

**NTEU Statement of Position on the Bargaining Unit Status of Federal Criminal Investigators in the Nuclear Regulatory Commission's Office of Investigations**

The Federal Criminal Investigators (GG-1811) in the Nuclear Regulatory Commission's Office of Investigations must be retained in NTEU's collective bargaining unit. As explained fully below, these investigators are not engaged in security work that directly affects national security. Accordingly, § 7112(b)(6) of the Federal Service Labor-Management Relations Statute (the Statute) does not bar their inclusion in a collective bargaining unit.

Section 7112(b)(6) of the Statute provides that a unit will not be considered appropriate if it includes "any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security[.]" To exclude an employee on the basis of performance of security work that "directly affects national security," the agency bears the burden of demonstrating that: (1) the tasks and duties of the employee's position include the designing, analyzing, or monitoring of security systems or procedures, or the regular use of, or access to, classified information; (2) the employee's security work concerns "national security;" and (3) the work "directly affects" national security as "a straight bearing or unbroken connection that produces a material influence or [alteration]." U.S. Department of Justice, Washington, D.C. and AFSCME, 62 FLRA 286, 290, 293 (2007).

As we show below, the agency cannot meet its burden to show that the investigators at issue here design, analyze or monitor security systems or procedures, or regularly use or have access to classified information. Neither can the agency demonstrate that these investigators' duties have a clear and direct effect on national security.

**1. The OI Investigators Do Not Design, Analyze, or Monitor Security Systems and Procedures**

The Nuclear Regulatory Commission (NRC) regulates commercial nuclear power plants and other uses of nuclear materials. The NRC's Office of Investigations (OI) investigates potential violations of the NRC rules, regulations, and requirements.

The OI investigators have no role or voice in the design or analysis of security systems. In reference to the "monitoring" of such systems and procedures included in the definition of "security work" first set forth in Department of Energy, Oak Ridge Operations, Oak Ridge, Tennessee, 4 FLRA 644 (1980), the investigators do not perform monitoring at an elevated or a systemic level.

While some investigations conducted by OI investigators involve security systems and procedures, the investigators' role is very limited. This is mainly due to the fact that at issue in these types of investigations are the security systems and procedures of sites that are owned and operated by the private industry and regulated by the NRC. As a result, investigators are not responsible for the physical security of these sites, and do not write and implement security action plans, emergency plans, and administrative manuals relating to security matters. Neither do they participate in the design, installation, and implementation of comprehensive security measures at sensitive facilities, or provide guidance regarding technical security requirements.

In addition, any involvement by OI investigators in security systems and procedures is limited. An investigation of a security matter, like all other types of investigations, can be initiated only after a case of a potential security violation has been reported to the NRC, transmitted to the appropriate individuals at the Agency, and deemed worthy of an investigation

by an entity known as the Allegations Review Board (ARB). If the ARB decides that an investigation is necessary, the ARB explicitly instructs OI investigators to focus on specific portions of a security procedure. They gather evidence related only to whether or not that particular part of a procedure was violated and, if so, whether it was done willfully or with careless disregard.

OI Investigators do not evaluate a security procedure's efficacy, or make recommendations for improvements. Nor do they make any determination of the potential impact of a finding that a violation did indeed occur with willfulness or careless disregard.

## **2. The OI Investigators' Security Clearance Does Not Automatically Exclude Them from the Bargaining Unit As Their Use Of Or Access To Classified Information Is Rare**

The FLRA has held that the requirement that an employee hold a security clearance is not determinative of unit exclusion. Dept. of Defense, Pentagon Force Protection Agency and FOP D.C. Lodge 1, 62 FLRA 164, 171-73 (2007). Accordingly, the mere fact that OI Investigators hold security clearances does not render them ineligible for bargaining unit inclusion.

In the course of their job duties, investigators rarely use or access classified information. The vast majority of their investigations do not involve any classified information. For example, one investigator, whose experience is representative of other investigators, has accessed classified information only one or two times during his five years as an OI investigator.

In addition, contrary to NRC's claim in its unit clarification filing, the OI Investigators do not attend and participate in NSIR threat intelligence briefings or conduct any significant level of liaison and coordination activities with Federal, state, and local law enforcement officials. Furthermore, while investigators may occasionally refer criminal cases to the U.S. Department of Justice for prosecution, DOJ has almost always declined prosecution of these cases.

## **3. The OI Investigators' Duties Have no Clear and Direct Effect on National Security.**

The Authority has defined "direct effect" as "a straight bearing or unbroken connection that produces a material influence or [alteration]." SSA, Balt., Md, 59 FLRA 137, 143. The meaning of "direct effect" is further explained by the Authority in U.S. Department of Agriculture, Food Safety and Inspection Service and AFGE, 61 FLRA 397 (2005) (U.S. Dept. of Agriculture).

In U.S. Department of Agriculture, the Authority found that food inspectors who inspected imported food stored in privately-owned-and-operated facilities subject to agency regulation did not have a direct effect on national security. The Authority provided several reasons for their decision. First, the employees played a limited role in protecting the country against sabotage and terrorist attacks. If the inspectors discovered any suspicious activities during the course of their duties, they would notify the appropriate authorities. Second, the food inspectors engaged in work that involved "several intervening layers of personnel and processes." Before the food reached these warehouses, it had already been inspected by authorities in the country of origin, and upon entry into the U.S., by U.S. Customs and Border Protection and the Animal and Plant Health Inspection Service. Third, the Authority reasoned that there was no "direct effect" on national security because the food inspectors had only limited influence on the final disposition of inspected food. Inspectors' findings were reviewed and approved by their

supervisors before they were entered into an agency database or a more extensive inspection was conducted. A final reason offered by the Authority to support its conclusion was that the food was stored at privately-owned-and-operated import warehouses, and thus the inspectors were not responsible for the physical security of their work areas and did not determine who had access to the facilities.

Even if the OI Investigators at issue here engaged in work related to “national security” under § 7112(b)(6) of the Statute, their work has no “direct effect” on national security. Like the food inspectors in U.S. Department of Agriculture, the OI Investigators have a very limited role in protecting the country from sabotage and terrorist attacks. They are not responsible for detecting terrorist and sabotage activities. If they were to discover information relating to terrorism or sabotage, they are required to contact the appropriate authorities.

Also like the food inspectors, the OI investigators’ work is embedded in several intervening layers of personnel and processes. Before an OI investigation is initiated, a case must generally go through a series of steps. First, a case of potential wrongdoing must be reported to the NRC. In some instances, NRC inspectors discover potential violations in the course of their inspections of sites regulated by the NRC. Upon their discovery, inspectors must evaluate whether the potential violations are due to deliberate misconduct. If they are, then they must notify their supervisors. Another way cases of potential wrongdoing are reported to the NRC is if employees of the regulated sites themselves alert the NRC if they determine that it is a reportable violation. And lastly, members of the public may notify the NRC.

After a case is reported, it is transmitted to NRC headquarters or a regional field office where a group known as the Allegations Review Board (ARB) reviews the case and determines whether OI should initiate an investigation. Only rarely is an investigation initiated before the ARB has made its final determination.

Another similarity between the investigators at issue in the instant matter and the food inspectors in U.S. Department of Agriculture is their limited influence over their agencies’ next steps as to investigated and inspected matters. The information developed during the OI investigation is used to help other components of NRC reach a conclusion regarding an allegation of wrongdoing and other enforcement and regulatory decisions. Specifically, after an OI Investigator completes her investigation, she writes a report containing her findings, which is reviewed and approved by her supervisor. The report is then forwarded to other components of the Agency – the Department of Enforcement and the Office of General Counsel – that separately conduct reviews of the report and make determinations regarding any potential violation. The two offices then collaborate to make a final determination on the violation and any ensuing enforcement decision.

A final similarity between the food inspectors in U.S. Department of Agriculture and the OI Investigators is that investigations take place at sites typically owned and operated by private industry but that are regulated by the NRC. As a result, OI Investigators are not responsible for the physical security of these sites, and do not write and implement security action plans, emergency plans, or administrative manuals relating to security matters. Neither do they participate in the design, installation, or implementation of comprehensive security measures at sensitive facilities, or provide guidance regarding technical security requirements.

For the foregoing reasons, like the food inspectors in U.S. Department of Agriculture, the OI Investigators do not have a direct effect on national security, and thus should not be excluded from NTEU’s bargaining unit.



UNITED STATES OF AMERICA  
FEDERAL LABOR RELATIONS AUTHORITY  
Washington Regional Office  
1400 K Street, NW, Second Floor • Washington, DC 20424-0001  
(202) 357-6029 FAX: (202) 482-6724

January 11, 2010

Dale Yeilding, President  
NTEU Chapter 208  
11555 Rockville Pike, Room O-1G22  
Rockville, MD 208252-2738

Case No. WA-RP-10-0019

Dear Mr. Yeilding:

Enclosed is a copy of a clarification of unit petition filed by the NRC. The purpose of the petition is to determine whether the employees in the GG-1811 Federal Criminal Investigator positions in the Office of Investigations are excluded from the NTEU bargaining unit because they are engaged in national security work within the meaning of section 7112(b)(6) of the Statute.

In accordance with sections 2422.6 and 2422.15 of the FLRA's Regulations, please provide the Region with the Union's position on the proposed exclusion of the GG-1811 Criminal Investigator position by **January 22, 2010**:

Please furnish copies of your submission and a completed Designation of Representative, FLRA Form 75 to me and the petitioner. Once the information is received, the assigned agent will contact you to schedule a conference to discuss, narrow and resolve any issues raised by the petition.

All communications and inquiries should be directed to the Authority agent named below to whom this case has been assigned. Refer to the case number in your communications. Your cooperation in this matter is appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter A. Sutton", with a long horizontal line extending to the right.

Peter A. Sutton  
Acting Regional Director

Enclosures: Petition, Notice to Employees & FLRA Form 75

Name of Petitioner: AFGE

Case Assigned to: Gary Stokes, Senior Attorney  
gstokes@flra.gov

Telephone Number: 312-886-3465 ext. 4020

Angela M. Bolduc, Chief  
Employee/Labor Relations  
U.S. Nuclear Regulatory Commission  
7201 Wisconsin Ave., Suite 425  
Bethesda, MD 20814-4810

Iryll Umel  
NTEU  
1750 H Street, NW  
Washington, DC 20006



UNITED STATES OF AMERICA  
FEDERAL LABOR RELATIONS AUTHORITY

PETITION

FOR FLRA USE ONLY

Case No. WA-RP-10-0019

Date Filed 12/10/09

See instructions on the back of this form. Attach additional sheets if needed, numbered according to the item to which they pertain. By signing the petition form, a labor organization/petitioner certifies it has submitted to the agency or activity and to the Department of Labor a roster of its officers and representatives, a copy of its constitution and by-laws, and a statement of its objectives.

1. Clear and concise statement of the purpose of the petition and the issues raised by the petition.

**The Nuclear Regulatory Commission proposes to exclude from the bargaining unit represented by NTEU Chapter 208 GG-1811 Criminal Investigators in its Office of Investigations on the basis that the employees occupying such positions are covered by 5 USC 7112 (b) (6) (see attached.)**

2. Description of the unit(s):

Included:  
**(See attached)**

Excluded:  
**(See attached)**

3. Approximate number of employees in the unit(s) affected by issues raised in the petition.

Currently 2750  
Proposed 2750

4. The petition is supported by:

a showing of interest of not less than 30%  
 evidence of membership of not less than 10%  
of the employees in the unit(s) involved in the petition.

5. PETITIONER:

NAME	AFFILIATION / DEPARTMENT	ADDRESS (Street and Number, City, State, and ZIP Code)	PHONE NO.
A. Petitioner Nuclear Regulatory Commission	N/A	7201 Wisconsin Ave, Suite 425 Bethesda, MD 20814-4810	
B. Petitioner Contact Angela Bolduc		same	(301) 492-2230

6. AGENCY(IES), OTHER THAN PETITIONER, AFFECTED BY THE PETITION:

NAME	DEPARTMENT	ADDRESS (Street and Number, City, State, and ZIP Code)	PHONE NO.
A. Activity/Agency			
B. Activity/Agency Contact			

7. LABOR ORGANIZATION(S), OTHER THAN PETITIONER, AFFECTED BY THE PETITION:

NAME	AFFILIATION	ADDRESS (Street and Number, City, State, and ZIP Code)	PHONE NO.
A. Labor Organization NTEU, Chapter 208	NTEU	11555 Rockville Pike Rm. O-1G22 Rockville, MD 20852-2738	301-415-3600
B. Labor Organization Contact Dale Yeilding, President		same	same

8A. Date(s) of Recognition/Certification (Month, Day and Year) of any unit(s) affected by issues raised in the petition.

01/21/1979

8B. Expiration of Current Agreement(s) (Month, Day and Year) covering any unit(s) affected by issues raised in the petition.

10/31/2013

9. Name, title, address, and telephone number of person filing petition.

**Angela Bolduc, Chief, Employee/Labor Relations and Worklife Branch**

10. I DECLARE THAT I HAVE READ THIS PETITION AND THAT THE STATEMENTS IN IT ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF. I UNDERSTAND THAT MAKING WILLFULLY FALSE STATEMENTS CAN BE PUNISHED BY FINE AND IMPRISONMENT, 18 U.S.C. 1001. THIS PETITION WAS SERVED ON ALL PARTIES KNOWN TO BE AFFECTED BY ISSUES RAISED IN THIS PETITION.

Angela Bolduc

Type or Print Your Name

[Signature]  
Your Signature

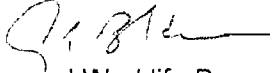
12/1/09  
Date



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

November 5, 2009

MEMORANDUM TO: Dale E. Yeilding, President  
NTEU Chapter 208

FROM: Angela M. Bolduc, Chief   
Employee/Labor Relations and Worklife Branch  
Office of Human Resources

SUBJECT: BARGAINING UNIT STATUS OF CRIMINAL INVESTIGATOR  
POSITIONS

We have recently completed a review of the functions and duties performed by employees in GG-1811 Federal Criminal Investigator positions in the Office of Investigations (OI). Our review finds that their duties are directly related to the security of the Nation's nuclear infrastructure. The investigations performed may stem from various sources such as from outside allegations, from NRC inspections or from NRC inquiries into accidents, incidents, theft, fraud, or unusual circumstances involving nuclear materials or facilities. Additionally, OI has exercised its authority to self-initiate investigations or inquiries of violations of NRC requirements and /or Federal law. Regardless of how they are initiated, the investigations are frequently sensitive and involve matters which could adversely affect public health or safety and the economic stability of the United States.

Criminal Investigators in OI have access to and regularly use classified information in the performance of their duties and, therefore, are required to undergo a Single Scope Background Investigation and hold a Q security clearance. They regularly attend and participate in NRC (NSIR) threat intelligence briefings during which restricted information (with various classification levels) are discussed and evaluated for action. In accordance with a Memorandum of Understanding with the U.S. Department of Justice (DOJ), OI refers substantiated investigations to the DOJ for prosecution consideration and, if accepted for prosecution, OI Criminal Investigators assist DOJ in gathering, analyzing, and preparing evidence, including providing trial testimony and having access to restricted Federal grand jury material.

Further, OI has accepted the NRC Federal Security Coordinator law enforcement liaison responsibilities. These responsibilities require that OI Criminal Investigators regularly conduct liaison and coordination activities with Federal, state and local law enforcement officials in the response areas of NRC licensees (Nuclear reactor and Cat 1 facilities) by facilitating communication of law enforcement sensitive and classified intelligence information as gathered by other Federal, state and local law enforcement agencies.

Based upon the functions and duties performed, we have concluded that employees in Federal Criminal Investigator positions, GG-1811, in OI are properly considered to be employees engaged in investigative work that directly affects national security. Therefore, under the

D. Yeilding

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provisions of 5 U.S.C. 7112(b)(6), these employees are ineligible for union representation and must be excluded from a collective bargaining unit. Up to this point, this exclusion has not been properly applied and the OI Criminal Investigators have been shown as included in the bargaining unit represented by NTEU. To correct this improper inclusion and be consistent with the requirements of the Federal Labor Relations Statute, we plan to notify current OI employees in Criminal Investigator positions of the above statutory requirements and, effective December 6, 2009, to properly code the positions as excluded from the bargaining unit.

Enclosed for your information is a list of the current employees in OI Criminal Investigator positions who will be affected by this correction. If you have any questions or would like to discuss this matter, please contact John Budnik on 301-492-2324.

Enclosure:  
As stated

cc: Iryll Umel, NTEU National Field Representative  
Cheryl L. McCrary, Deputy Director, Office of Investigations

NUCLEAR REGULATORY COMMISSION  
OFFICE OF INVESTIGATIONS (OI)

EMPLOYEES IN POSITIONS INELIGIBLE FOR UNION REPRESENTATION BASED ON  
INVESTIGATIVE WORK THAT DIRECTLY AFFECTS NATIONAL SECURITY

WASHINGTON D.C. OFFICE

Steven P. Jefferson GG-1811-14  
Juan C. Diaz GG-1811-14

PHILADELPHIA FIELD OFFICE

Jeffrey A. Teator GG-1811-14  
Mark a. Mullen GG-1811-14  
Paul Richart GG-1811-13  
Diane T. Gallagher GG-1811-13  
Jeffrey J. Ferich GG-1811-13  
Albert Vincent Cabrelli GG-1811-13

ATLANTA FIELD OFFICE

Vanessa G. Selewski GG-1811-13  
David E. Tregre GG-1811-13  
Donrich Lamont Young GG-1811-13

CHICAGO FIELD OFFICE

Maky K. Fahey GG-1811-14  
Joseph M. Ulie GG-1811-14  
Scott W. Kryk GG-1811-14  
Craig A. Hayden GG-1811-14  
Eugene R. Richards Jr. GG-1811-13  
Mark J. Hannan GG-1811-13  
Jerome R. Bigoness GG-1811-13  
Charles J. Dvorak GG-1811-13  
Michele F. Janicki GG-1811-13

DALLAS FIELD OFFICE

William M. Fitzgibbon GG-1811-14  
John H. Oglesby Jr. GG-1811-14  
Brian D. Gonsoulin GG-1811-13  
Gayle R. Walker GG-1811-13

Enclosure



UNITED STATES OF AMERICA  
FEDERAL LABOR RELATIONS AUTHORITY

Washington Regional Office  
1400 K Street, NW, Second Floor • Washington, DC 20424-0001  
(202) 357-6029 FAX: (202) 482-6724

January 11, 2010

Angela M. Bolduc, Chief  
Employee/Labor Relations  
U.S. Nuclear Regulatory Commission  
7201 Wisconsin Ave., Suite 425  
Bethesda, MD 20814-4810

Case No. WA-RP-10-0019

Dear Ms. Bolduc:

The Agency's petition has been docketed and assigned the case number indicated above. Enclosed is a notice of petition that the NRC is requested to post in accordance with section 2422.7 of the FLRA's Regulations. The notice of petition advises affected employees about the petition. Please reproduce and post copies of the enclosed notice, inserting the date of posting, in places where notices are normally posted for the employees affected by issues raised in the petition and/or distributed in a manner by which notices are normally posted. The notice should be posted conspicuously for a period of *ten (10) calendar days* and not be altered, defaced, or covered by other material.

Your cooperation in this matter is appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter A. Sutton", with a long horizontal line extending to the right.

Peter A. Sutton  
Acting Regional Director

Enclosures: Petition & Notice to Employees

Case Assigned to: Gary Stokes, Senior Attorney  
gstokes@flra.gov

Telephone Number: 312-886-3465 ext. 4020

Dale Yeilding, President  
NTEU Chapter 208  
11555 Rockville Pike, Room O-1G22  
Rockville, MD 20825-2738

Iryll Umel  
NTEU  
1750 H Street, NW  
Washington, DC 20006



**NOTICE TO EMPLOYEES  
FROM THE  
FEDERAL LABOR RELATIONS AUTHORITY**

A petition has been filed with the Regional Director of the Federal Labor Relations Authority to determine a matter related to the representation of certain employees of the Nuclear Regulatory Commission (NRC).

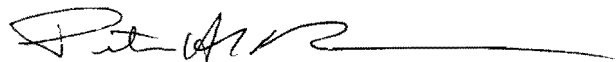
The petition was filed by the NRC.

The purpose of the petition is to clarify the bargaining unit status of the GG-1811 Criminal Investigator position in the Office of Investigations

This case is being investigated and the Federal Labor Relations Authority HAS MADE NO DETERMINATION AT THIS TIME. This Notice should be conspicuously posted for a period of ten (10) days and should not be altered, defaced, or covered by other material.

Any request to intervene or cross-petition, accompanied by any necessary showing of interest, must be submitted in writing and filed with the Regional Director or the Hearing Officer prior to the opening of the hearing. If no hearing is held, a request to intervene and a cross-petition must be filed prior to action being taken by the Regional Director in accordance with section 2422.30 of the Regulations of the Federal Labor Relations Authority.

Federal Labor Relations Authority



Peter A. Sutton, Regional Director  
FLRA, Chicago Regional Office  
55 West Monroe, Suite 1150  
Chicago, Illinois 60603  
312-886-3465 Ext. 4020

Date of Posting: \_\_\_\_\_

Case No. WA-RP-10-0019

**THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE  
COVERED OR DEFACED**