denied, or if the Authority does not undertake to review of this action within sixty (60) days after the filing of the application for review. I will issue an appropriate Clarification of Unit Certification ordering that the unit be clarified consistent with my findings, as above.

Pursuant to Section 2422.31 of the Regulations, you may file an application for review of my Decision and Order with the Authority within sixty (60) days of the date of my Decision and Order. The sixty (60) days time limit may not be extended or waived. Copies of the application for review must be served on me and on all other parties. A statement of such service must be filed with the application for review.

The application for review must be a self-contained document enabling the Authority to rule on the basis of its content without the necessity of recourse to the record. The Authority will grant review only upon one or more grounds set forth in Section 2422.31 of the Regulations.

Any application filed must contain a summary of all evidence or rulings relating to the issues raised and supporting argument. An application may not raise any issue or allege any facts not timely presented to the Regional Director. The application for review must be filed with the Federal Labor Relations Authority, 1400 K Street, N.W., Second Floor, Washington D.C. 20424-0001, by close of business, August 30, 2010.

Pursuant to Section 2429.21(b) of Regulations, the date of filing will be determined by the date of mailing indicated by the postmark date. If no postmark date is evident on the mailing, it will be presumed to have been mailed five (5) days prior to receipt. An application for review filed by personnel delivery shall be filed on the date it is received by the Federal Labor Relations Authority.



James E. Petrucci
Regional Director
Dallas Region
Federal Labor Relations Authority
525 S. Griffin Street, Suite 926, LB 107
Dallas, Texas 75202-5093

Dated: June 30, 2010

CERTIFICATE OF SERVICE
Case No. DA-RP-09-0015

I hereby certify on June 30, 2010, that a copy of the **DECISION AND ORDER** issued by James E. Petrucci, Regional Director, in Case No. DA-RP-09-0015, was sent to the following parties in the manner indicated:

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