ATTACHMENT 3B2

EXAMPLE OF BRIEF TO THE OALJ

UNITED STATES OF AMERICA
BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
BOSTON REGION

DEFENSE LOGISTICS AGENCY,
DEFENSE DISTRIBUTION REGION EAST
DEFENSE DEPOT SUSQUEHANNA
NEW CUMBERLAND, PENNSYLVANIA
-Respondent-

and

Case No. BN-CA-70149

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2004, AFL-CIO
-Charging Party-

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BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Labor Relations Authority Decisions

U.S. Supreme Court Decisions

United States Court of Appeals Decisions

National Labor Relations Board Decisions

Statutes and Regulations

Federal Service Labor-Management Relations Statute

Rules and Regulations of the Federal Labor Relations Authority

Other Authority

COUNSEL FOR THE GENERAL COUNSEL'S

BRIEF TO THE ADMINISTRATIVE LAW JUDGE

I. STATEMENT OF THE CASE

Pursuant to section 2423.25 of the Rules and Regulations of the Federal Labor Relations Authority, herein called Authority, Counsel for the General Counsel respectfully submits this brief to the Administrative Law Judge (ALJ) in support of the allegations of an unfair labor practice (ULP) set forth in the Complaint and Notice of Hearing (Complaint) issued in the case by the Regional Director for the Boston Region of the Authority on May 16, 1997.

This proceeding arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Authority, 5 C.F.R. §§ 2411-2472. The proceeding was initiated by a ULP charge, as amended, filed against the Defense Logistics Agency, Defense Distribution Region East, Defense Depot Susquehanna, New Cumberland, Pennsylvania (Activity or Respondent) by the American Federation of Government Employees, Local 2004, AFL-CIO (Charging Party or Union). (GC Exs 1(a, c)).1/ The complaint alleges that the Respondent committed a ULP in violation of 5 U.S.C. § 7116(a)(1), (5) and (8) when the Respondent denied the Union's request to take tests in Building T-21 to determine whether asbestos was present. The complaint further alleges that the Respondent's conduct constituted a violation of section 7116(a)(1) and (5) by preventing the Union from performing its duties as the exclusive representative. Lastly, the complaint alleges the denial is an independent violation of 7116(a)(1) because the Respondent's conduct interfered with the unit employees' section 7102 right to have their grievances processed and to be represented by their exclusive representative in that process. (GC Ex 1(e)).

On June 9, 1997, Respondent filed its answer denying the substantive allegations of the Complaint. (GC Ex 1(f)). A hearing was held before the Honorable Jesse Edwards, Administrative Law Judge, on July 9, 1997, in Harrisburg, Pennsylvania. At the hearing, the ALJ granted General Counsel's motion to amend the complaint to clarify the name of the Respondent by adding "Administrative Support Center East." (TR 13:10-11).

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1 All references to the transcript of the hearing shall be referred to as "TR" followed by the reference to the appropriate page and line number; General Counsel's Exhibits will be referred to as "GC Ex"; Joint Exhibits will be referenced as "Jt. Ex"; and Respondent's Exhibits will be referred to as "R Ex".

II. ISSUES

A. Whether the ULP charge is barred under section 7116(d) of the Statute.

B. Whether the Respondent violated the Statute by refusing to allow the Union access to conduct tests for asbestos.

1. Whether the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by refusing to allow the Union access to take tests at its own expense to determine asbestos exposure in Building T-21 thereby preventing the Union from obtaining data pursuant to section 7114(b)(4) of the Statute.

2. Whether the Respondent engaged in bad faith bargaining in violation of section 7116(a)(1) and (5) of the Statute when it denied the Union access to Building T-21 to conduct tests of its choice.

3. Whether the Respondent interfered with the Union's right to file and process grievances in violation of section 7116(a)(1) of the Statute when it denied the Union access to Building T-21 to conduct tests of its choice.

III. STATEMENT OF FACTS

The Defense Depot Susquehanna is a tenant at the Defense Logistics Agency, Defense Distribution Regional East's installation at New Cumberland, Pennsylvania. (Donaldson, TR 333:9-11). The Union is the certified exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. (GC Ex 1(e, f)). John McKinley has been President of the Union since May 1996. (McKinley, TR 32:15-16). The parties' current collective bargaining agreement (contract) was effective January 19, 1995. (Jt. Ex 1). Article 15 of the contract requires the Respondent to provide safe and healthful working conditions for all employees, determined in accordance with the standards contained in Section 19 of the Occupational Safety and Health Act (OSHA). (Jt. Ex 1). Article 12, Section 6 of the contract provides that "environmental differential pay shall be paid to any employee who is exposed to a hazard, physical hardship or working conditions as authorized by FPM Supplement 532-1, Subchapter S8 and Appendix J." (Jt. Ex 1).2/ The contract does not limit payment of environmental differential pay (EDP) to cases where the level of asbestos is over the permissible level allowed by the OSHA standards. (Jt. Ex 1; McKinley, TR 134:16-24).

In June or July 1996, a bargaining unit employee, Joel Prachet, expressed concerns to the Union that employees were being exposed to asbestos in Building T-21. (Dalwind, TR 147:5-8; McKinley, TR 41:3-22; Jones, TR 194:11-15). Asbestos is a known carcinogen and can be a dangerous material. (Silverman, TR 256:24-25; 284:1-3). Building T-21 is a 55,000 square foot, two story warehouse in the controlled security area of the Respondent. (McKinley, TR 35:25; 36:7-9). The building is encased in transit paneling containing asbestos.

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2 A discussion about this standard, and the fact that FPM Supplement 532-1 has been replaced by 5 C.F.R. § 532.511, Appendix A, will be addressed later in the brief.

(McKinley, TR 36:10-11; Jones, TR 246:2-10). In 1996, Building T-21 was used as a warehouse with larger items stored on the first floor, and smaller items stored in racks and bins on the second floor. (McKinley, TR 36: 18-19; Jefferson, TR 324: 8-15). Forklifts were used in Building T-21. (Jones, TR 236:7-10; McKinley, TR 38:1-2). Exhaust and floor fans were continuously used. (McKinley, TR 37:7-9; Jefferson, TR 330:19-25). Over the course of the past several years, approximately 60 bargaining unit employees have worked in Building T-21. (McKinley, TR 38:21-24).

In 1990, asbestos was found in Building T-21. (Jones, TR 246:3-10, McKinley, TR 40:2-10). The Union filed a grievance, invoked arbitration, and on August 8, 1990, an arbitrator issued a decision and award, directing the New Cumberland Army Depot to pay EDP to employees due to exposure to asbestos. (R Ex 1). In 1992, the parties signed a settlement agreement which required a lump sum payment to be paid to wage grade employees who worked at the New Cumberland site between April 7, 1988 and November 7, 1992. The agreement stated that "there will be no liability for environmental differential pay based upon the instant arbitrator's award subsequent to 7 November 1992." (R Ex 1). In accordance with the 1992 settlement agreement, the Activity undertook an abatement process, to clean and remove the asbestos. (R Ex 1; Jones, TR 246:3-10; McKinley, TR 40:2-10). The settlement agreement contained a section detailing procedures to be followed if an employee notices a white powder substance suspected to contain asbestos. (R Ex 1). These procedures were not followed when Prachet expressed concerns regarding the presence of asbestos in Building T-21 in 1996. (Jones, TR 236:19-25; 250:2-11).3/

Four years after the settlement and after the abatement process, Building T-21 was deteriorating. (Jones, TR 219: 20-25; Jefferson, TR 325:4-7). Therefore, in 1996, the Respondent began "rewarehousing", moving material from Building T-21 to another warehouse. (Jefferson, TR 325:7-8; McKinley, TR 123:16-18). Between four and six bargaining unit employees were working in the building at this time. (McKinley, TR 100:12-14; Jefferson, TR 323:11-21). After taking an asbestos awareness class, Prachet became concerned that asbestos was once again a problem in Building T-21 and that he and the other employees in Building T-21 had been exposed. (Dalwind, TR 147:5-8; McKinley, TR 41:3-22; Jones, TR 194:11-15). Prachet contacted Respondent's Safety Office on three occasions but was dissatisfied with their response. (McKinley, TR 41:8-10). Subsequently, Prachet contacted fifth Vice President of the Union, Rick Dalwind, and discussed his concerns regarding the presence of asbestos in Building T-21. (McKinley, TR 41:10-12; Dalwind, TR 146:17-21, 147:5-8). After Dalwind walked through the building, McKinley requested that Dalwind contact the Safety Office. (McKinley, TR 42:10-13; Dalwind, TR 147:22-

3 At the hearing, Counsel for the Respondent suggested that the 1992 Settlement Agreement somehow addressed what should happen if employees suspected asbestos in any of Respondent's buildings at any time. This settlement was four years prior to the 1996 events at issue and Respondent's own witness admitted that the process was not followed after Prachet alerted the security office to the suspected presence of asbestos. (Jones, TR 236:19 to 237:2). The witness also noted that the procedures set forth in the Settlement Agreement would not be the appropriate procedures to follow in the case at hand. (Jones, TR 250:2-11).

25). On July 11, 1996, representatives from the Union and from the Respondent's Safety Office toured Building T-21 to conduct a visual inspection of the area of concern. (Jones, TR 195:5-6; McKinley, TR 42:16-17).

A. The Respondent takes asbestos tests.

On July 12, 1996, Clarence Jones, Environmental Inspector Specialist for Respondent, collected bulk samples from Building T-21 to be tested. (Jones, TR 192:10, 201:8-12). Bulk sample testing is when samples of debris and dust are collected and analyzed to determine the presence of asbestos. (Silverman, TR 256:4-11). Dalwind was present during this collection of samples. (Dalwind, 149:7-8; Jones, TR 199:2-5). The Respondent sent samples to Analytical Laboratories, a private contractor, for analysis. (Jones, TR 201:22-25; McKinley, TR 44:17-18). Analytical Laboratories concluded that two of the five samples collected contained asbestos. (Jt. Ex 2; Jones, TR 202:15-20). Respondent considered this material to be non-friable, meaning that it cannot be pulverized by pressure of a finger and is unlikely to become airborne. (Jones, TR 235:21-24; 203:18-23; 204:5-7). If something with more force, such as a forklift, hit non-friable matter, it could become friable and therefore much more likely to become airborne. (Jones, TR 235:25 to 236:2). Asbestos becomes an occupational health hazard when it is airborne. (Jones, TR 204:4-7). Further, non-friable debris, as opposed to large, intact non-friable matter, is susceptible to becoming airborne, and could be treated the same way friable debris is treated. (Silverman, TR 286:21-25).

The Respondent subsequently took a personal breathing zone test in Building T-21 on July 17, 1996. (Jones, TR 206:2-5; Jt. Ex 3). A personal breathing zone test (PBZ test) uses a measuring device placed on an employee's collar or lapel to monitor the air to detect the presence of fibers. (McKinley, TR 43:10-18; Stinchley, TR 271:16-18; Stinchley, TR 299:16-23). Union Vice President Dalwind was "in and out" while the samples were being taken in July 1996. (Jones, TR 206:20-21). He was present for a total of approximately 10-to-15 minutes. (Dalwind, TR 150:16-18). Due to Dalwind's lack of expertise in this area, he conceded he would not know whether the test was properly set up. (Dalwind, TR 150:19-21). The employees in Building T-21 were in the process of knocking down bins upstairs during the day long test. (Jones, TR 207:16-18; 208:2-6; 209:1-3). The Union had no say, or input, in how or under what conditions the PBZ test was conducted. (Dalwind, TR 151:5-7; McKinley, TR 46:25-47:2). Guardian Laboratories, a private contractor, conducted the analysis of the PBZ test collected by the Respondent. (McKinley, TR 48:7-10; Jt. Ex 3).4/ The results showed that the presence of fibers, possibly asbestos, was within the permissible limits under the OSHA standard. (Jt. Ex 3; McKinley, TR 48:20-23).

B. The Union conducts its own bulk sample test.

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4 One of the Union's concerns was that the Respondent collected the samples, rather than the contractor. Private laboratories were capable of collecting the samples and, in fact, Guardian Laboratories does not guarantee the results when samples are collected by others. (Jones, TR 228:7 to 229:5; Jt. Ex 3).

Around the same time that the Respondent was conducting the above- mentioned bulk sample and PBZ test, Dalwind asked Prachet to collect bulk samples of the debris suspected of containing asbestos. (Dalwind, TR 147:22-25; 148:5-13; McKinley, TR 50:3-19). Although not certified in collecting hazardous material, Prachet did collect five samples from Building T-21. (Dalwind, TR 148:9; McKinley, TR 50:20-23). These samples were analyzed by Johnston Laboratories, a laboratory in New Cumberland, Pennsylvania that Dalwind found through the Yellow Pages. (Dalwind, TR 148:14-21). On July 26, 1996, Johnston Laboratories reported that three of the five samples collected from Building T-21 tested positive for the presence of asbestos. (Dalwind, TR 149:2; McKinley, TR 52:6-9; Jt. Ex 4). Management was never told about these samples or tests because the tests were unofficial and the samples collected by non-certified personnel. (Dalwind, TR 148:22-24; McKinley, TR 51:17-19; 53:2-3). The Union President determined that official tests of Building T-21, taken by independent experts, were necessary. (McKinley, TR 53:2-16).

C. The Union requests permission to have experts conduct tests.

Because neither McKinley nor Dalwind was certified in the collection process, McKinley wanted to hire an expert to conduct tests to determine whether the results they had received to this point were reliable. (McKinley, TR 53:2-6, 56:17-21). In part, McKinley was concerned about the warranty on the results of the Respondent's PBZ test which stated that Sentinel Laboratories, the laboratory that performed the analysis, assumed no liability for the results based upon inaccurate data supplied by the client. (Jt. Ex 3; McKinley, TR 98:3-9). In this case, Sentinel Laboratories' client was the Respondent. Further, McKinley had concerns about the safety and the well-being of the employees in Building T-21 and wanted to do anything he could do to find out whether the employees had been exposed to asbestos. (McKinley, TR 49:12-16). On August 5, 1996, McKinley wrote to John Thomas, Safety and Occupational Health Manager. He requested clearance to conduct asbestos testing, at AFGE's own expense, by a laboratory of AFGE's choice. (Jt. Ex 5; McKinley, TR 49:19-23). The employees were concerned for their health and McKinley wanted a second opinion in order to be able to confidently tell the employees that they were not exposed to asbestos and so that the employees could willingly accept that finding. (McKinley, TR 53:9-16, 55:2-5, 56:22-57:9). McKinley stated in this request, "it is the unions [sic] intention to take every precaution to insure that a safe workplace is a reality." (Jt. Ex 5). This request to conduct the test was provided to Col. Donaldson, the management official who is responsible for, and has control over, the buildings on the installation, including Building T-21. (Donaldson, TR 334:1-4; 332:11-15; 333:10-11). Larry Greninger, at that time the Director of Engineering and Equipment Management, met with McKinley. During their discussion, McKinley expressed his concerns about the possible presence of asbestos and the need for the Union to have independent tests taken. (McKinley, TR 57:14-22; 58:17-24). It is undisputed that McKinley told Greninger that in order to fully represent the employees and assure

the employees they were not exposed to any kind of hazardous condition, it was imperative for the Union to obtain independent testing results. (McKinley, TR 59:2-9). Greninger agreed that the Union could have an expert take independent tests. (McKinley, TR 59:12-15). To that end, Dalwind contacted Johnston's Laboratory to get a statement of work--a proposal of what type of tests should be conducted and the cost. (McKinley, TR 59:18-21). Dalwind inquired about the use of "aggressive" air sampling which is a method of testing for asbestos. (Dalwind, TR 174:16-21).

On August 13, 1996, Col. Donaldson sent a letter to McKinley detailing the information that needed to be provided before the Union would be granted permission to contract out for sampling in Building T-21. (Jt. Ex 6). Included was the requirement that the Union provide the name and address of the laboratory and a copy of the board certification of the Industrial Hygienist who would conduct the sampling along with the scope of work conforming to the requirements of 29 C.F.R. § 1926.1101. (Jt. Ex 6; McKinley, TR 60:7-11).5/

D. The Union was denied the right to have experts conduct aggressive air tests and bulk samples.

As requested, a scope of work and board certifications were provided to the Union by Ed Kellogg, President of Johnston Laboratories. (Jt. Ex 7; McKinley, TR 60:20-22). Johnston Laboratories proposed bulk sample tests as well as "aggressive" asbestos sampling. (Jt. Ex 7). "Aggressive" air sampling involves setting up air samplers to draw air through a cassette to measure fibers in the air, while fans are on to move the air over the ceiling, wall and floor areas. (Jt. Ex 7; Silverman, TR 256:18-24). Dalwind furnished Johnston's scope of work and the board certification to Greninger. (McKinley, TR 61:20-21; Dalwind, TR 154:9-12; Donaldson, TR 334:24 to 335:3). Again, Dalwind relayed to Greninger his reasons why the Union wanted to conduct these tests. (Dalwind, TR 157:15-18). On September 3, 1996, Greninger approved the scope of work as proposed by Johnston Laboratories. Greninger, however, reversed his decision to allow the proposed aggressive air samplings. (Dalwind, TR 157:4-14, 154:22 to 155:2). Respondent concluded that Johnston Laboratories' proposal was not acceptable because the aggressive air sampling procedure was not in accordance with the OSHA regulations for determining asbestos exposure. (Jones, TR 213:14-18; Donaldson, TR 350:21-22, 335:9-17).6/ Further, the Respondent believed that bulk samples were not necessary because the Agency had just collected bulk samples in July and because there had been a survey in 1989, seven years earlier, during which bulk samples were collected. (Jones, TR 214:18-24; Donaldson, TR 352:1-4).

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5 Respondent's witness Jones testified that he had cited 29 C.F.R. § 1926.1101 in the August 13, 1996 letter. He admits that this cite was wrong and in later correspondence the Respondent referenced the correct cite, 29 C.F.R. § 1910.1001.

6 Despite the Respondent's expressed concerns about the procedures proposed by Johnston Laboratories, Respondent recently contracted with that same Laboratory for environmental testing. (Jones, TR 229:18-25).

On September 6, 1996, Greninger signed a letter for Col. Donaldson denying the Union's request to conduct aggressive asbestos sampling in Building T-21. (Jt. Ex 8; Donaldson, TR 335:18-22). The letter stated that the scope of work was not in accordance with 29 C.F.R. § 1910.1001, and that a personal breathing zone sampling was **the** acceptable method to be utilized in Building T-21. (Jt. Ex 8). The proposal was not the standard practice of the Respondent and thus was denied. (Jones, TR 242:5-7). While the letter stated that the scope of work was unacceptable, Col. Donaldson testified there were other concerns that crossed his mind when he denied the test. (Donaldson, TR 350:12-13). Col. Donaldson testified that in denying the Union's request, he recalled the large five or six million dollar pay out in asbestos environmental differential pay in 1991, and "the Agency was a little gun shy from getting involved and being careful what they were doing in the testing work." (Donaldson, TR 337:8-13).

There was varying testimony at the hearing about what tests would be appropriate to determine whether the employees in Building T-21 were exposed to asbestos. Mark Silverman is an assistant professor at Hunter College, School of Health Sciences and an adjunct Assistant Professor at the Mt. Sinai School of Medicine in New York. Silverman had previously been employed as a compliance officer for OSHA, and has been a certified Industrial Hygienist with experience conducting air sampling since 1980. (Silverman, TR 252:13-17, 253:1-2, 253:9-14; 254:7-11). Silverman was deemed an expert in the field of asbestos. (TR 263:15-20). In Silverman's professional opinion, the PBZ test noted in the OSHA regulations was not the only available test; indeed, in his professional opinion, the PBZ tests are often misleading, and he recommended the use of the aggressive air sampling as the best way to test for asbestos in this situation. (Silverman, TR 289:25 to 290:23, 270:15-25). Clarence Jones, who is <u>not</u> a certified Industrial Hygienist and is not certified to take PBZ samples or aggressive air samples, testified on behalf of the Respondent that in his professional opinion, he believed the OSHA regulation was the only appropriate source to consult. (Jones, TR 245:3-5, 240:9-11, 192:9-12, 241:4-9). David Stinchley, a certified Industrial Hygienist with the Respondent since 1993, also testified he would not recommend aggressive air testing. (Stinchley, TR 292:10-13, 293:6-8, 307:16-22). He would recommend the PBZ test required by OSHA, although he admitted the Respondent has sometimes looked beyond regulations and used professional opinion regarding testing methodology. He also testified that it would not surprise him if other certified Industrial Hygienists disagreed with his opinion about use of the PBZ test. (Stinchley, TR 308:1-5, 300:19-23, 301:3-5).

E. The Union again requests to have Building T-21 tested for asbestos and the requests are denied.

Subsequent to Col. Donaldson's denial of the Union's right to have tests conducted, McKinley contacted General Strident, the Region Commander at Defense Distribution Region East. (McKinley, TR 68:8-19). In a meeting on September 10, 1996, McKinley appealed to the General to intervene on the Union's behalf and allow the Union to obtain its own tests. (Jt. Ex 9; McKinley, TR 69:15-21). McKinley reiterated the Union's need for the test.

(McKinley, TR 70:1-9). The General noted that it seemed like a reasonable request but stated that it was Col. Donaldson's decision whether to permit the test. He referred the matter back to Col. Donaldson. (McKinley, TR 69:22-25).

Thereafter, Col. Donaldson responded to the Union by letter dated October 4, 1996. (Jt. Ex 9). In the letter, Col. Donaldson noted that it was management's responsibility to ensure a safe work environment and that the Union was not permitted to gather and test for asbestos. (Jt. Ex 9).

F. The Respondent agrees to let the Union test Building T-21 for asbestos.

After the Respondent denied the Union the right to have its experts conduct the aggressive air sampling, the Union requested that Johnston Laboratories provide a revised scope of work. (McKinley, TR 66:22-25; GC Ex 3). The Union was attempting to comply with the testing restrictions outlined by the Respondent. (McKinley, TR 67:3-11; 74:7-16). McKinley discussed these revised procedures with Col. Donaldson on November 7, 1996. (McKinley, TR 67:18-23; GC Ex 4). At this meeting, Col. Donaldson verbally agreed that the Union could conduct the PBZ test if it complied with the OSHA regulations. (Donaldson, TR 343:15-19; McKinley, TR 78:16-23). This test was not disruptive to the Respondent's operations. (Stinchley, TR 309:19-25). McKinley agreed to the tests under the conditions outlined by the Respondent. (McKinley, TR 74:11-24, 121:16-19, GC Ex 4).7/ The Union accepted the restrictions because of the necessity of the tests and because the Union had been seeking tests since August 1996 and there was no indication that there was any other way to have an independent laboratory test T-21 for asbestos. (McKinley, TR 74:17-24).

G. The Respondent reverses its decision and denies the Union the right to conduct tests.

Six days later, on November 13, 1996, Col. Donaldson reversed his decision to allow the Union to conduct PBZ tests in Building T-21. (Jt. Ex 10; McKinley, TR 79:15-18). In a letter to the Union, Col. Donaldson attempted to justify his reversal. In the first paragraph of the letter, he determined that no additional tests were needed because PBZ tests were already taken by the Respondent in July 1996, and the conditions of the building had not changed since that time. (Jt. Ex 10). Both of these facts were known to Col. Donaldson when he approved the tests for Building T-21 six days earlier. (Donaldson, TR 356:17-23).8/ In the second paragraph, he noted the building would soon be out of use so "if the purpose of the test was to preclude any possible future health conditions of employees, it is not necessary as the building is no longer going to be used for warehousing operations." (Jt. Ex 10; Donaldson,

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7 As will be argued later in the brief, the General Counsel contends that the Union should not be limited to tests as restricted by Col. Donaldson in November 1996. Rather, the Union should be entitled to conduct any tests, as long as the tests are not disruptive to the Respondent's operations.

8 Later in the brief, we argue that because these reasons were known to Col. Donaldson when he made the decision to allow the Union to take tests, these same reasons cannot be valid reasons for his decision to deny the Union the right to take tests.

TR 355:11-15). McKinley had told the Respondent on more than one occasion that the Union was concerned about past exposure. (McKinley, TR 80:4-13). This issue was not addressed in Col. Donaldson's letter. (Jt. Ex 10).

H. The Union continues to request permission to conduct tests.

On November 14, 1996, the Union filed a grievance regarding the Respondent's violation of Articles 12 and 15 of the collective bargaining agreement. (Jt. Ex 11). In support of the grievance, the Union noted that the Activity's failure to allow the Union to take tests of its own created a presumption that the building was unsafe. (Jt. Ex 11; McKinley, TR 82:16-21). The remedy sought by the Union was a full and proper clean up of Building T-21 and prospective and retroactive environment differential pay for all bargaining unit employees assigned to Building T-21 for the past six years.

After the grievance was filed, the Union received documentation from the Respondent regarding the destruction of Building T-21. (GC Ex 5). There were no employees in the building at the time, nevertheless, the Union contacted OSHA. (McKinley, TR 85:21-24; Jefferson, TR 326:9-10). OSHA visited Building T-21 in December 1996 but did not take any air monitoring tests. (McKinley, TR 86:11-13; 87:17-21; Dalwind, TR 165:5-7). In the 55,000 square foot building, the OSHA representative took only one bulk sample. (Dalwind, TR 164:3-4). The Union requested that other samples be taken, but the OSHA representative declined to take them. (Dalwind, TR 164:7-13). The Union, unsatisfied with OSHA's sampling, sent a letter to Col. Donaldson on December 9, 1996 reiterating that the visit by OSHA did not satisfy or even respond to the Union's continuing request to have its own expert conduct tests for asbestos in Building T-21. (Jt. Ex 12; McKinley, TR 89:20-24).

IV. ARGUMENT

A. The charge is not barred by Section 7116(d) of the Statute.

The Respondent contends that the complaint is precluded under section 7116(d) of the Statute because the Union elected to grieve the Respondent's refusal to allow testing prior to the filing of a ULP charge with the Authority. The Respondent's contention has no merit. On its face, the grievance concerns the Respondent's failure to provide a healthy and safe work environment, not the Respondent's failure to allow the Union to conduct asbestos tests. The failure to allow the Union to conduct its own test was only mentioned in the grievance to argue for a legal presumption that the building has been unsafe. As such, the grievance and the ULP charge involve different issues and different legal theories. Accordingly, under well-established Authority precedent the complaint in this case is not precluded by section 7116(d) of the Statute. See Olam Southwest Air Defense Sector (TAC) Point Arena Air Force Station, Point Arena, California, 51 FLRA 797, 801-05 (1996); U.S. Department of the Army, Army Finance and Accounting Center, Indianapolis, Indiana and American Federation of Government Employees, Local 1411, 38 FLRA

1345 (1991), petition for review denied sub nom. American Federation of Government Employees, Local 1411 v. FLRA, 960 F.2d 176 (D.C. Cir. 1992).

B. The Respondent violated the Statute by refusing to allow the Union access to conduct tests for asbestos.

1. Background.

The facts in this case are not in dispute. On numerous occasions the Union requested permission from the Respondent to conduct tests at its own expense to determine if bargaining unit employees working in Building T-21 were exposed to asbestos. As the Union explained to the Respondent, the information was needed by the Union to determine if bargaining unit employees were entitled to EDP under the parties' contract. While the General Counsel recognizes that the Authority, to date, has not had the opportunity to address this issue, it is well settled in the private sector under the National Labor Relations Act (NLRA) that labor organizations have the right to take tests under circumstances factually indistinguishable from the facts in this case. Succinctly stated, we believe the Authority should adopt the approach taken by the National Labor Relations Board (NLRB or Board) and find the Respondent's conduct in this case to be unlawful.

The complaint in this proceeding alleges three separate and distinct violations of the Statute. Initially, the General Counsel has alleged that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute because the Respondent's conduct was inconsistent with section 7114(b)(4) of the Statute. That section of the Statute represents Congress' attempt to codify for unions in the federal sector the well- established right of a labor organization in the private sector to information that is needed to fulfill its role as an exclusive representative. It is under that framework that the NLRB has analyzed the right of a labor organization to take tests to ensure the health and safety of bargaining unit employees. The General Counsel recognizes, however, that distinctions exist between a union's right to information in the federal sector and the private sector. Respondent may argue that "technically" section 7114(b)(4) of the Statute may not apply because it refers to a union's right to "data" and there is no specific reference to a union's right to take tests. As shown below, the General Counsel contends the information that the Union would obtain as a result of its request to conduct asbestos testing is tantamount to a data request under section 7114(b)(4). However, recognizing this possible distinction, we have also alleged that the Respondent violated section 7116(a)(1) and (5) without regard to the specific requirements of section 7114(b)(4) since a union cannot reasonably be expected to fulfill its role as an exclusive representative and full partner in the collective bargaining process without access to the same type of information available to an agency. As we will show, the applicable analytical framework remains essentially the same. The only difference is that the strictures presented by section 7114(b)(4) of the Statute are no longer present. Finally, the General Counsel has alleged that the Respondent's conduct constituted an independent violation of section 7116(a)(1) of the Statute because such

conduct interfered with a union's basic right under section 7102 of the Statute to file and process grievances on behalf of bargaining unit employees. Our analysis begins by examining the analytical framework that exists under the NLRA.

2. The law under the National Labor Relations Act.

In Winona Industries, Inc., 257 NLRB 695 (1981) (Winona), the Board adopted an ALJ's analysis and decision in which the ALJ found that an employer violated section 8(a)(5) and (1) of the NLRA by denying the union access to its premises to conduct an independent health and safety inspection. The Board treated the union's request for access as the equivalent of requesting information which was relevant to the union's discharge of its bargaining obligation. Notwithstanding that the reports of OSHA inspectors may have been available, the ALJ noted that the union's industrial hygienist followed procedures which would reveal data supplementing and expanding that obtained by the OSHA investigators. Moreover, the ALJ noted that OSHA regulations establish minimum requirements and were not intended to preclude the matter of health and safety from collective bargaining. Thus, by denying the requested in-plant inspection by an industrial hygienist to investigate health and safety conditions, which was relevant to the union's discharge of its bargaining obligation, the Board held that the employer failed to bargain in good faith. Winona, 257 NLRB at 698.

In Holyoke Water Power Company, 273 NLRB 1369 (Holyoke), enforced sub nom. NLRB v. Holyoke Water Power Company, 778 F.2d 49 (1st Cir. 1985), the Board reexamined the approach taken in Winona and modified it by applying an access-balancing test that was first formulated by the Supreme Court in NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) (Babcock & Wilcox) to situations where a union requests access to an employer's premises to take tests to ensure the health and safety of bargaining unit employees. Holyoke, 273 NLRB at 1370. Thus, to obtain access for testing under Holyoke, it is not enough to show that a request for access is tantamount to a request for information and that the information sought by way of access is relevant to the Union's performance of its representational duties. Rather, the right of the employees to be responsibly represented by a union of their choice must be balanced against "the right of an employer to control its property and ensure that its operations are not interfered with." Id.

Under Board law, access to an employer's premises to obtain the relevant information will be granted where it is found that responsible representation of employees can only be achieved by having such access. In such a case, an employer's property right gives way to the employees' rights. However, the access ordered must be limited to reasonable periods so as not to disrupt an employer's operations. If there are alternatives whereby a union can effectively discharge its duties through alternative means other than by the access requested, the employer's property rights will be found to predominate and the union will be denied access. Id.

In Holyoke, the Board held that the employer's property rights were outweighed by the employees' right to responsible representation and that the employer must grant the union's industrial hygienist reasonable access to its fan room to conduct noise level studies. Id. The Board recognized that health and safety conditions are terms and conditions of employment about which the employer must bargain on request. In addition, the Board noted that there would be no interference with the employer's production because the fan room was not a production area and no employees worked there full time. Id.

Although the United States Court of Appeals for the First Circuit enforced the Board's decision, it did not specifically endorse the Board's new legal framework. The court questioned the Board's adoption of the Babcock & Wilcox balancing test on several grounds. First, the court noted that the balancing test was developed "to handle requests for access by non-employee union organizers who are likely to disrupt the employer's operations." Holyoke, 778 F.2d at 52.9/ Where a union seeks access only to study a matter relating to the health and safety of employees, the potential for disruption is not as great. Id. Second, the court stated that the rule in Babcock & Wilcox concerning an employer's duty to refrain from interfering with protected employee activities arose under section 8(a)(1), not under section 8(a)(5) concerning the employer's affirmative duty to bargain. The court observed that less weight may be accorded to an employer's property rights when it is subject to a duty to bargain. Id. Nevertheless, because the court agreed with the Board that the same result is obtained under either analytical framework, it did not decide whether the Babcock & Wilcox balancing formula applies to requests for access by unions that already represent the employees. Id. at 53. The instant case concerns a bargaining issue only and does not involve any organizing efforts.

In ASARCO, Incorporated, Tennessee Mines Division, 276 NLRB 1367 (1985) (ASARCO), aff'd in relevant part, 805 F.2d 194 (6th Cir. 1986), the Board held that the access sought by the union for the industrial hygienist to investigate a fatal accident to an employee was clearly relevant to the union's performance of its representational duties and also outweighed the employer's property rights. Id. at 1369. Noting that the local representatives were not trained in accident investigation techniques, the Board rejected the employer's argument that because the local representatives were present at the onsite investigation they were able to completely fulfill the union representatives' obligations. Id. at 1370.

On appeal, the United States Court of Appeals for the Sixth Circuit, like the First Circuit, questioned the applicability of Babcock & Wilcox to a request for access made under the circumstances of this case, i.e., not by non-employee union organizers. ASARCO, 805 F.2d at 197-98. Nevertheless, without deciding which test--Holyoke

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9 The Authority has recently applied the Babcock & Wilcox legal framework in Social Security Administration, 52 FLRA 1159, 1184-89 (1997) where non-employee organizers sought access to public area in the building where SSA was located.

or Winona--applies, the court nevertheless followed the lead of the First Circuit in Holyoke and upheld the Board's order with respect to the access question because the outcome was the same under either test. Id.

In another case, Hercules Incorporated, 281 NLRB 961 (1986), (Hercules), the Board applied the Holyoke legal framework and held that the employer must permit the union's representatives to enter its facility to, among other things, conduct health and safety inspections. The Board modified the recommended order and notice in accordance with the Board's accommodation policy set forth in Holyoke so that access will be limited to reasonable periods and at reasonable times, i.e., times least likely to disrupt the employer's operations.

The NLRB continues to apply the Holyoke test and routinely finds violations of the NLRA when an employer refuses to allow a labor organization to take tests to ensure the health and safety of bargaining unit employees. See, e.g., American National Can Company, Foster-Forbes Glass Division, 293 NLRB 901, 905 (1989), enf'd sub nom. NLRB v. American National Can Company, Foster-Forbes Glass Division, 924 F.2d 518, 524 (4th Cir. 1991); C.C.E., Inc., 318 NLRB 977 (1995). Compare New Surfside Nursing Home, 322 NLRB 531 n.2 (1996) (Board applied Holyoke standard as controlling precedent but specifically noted that no party challenged its applicability). Indeed, the Board has found in every case in which a union sought access for an industrial hygienist to perform a safety and health inspection, that the information sought was relevant to the union's performance of its representational duties and that the employer failed to show how granting access would infringe on its property rights.

The Authority looks to private sector law for guidance in the absence of specific precedent under the Statute. See, e.g., U.S. Geological Survey and Caribbean District Office, San Juan, Puerto Rico, 50 FLRA 548, 550 (1995); U.S. Department of Labor, Office of the Solicitor, Arlington Field Office, 37 FLRA 1371, 1381 (1990). The law is well established in the private sector regarding the right of unions to take independent safety and health tests and the Board's analysis should be applied to the federal sector.

3. The Respondent violated section 7116(a)(1), (5) and (8) of the Statute by refusing to allow the Union to take tests at its own expense to determine asbestos exposure in Building T-21 thereby preventing the Union from obtaining data pursuant to section 7114(b)(4) of the Statute.

Among other things, under section 7114(b) of the Statute, the duty to bargain in good faith includes the obligation **--**

> **(**4) in the case of an agency, to furnish to the exclusive representative involved or its authorized representative, upon request and, to the extent not prohibited by law, data --
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> (C) which does not constitute guidance, advice counsel or training provided for management officials or supervisors relating to collective bargaining . . . .

With the law in the private sector providing guidance, we contend that the Respondent's conduct was inconsistent with its obligations under section 7114(b)(4) of the Statute and therefore violative of section 7116(a)(1), (5) and (8) of the Statute.

a. The request to take tests was a request for "data" within the meaning of section 7114(b)(4) of the Statute.

The General Counsel contends that the "information" the Union would obtain as a result of its request to conduct asbestos testing is tantamount to requesting "data" under section 7114(b)(4). The Authority has not definitively addressed whether something that is not a tangible document in existence at the time of the request is "data." However, "datum" (the singular form of "data") is defined as "something that is given either from being experientially encountered or from being admitted or assumed for specific purposes . . . detailed information of any kind." Websters 3rd New International Dictionary 577 (1986) (Websters); see also Black's Law Dictionary 395 (6th ed. 1990) (defining data as "[o]rganized information generally used as the basis for an adjudication or decision"). Moreover, "information" is defined as "knowledge communicated by others or obtained from investigation, study, or instruction." Websters, at 1160.10/ Based upon the latter definitions, the knowledge or information that the Union would obtain as a result of asbestos testing is "data" within the meaning of section 7114(b)(4).

The Union's request met all the statutory requirements of section 7114(b)(4). Obviously, at the time of the request, Building T-21 was normally maintained by the Respondent in the regular course of business. Moreover, as discussed further below, the access to the building was reasonably available and necessary for the Union to fulfill its role as the exclusive representative of the employees.

b. The Union articulated a particularized need to the Respondent when it requested permission to take tests to determine asbestos exposure.

The facts of this case establish that the Union has met the particularized need standard as required under Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri, 50 FLRA 661 (1995) (IRS, Kansas City). The Union has articulated, with specificity, why it needs the information, including the uses to which the information will be put and the connection between those uses and the Union's representational responsibilities under the Statute. Id. at 669.

Specifically, the Union requested access to the facility to conduct an independent investigation of asbestos levels in the building. The Respondent understood why the Union wanted to take the tests--it wanted to verify the

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10 Furthermore, the Authority, as a matter of course, uses the word "information" and "data" interchangeably. See, e.g., U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois, 52 FLRA 1195, 1199-1209 (1997); United States Department of Defense, Departments of the Army and Air Force, Headquarters, Army and Air Force, Exchange Service, Dallas, Texas, 19 FLRA 652, 667 (1985) (Authority adopted ALJ decision in which the ALJ found that "information" is one definition of "data").

results of asbestos testing conducted by the Respondent's representative. The Union stated its desire "to insure that a safe workplace is a reality." McKinley repeatedly expressed to Respondent his reasons why the Union needed to conduct its own independent tests. Written communications between the Activity and the Union establish that the Activity understood the Union's concern that unit employees who worked in Building T-21 were potentially at risk for exposure to asbestos. Moreover, Article 15 of the party's collective bargaining agreement contains broad provisions concerning Safety and Health. As such, "matters affecting workplace safety are clearly grievable." Department of the Air Force, Scott Air Force Base, Illinois, v. FLRA, 104 F.3d 1396, 1400 (D.C. Cir. 1997). Thus, the Union met the particularized-need standard because it "has a grievable complaint covering the information." Id. (quoting NLRB v. FLRA, 952 F.2d 523, 532-33 (D.C. Cir. 1992)).

To establish particularized need, a union must respond to an agency's request for clarification and provide additional explanation as to why it needed the requested information. Department of the Air Force, Washington, D.C., 52 FLRA 1000, 1007-08 (1997). The Activity's letter denying the request for access to Building T-21 to conduct tests stated: "If the purpose of the test was to preclude any possible future health conditions of employees, it is not necessary as the building is no longer going to be used for warehousing operations."11/ Although testimony was presented that the Union was not solely concerned with future health concerns for the employees, and that the Activity was aware of that, this may fairly be construed as a request for clarification of the request for information, i.e., unless the Activity hears otherwise from the Union, asbestos testing is not necessary because the building would no longer be used. The Union responded to the Activity's assertion in a grievance filed the very next day stating, in relevant part, that it needed the information to determine if unit employees were entitled to EDP for the past six years. The Union therefore clarified its request and the Union's request to conduct asbestos testing was not rendered moot because the building would no longer be used for warehousing.

Obviously, the results of the Union's test would be necessary for the Union to determine if it should continue to pursue the matter. If the tests corroborated the results of the Activity-sponsored tests, the Union may have decided not to pursue the matter. If the results differed from the Activity-sponsored test, that information would be critical to the Union's efforts to represent the employees. Without the Activity's permission to take its own tests, however, the Union's ability to represent unit employees in an arbitration proceeding is compromised.

The circumstances of this case establish that the Activity "should have been able to connect the dots between the points made by the Union." Department of Health and Human Services, Social Security Administration,

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11 Col. Donaldson provided other reasons why the Respondent was denying the tests, namely that PBZ tests were conducted in July and "because conditions in the building have not changed" additional tests were not necessary. However, Col. Donaldson was well aware of those "reasons" on November 7 when he granted the Union the right to take its tests and therefore they are not the true basis for the denial.

New York Region, New York, New York, 52 FLRA 1153, 1157 (1997) (Member Wasserman dissenting). That is, the Union has disclosed: (1) its representation of employees in a grievance who are potentially entitled EDP back pay, and (2) its need for additional asbestos testing results to determine whether to invoke the arbitral process.

The Activity argued that the Union's test were not necessary for various reasons. One argument presented was that the Union's test was not necessary because the "aggressive" tests did not comply with OSHA regulations and that the parties had agreed to abide by OSHA standards in Article 15 of the collective bargaining agreement. However, the Union was seeking environmental differential pay for the employees possibly exposed to asbestos in Building T-21, as set forth in Article 12, section 6. That section states that EDP "shall be paid to any employee who is exposed to a hazard, physical hardship or working conditions as authorized by FPM Supplement 532-1, Subchapter S8 and Appendix J." Effective December 31, 1994, the FPM was abolished. The standards for EDP were codified at 5 C.F.R. § 532.511, Appendix A. American Federation of Government Employees, Local 1482 and U.S. Department of the Navy, Marine Corps Logistics Base, Barstow, California, 50 FLRA 572, 573 n* (1995). As codified, EDP is authorized for wage grade employees, "working in an area where airborne concentrations of asbestos fibers **may** expose employees to **potential** illness or injury and protective devices or safety measures have not practically eliminated the potential for such personal illness or injury." 5 C.F.R. § 532.511, Appendix A (Emphasis added). It is the role of an arbitrator to determine whether the employees are entitled to EDP and whether the OSHA standard is the correct standard to measure asbestos exposure. The Authority has upheld arbitrators who have found that **any** level of exposure constitutes an appropriate determination of quantitative levels for purposes of entitlement to EDP. U.S. Department of the Army, Red River Army Depot, Texarkana, Texas, 53 FLRA 46 (1997). Therefore, it was not proper for the Agency to deny the "aggressive" test because it did not fall within the parameters of OSHA. The Union must be allowed to take tests of its own choice; the arbitrator will determine whether the result is a valid indicator of whether the wage grade employees in Building T-21 are entitled to EDP.

The Respondent's claim that the Union does not need to conduct its own tests because a Union representative was present when the Respondent's representative conducted asbestos testing is both self-serving and not persuasive. A union representative who does not have specialized knowledge in asbestos testing cannot fulfill his or her representational duties. See ASARCO, 276 NLRB at 1370. The evidence demonstrates that neither McKinley nor Dalwind had any specialized knowledge in asbestos testing and would not even know whether the tests had been conducted properly.

Another argument offered by the Respondent, that the Union could obtain the required information through other sources, specifically through an information request, is similarly unpersuasive. The Union had access to the

tests conducted by the Agency. However, "at the very least, fairness dictates that the Union's own investigator is entitled to access to verify the accuracy and reliability of Respondent's investigation . . . . The proposition that a union must rely on an employer's good intentions concerning the vital question of the health and safety of represented employees seems patently fallacious." Hercules, 281 NLRB at 967 (quoting, in part, Oil, Chemical & Atomic Workers Local Union No. 6-75, AFL-CIO, v. N.L.R.B., 711 F.2d 348, 361 (D.C. Cir.1983)). The Board adopted, over exceptions, the ALJ's decision which stated:

> The potential for controlling the results by controlling the investigator simply is so obvious that we need not dwell on the claim that Respondent's air sampling reports are a viable alternative to the Union's independent inspection. It is elementary that here, as with the accident investigation, a verifiable, fair, accurate, and complete investigation necessitates the Union having access to conduct its own air monitoring. The need for such live study by the Union is compelling. Id. at 968.

Lastly, the Respondent contends that the Union's tests were not necessary because the 1992 settlement agreement, which provided for a lump sum payment to all employees who worked at the facility between April 7, 1988 and November 8, 1992, precluded further EDP payments. The Respondent's argument is untenable. The agreement had a limited life because it provided that "there will be no liability for environmental differential pay **based upon the instant arbitrator's award** subsequent to 7 November 1992." (Emphasis added). It can hardly be construed to preclude liability based on potential exposure in 1996, years after that arbitrator's award. Further, the settlement agreement calls for certain procedures to be followed if "a white powder substance which is suspected to contain asbestos" is noticed. The Respondent appears to argue that the 1992 settlement agreement dictates forevermore the appropriate actions to be taken if asbestos is suspected and that these procedures, if followed, would negate any attempts to be compensated for asbestos exposure. However, Respondent's own witness testified that the procedures dictated in the settlement agreement were not followed when the Respondent became aware of the Union's concerns about asbestos in 1996. Therefore, the General Counsel fails to see how the 1992 settlement agreement would bar the Union's attempts to compensate employees potentially exposed to asbestos. The Respondent is free to raise this argument with the arbitrator who will determine whether the employees were entitled to EDP. This, however, does not negate the right of the Union to access to conduct tests of its own choice in order to properly represent its employees.

c. The Activity has not asserted any countervailing anti-disclosure interests.

Once a union has met its burden of establishing a particularized need, the agency is responsible for asserting and establishing any countervailing anti-disclosure interests. IRS, Kansas City, 50 FLRA at 670. These would include any assertions that the Activity would make under the second prong of the private sector test. The Activity has not asserted any anti-disclosure or countervailing interests in this case and none is apparent to us. The Respondent never argued that either the "aggressive" tests or the PBZ test would be disruptive, and there is no

evidence that taking another air sampling test would be disruptive. Indeed, towards the end of the parties' discussions, when the tests were ultimately denied, there would have been no interruption of work because the building was no longer in use. In short, the record contains no evidence of any anti-disclosure interest unless we consider Col. Donaldson's concerns about the potential adverse economic impact the Respondent would suffer if the results test positive for airborne asbestos.

4. The Respondent engaged in bad faith bargaining in violation of section 7116(a)(1) and (5) of the Statute when it denied the Union access to Building T-21 to conduct tests of its choice.

The complaint also alleges that the Respondent's conduct constituted an independent violation of section 7116(a)(1) and (5) of the Statute. In that regard, the analytical framework followed by the NLRB when an employer refuses to allow a union to take tests to ensure the health and safety of bargaining unit employees is based on decisional precedent. It is not dependent upon a specific section of the NLRA that provides a union with the statutory right to information. Thus, the NLRB finds such conduct unlawful because it falls within the penumbra of "bad faith bargaining" within the meaning of section 8(a)(5) of the NLRA. The General Counsel contends that unions in the federal sector and the employees in bargaining units which they represent deserve no less. In fact, to reach any other conclusion would seriously undermine the ability of a union to represent bargaining unit employees in the collective bargaining process. It would also totally ignore the Authority's definition of collective bargaining:

> The collective bargaining process includes the negotiations conducted by the agency and the exclusive representative as well as the administration of the collective bargaining agreement. Contract administration by the agency and the exclusive representative encompasses those circumstances and situations where the parties are: . . . (3) processing grievances filed under the negotiated grievance procedure; . . . (5) engaged in other labor-management relations activities and interactions which affect the conditions of employment of bargaining unit employees or have an impact on the union's status as the exclusive representative of the employees.

NLRB, 38 FLRA 506, 519 (1990), remanded as to other matters sub nom. NLRB v. FLRA, 952 F.2d 506, 523 (D.C. Cir. 1992). In short, whether this case involves "data" within the meaning of section 7114(b)(4) or not, the Authority should follow the analytical framework of the Board and conclude that the Respondent's conduct was unlawful.

With the above in mind, the General Counsel has established that the Union requested permission to take tests in Building T-21. It has also been established that the Union had a particularized need to take tests in Building T-2, and it articulated that need to the Respondent on a number of occasions. Because there are no countervailing interests against allowing the Union to take tests in Building T-21, the facts establish that the Respondent has engaged in "bad faith bargaining" and thereby violated section 7116(a)(1) and (5) of the Statute without regard to the strictures needed to establish a violation of section 7114(b)(4) of the Statute.

5. The Respondent interfered with the Union's right to file and process grievances in violation of section 7116(a)(1) of the Statute when it denied the Union access to Building T-21 to conduct tests of its choice.

It is well settled that employees have a right under section 7102 of the Statute to file and process grievances. E.g., Department of Justice, Bureau of Prisons, Federal Correctional Institution, Butner, North Carolina, 18 FLRA 831, 833 (1985) (BOP). This right also encompasses the right to gather evidence in support of that grievance or to conduct an investigation to determine whether to file a grievance. See U.S. Department of Justice, Immigration and Naturalization Service, 37 FLRA 362, 372 (1990) (explaining Department of Defense Dependent Schools, Mediterranean Region, Naples American High School (Naples, Italy), 21 FLRA 849, 850 (1986) (discussing BOP)); see also BOP, 18 FLRA at 833. In BOP, the Authority found that an agency violated section 7116(a)(1) of the Statute by issuing a memorandum which in effect deterred an employee from conducting an independent investigation into his alleged misconduct. Similarly, the Respondent's intransigence here in refusing to allow the Union to independently test asbestos levels seriously compromised the Union's ability to effectively represent its employees. Indeed, the Respondent's conduct has prevented the Union from obtaining information it needs to determine whether it should continue to process a grievance of critical importance to bargaining unit employees and/or seriously disadvantaged the Union in its ability to present a case to an arbitrator regarding employees' entitlement to EDP. Plainly, under these circumstances, the Respondent has independently violated section 7116(a)(1) of the Statute since its conduct has interfered with the right of unit employees under section 7102 of the Statute to have their grievances processed by their exclusive representative in an effective and responsible manner.

V. REMEDY

As a remedy for the violations, Counsel for the General Counsel proposes that the Administrative Law Judge adopt the attached Proposed Order, including a Notice to All Employees. Because Building T-21 has been targeted for destruction, the General Counsel has recommended that the Administrative Law Judge order the Respondent to maintain the building until testing is completed. A remedy without such a provision would not effectuate the purposes and policies of the Statute.

VI. CONCLUSION

For all of the above reasons, the ALJ should find first that the ULP charge is not barred under section 7116(d) of the Statute. Further, the ALJ should find that in refusing to allow the Union to conduct tests for asbestos, the Respondent has committed a violation under section 7116(a)(1), (5) and (8) of the Statute, as well as independent violations under section 7116(a)(1), and (5) and section 7116(a)(1). To remedy the violations, the General Counsel requests that the ALJ issue the proposed order (attachment).

Respectfully submitted,

_____
Counsel for the General Counsel
Federal Labor Relations Authority
Boston Region

Dated: September 15, 1997

PROPOSED ORDER

The Administrative Law Judge is respectfully requested to Order the Defense Logistics Agency, Defense Distribution Region East, Administrative Support Center East, Defense Depot Susquehanna, New Cumberland, Pennsylvania to:

1. Cease and desist from:

(a) Failing and refusing to bargain in good faith with the American Federation of Government Employees, Local 2004, AFL-CIO, (the Union) the exclusive representative of certain of its employees, by denying the Union access to buildings at New Cumberland to conduct any tests the Union considers necessary to enforce and/or administer the health and safety provisions of the parties' collective bargaining agreement.

(b) Failing and refusing to respond to an information request from the Union by refusing to allow the Union to conduct tests to determine the health and safety of the bargaining unit employees.

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

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

(a) Grant permission to the Union to perform, at the Union's expense, any tests the Union considers necessary to enforce and/or administer the health and safety provisions of the parties' collective bargaining agreement, including, but not limited to, tests to determine the presence of asbestos in Building T-21.

(b) Maintain Building T-21 until testing is complete.

(c) Either party may request, unopposed, that the Arbitrator re-open the record in Grievance Number 96-127 to include the results of the tests conducted in Building T-21.

(d) Post at its facilities 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 Commander, Defense Logistics Agency, Defense Distribution Region East, Administrative Support Center East, New Cumberland, Pennsylvania, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, within 30 days from the date of this Order, notify the Regional Director of the Boston Region, Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston, Massachusetts, 02110, in writing, as to what steps have been taken to comply.

attachment

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

The Federal Labor Relations Authority has found that the Defense Logistics Agency, Defense Distribution Region East, Administrative Support Center East, Defense Depot Susquehanna, New Cumberland, Pennsylvania violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

We hereby notify our employees that:

WE WILL grant the American Federation of Government Employees, Local 2004, AFL-CIO, (the Union) permission to perform, at the Union's expense, any tests the Union considers necessary to enforce and/or administer the health and safety provisions of the parties' collective bargaining agreement, including, but not limited to, tests to determine the presence of asbestos in Building T-21.

WE WILL NOT fail and refuse to bargain in good faith with the Union by failing to allow the Union to take tests related to the health and safety of the bargaining unit employees.

WE WILL NOT fail and refuse to supply information, as required by law, requested by the Union to ensure the health and safety of the bargaining unit employees.

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

attachment

CERTIFICATE of SERVICE

I certify that a copy of the General Counsel's Brief to the Administrative Law Judge and attachment in Case No. BN-CA-70149 were sent, this date, to the following parties:

CERTIFIED MAIL

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Dated: September 15 , 1997 _____