

CBR



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COLLECTIVE BARGAINING REPORT

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Defending Against Inspection Service and OIG Investigations

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INTRODUCTION

Often employees or stewards are confronted by surprise visits from postal inspectors or agents of the Office of Inspector General (OIG). Investigations conducted by inspectors or OIG agents usually concern workplace matters or alleged employee misconduct, but may also relate to alleged violations of criminal laws and could result in criminal charges being brought against employees. When inspectors or OIG agents seek to interrogate an employee, the matter should be treated very seriously and an employee should assert his/her right to assistance from a union representative. It is important also that employees be alerted not to give oral or written statements to OIG agents or inspectors unless they first have obtained advice from their stewards and their attorneys.

Before an employee is questioned, a

union representative should confer with the employee and attempt to find out if the employee knows what prompted the investigation. He/she should also request from inspectors what the nature of the investigation is. If it potentially relates to criminal offenses, the steward should advise the employee to immediately inform the inspectors or agents that he/she wishes to consult with an attorney before proceeding with any questioning. While inspectors or agents may claim that their questioning doesn't relate to a criminal matter and/or that the employee doesn't have a right to an attorney since he or she isn't in custody, if there is any suspicion that criminal charges may be possible the employee and steward should insist that the employee be given the right to consult with an attorney.

In addition, even if an employee is told that whatever he or she says won't be used against him/her, if the matter under investigation is criminal in nature a steward or the employee should advise the inspector or OIG agent that he/she wishes to contact an attorney. Under no circumstances should an employee sign any forms or make any statements until he/she has consulted with an attorney. Even if an employee's statement isn't used, this doesn't necessarily mean the employee may not be charged in a criminal proceeding. The following information more fully addresses what contractual provisions and laws apply to OIG and Inspection Service investigations. Also, arbitration awards provide helpful authority on defending against discipline that arises following OIG and Inspection Service investigations.

Collective Bargaining Report

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RIGHTS DURING IS AND OIG INTERVIEWS

The Postal Inspection Service and the Office of Inspector General both conduct investigations into allegations of postal employee misconduct. Prior to 2005, the role of the OIG was for the most part limited to investigating fraud and waste in the Postal Service but it has since been expanded to include other investigative work that had been conducted previously only by the Inspection Service. *(For more detailed information regarding the "Transition of Work from the Inspection Service to the OIG," see CBR 05-06, Oct./Nov. 2005, pages 47-78, available on the Industrial Relations section of the APWU website.)*

There are several types of investigations during which an employee may become the subject of an interview, and each may require a somewhat different response. One type is when the employee is a witness to an incident involving alleged misconduct by another employee or involving a customer. Another type is when inspectors or agents are seeking information that is likely to lead to discipline of the employee that is being questioned, or when an employee is being investigated for possible criminal charges as well as discipline. In these types of circumstances, it is important that a steward not allow inspectors or agents to limit his or her participation to that of a passive observer. Although a steward should not turn the interrogation into an adversarial proceeding and prevent the inspectors and/or agents from questioning the employee, the steward should nonetheless advise and actively assist the employee. He or she should attempt to clarify the facts, and assist the employee in articulating an explanation. However, in the first circumstance, a

steward most likely will only need to take note of questions and answers and ask questions or seek clarification to prepare a record in the event the investigation may lead to previously unforeseen discipline of the employee. If the steward discovers that the employee is under arrest, a suspect in a crime, or believes the employee may be a subject of a criminal investigation and/or there are legal issues that need to be addressed, he/ she may appropriately advise the employee to remain silent and not to sign any statements/forms until he/ she has consulted with legal counsel. In addition, there may be circumstances when a steward is being subjected to demands that he/she testify or otherwise disclose information provided to him/her by employees in confidence in his/her capacity as a representative. *(See Steward's "Privilege" section, page 26)*

Stewards and employees should therefore become familiar with applicable provisions in the National Agreement as well as court decisions in Weingarten and Miranda which come into play to protect an employee during questioning by the Inspection Service or the OIG. In addition, they should become aware of Garrity and Kalkines warnings used by agents or inspectors that affect whether an employee can be disciplined for not cooperating with an investigation and of when answers or statements provided during an interview may be used in a criminal case.

Relevant Contractual Protections

Article 17, Section 3 of the National Agreement states in part that “[i]f an employee requests a steward or union representative to be present during the course of an interrogation by the Inspection Service, such request will be granted. All polygraph tests will continue to be on a voluntary basis.” The Postal Service has acknowledged that this requirement applies equally to the OIG. In the APWU-USPS 2007 Joint Contract Interpretation Manual at page 4 (Article 17) the parties specify that one of the Steward Rights is “[t]he right to represent an employee during an Inspection Service or OIG interrogation, when requested by the employee.” This is reinforced further under Article 17, Questions and Answers on Representation, which restates this right at p. 6 of the JCIM (Article 17). *(See pages 54 and 55 for relevant sections of the JCIM)* The National Agreement also contains a Memorandum of Understanding on the Role of the Inspection Service at page 327 which provides in part that “[t]he Postal Inspection Service has an obligation to comply fully with the spirit of the National Agreement.” *(See page 56 for a copy of the MOU)*

In response to written questions by the APWU, the Postal Service has responded that such an obligation also extends to the Office of Inspector General *(See pages 57-63 for copies of 26 questions and answers regarding the transition of responsibilities from the Inspection Service to the Office of Inspector General. Note that APWU’s questions and management’s answers have been merged into one document for your convenience. The original information request and management’s response are printed in the Oct/Nov 2005 CBR Issue 05-*

06, pages 55-70, and an October 12, 2005 Memo to the Field available on the APWU’s website)

Weingarten Protections

Besides contractual protections, an important right guaranteed under the National Labor Relations Act is the right to assistance from union representatives during investigatory interviews. This right was upheld by the U.S. Supreme Court in NLRB v. J. Weingarten Inc., 420 US 251 (1975), and is known as the Weingarten rule. The rule affords an employee a right to representation during an investigatory interview which he or she reasonably believes may lead to discipline. It is important to stress to employees that they must request union representation since management (or a postal inspector or OIG agent) doesn’t have to offer to provide it to them. The Weingarten decision specifically provides that an employer must choose among three options once an employee requests union representation: (1) Grant the request and delay questioning until the union representative arrives; (2) Deny the request and end the interview immediately; or (3) Give the employee a choice of: (a) having the interview without representation or (b) ending the interview. Therefore, if an employee asks for union representation, the OIG agent(s) or inspector(s) are required to grant the request and delay questioning until the representative arrives. If an agent or inspector denies the request for union representation and continues questioning, employees can refuse to answer questions.

After an employee is granted the right to representation by a union steward, he or she has the right to a private discussion with the steward before the interview continues, and to have the steward present during the interview with an OIG agent or

postal inspector. At page 5 (Article 17) of the JCIM, such a right is described. “The Weingarten rule includes the right to a pre-interview consultation with a steward. Federal courts have extended this right to pre-meeting consultation to cover Inspection Service interrogation.” In addition, the steward isn’t restricted to acting as a passive observer. The JCIM provides further that “[t]he employee has the right to a steward’s assistance, not just as a silent presence, during an interview covered by Weingarten.” (See pages 54 and 55 for relevant sections of the JCIM) NLRB and federal court decisions that have addressed and determined the scope of this right in Inspection Service interviews include USPS and Ralph Bell, 288 NLRB 864 (1988) and USPS v. NLRB and APWU, 969 F.2d 1064 (D.C. Cir. 1992). In the last cited case, the U.S. Court of Appeals for the District of Columbia upheld an NLRB decision ordering the Postal Service to cease from refusing to permit employees to consult with union representatives before Inspection Service interviews. It enforced the NLRB’s order directing the Postal Service to make a nationwide posting setting out its obligation not to refuse such consultations. (See page 64 for a copy of the NLRB order, including the nationwide posting).

Furthermore, as early as 1979, the Chief Postal Inspector in a letter to APWU’s then-president acknowledged the role of a union representative to include “clarify[ing] the facts, suggest[ing] other sources of information, and generally assist[ing] the employee to articulate his/her explanation.” (See pages 65-66 for a copy of the letter). Then again in 1982, responding to an inquiry by APWU’s then-vice president, the Chief Postal Inspector reiterated that “it is not Inspection Service policy that union representatives may only participate as

passive observers.” (See pages 67-69 for a copy of the letter from the APWU and the Chief Inspector’s reply).

Though the Postal Service had tried to make the distinction in the past that there may not be a right to union representation in the case of an employee being “interviewed” by postal inspectors as opposed to the case of an employee who is the subject of an interrogation, a 1986 Step 4 settlement (USPS #H1C-NAC 96) specifies that the parties agree that the right to a steward or union representative under Article 17.3 “applies to questioning of an employee who has or may have witnessed an occurrence when such questioning becomes an interrogation.” (See page 70 for a copy of the Step 4 settlement)

NLRB Charges and Grievances for Weingarten Noncompliance

In the event an employee isn’t granted his or her request for representation by a union steward, unfair labor practice charges can be filed with the National Labor Relations Board. Since both the steward’s rights and the employee’s rights have been violated, it is recommended that two separate charges be filed which includes one based on interference with a steward’s rights to act in a representative capacity during the investigatory interview and one due to the employee being deprived of his or her Weingarten right. It is likely that the NLRB will combine the charges but that may strengthen the case. Both charges should allege violations of Section 8(a)(1) of the National Labor Relations Act. Section 8 says: “It shall be an unfair labor practice for an employer --- (1) to interfere with, restrain or coerce employees in the exercise of rights guaranteed in section 7 ...” Employees’ right to assistance during investigatory

interviews is premised on the “mutual aid and protection” clause of Section 7 of the NLRA whereas a steward’s right to represent the employee is premised on other parts of Section 7 which relate to “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining” Recommended wording for each charge is as follows:

The Local’s charge (which would be filed by or on behalf of the steward or union representative):

“Since on or about _____, and continuing to date, the Postal Service has interfered with, restrained and coerced employees in the exercise of their right to self-organization, form, join and assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining, by interfering with shop steward [fill in name]’s right to represent and assist employees during investigatory or pre-disciplinary interviews.”

The individual’s charge (which should be filed by or on behalf of the individual employee):

“Since on or about _____, and continuing to date, the Postal Service has interfered with, restrained and coerced employees in the exercise of their right to mutual aid and protection by failing to afford [fill in name] the right to the assistance of fellow employees during interviews which may result in discipline.”

In addition to NLRB charges, individual grievances should be filed on behalf of the employee whose Weingarten rights have been violated, and a separate class action grievance also should be filed by the union on behalf of the steward whose rights to participate in an investigatory interview were violated.

NLRB Pilot Program for Weingarten Violations

Please note that on February 28, 2008, the Postal Service and the National Labor Relations Board entered into a settlement agreement concerning cases that involved Postal Service Weingarten violations pending in the Contempt Litigation and Compliance Section of the NLRB, before the Board, and before or recently enforced by an appellate court. The agreement established a pilot program to address pending and future Weingarten violations. We believe that the settlement agreement jeopardizes protections provided to employees under applicable laws and the Collective Bargaining Agreement.

Under the agreement whenever management commits a Weingarten violation it can:

- Avoid an NLRB cease-and-desist order or contempt proceeding by correcting its mistake by conducting a new interview with a union representative;
- Make reference to the actions taken under the settlement agreement as a defense in the grievance procedure or other proceedings; and
- Retain information it obtains through the unlawful interrogation (the investigatory interview conducted in violation of Weingarten) for use in criminal matters.

The APWU intends to challenge the

program if and when the NLRB attempts to obtain approval from the appeals court of a consent order embodying the new agreement. Copies of unfair labor practice charges related to Weingarten violations that have been filed after the NLRB/USPS settlement establishing the pilot program went into effect should be forwarded to the Industrial Relations Department.

Weingarten Violations in the Grievance Procedure

Following are some examples of how arbitrators have treated Weingarten-type violations in the grievance-arbitration procedure.

In a recent case, an OIG agent scheduled an interview with an employee following discovery of items in a common desk used by the employee and other clerks including a \$1,000 money order, Postal Service calling cards and note cards. Before the day of the interview, the employee had informed the union she would need a steward. On the day of the interview, the employee asked the manager about the steward and he told her that she didn't need one. The steward, in the meanwhile, reported to the facility but wasn't escorted to the office where the employee was being interviewed. Before the interview with the agent, the employee didn't make another request for a union steward or attorney. The agent informed her that she had the "right to remain silent" and anything she said or did could be used as evidence in an administrative proceeding. The employee then admitted, among other things, that she allowed her sister to use her password 5 to 10 times on her POS machine, and she had been informed by a customer that a \$1,000 money order was fraudulent but she hadn't

mailed it to the Inspection Service though she called them to report the incident.

Arbitrator Irene Thomas found that the OIG agent violated Article 17.3 when he failed to allow the employee representation by a steward. She stressed that "Article 17.3 is more stringent than the National Labor Relations Board's Weingarten rule which entitles an employee to union representation on request at an investigatory interview which the *employee reasonably believes* might result in her being disciplined." "This Article requires the employer to allow the presence of a shop steward during an interrogation upon request – period," she continued. Accordingly, the arbitrator found that management violated Article 17.3 by not allowing the steward who was in the facility to be present during the OIG's interrogation of the grievant. But she indicated that the Article 17 violation "under the circumstances" didn't warrant sustaining the grievance because the employee "freely agreed to speak to [the] Agent ... despite knowing that her requested shop steward was not present." Also, "[s]he fully acknowledged, in writing, that she had the right to remain silent and that what she said or did may be used against her in an administrative proceeding." Moreover, given the evidence that the grievant had "lax behavior with financial matters" in her work, the arbitrator found that while the removal should be set aside and the employee should be reinstated she wasn't entitled to back pay. However, Arbitrator Thomas ordered that "[b]ecause the employer violated Article 17.3 of the national agreement relating to shop stewards being permitted to be present during an interrogation, [the Postal Service] shall post a notice throughout the Livingston Post Office stating that a violation of Article 17.3 occurred and that employees are entitled to have a shop stew-

ard present when being interrogated by the Inspection Service, including the OIG's office." (*AIRS #47203 - USPS #C00C-4C D 07058565 and C06C-4C-D 0712699; 10/9/2008*)

Also see *AIRS #10145 - USPS #W4T-5H-D 9329 (5/13/1986)* in which an arbitrator found that inspectors' failure to provide an employee a steward when he requested one at the outset of the inspectors' investigatory interview violated Article 17.3 of the National Agreement. Arbitrator John Abernathy indicated that it was improper for inspectors to merely allow a co-employee to accompany the grievant during the interview when stewards or other union representatives were unavailable. He said that Article 17, Section 3 "means that it is up to the Postal Service to see that representation is provided, once it is requested." In addition, he noted that there was "nothing in the record to indicate that there was anything to prevent the postal inspectors from delaying the interview to a time when an appropriate shop steward or other Union representative could be present, so as to preserve the grievant's contractual rights." The arbitrator agreed with the union that the appropriate remedy in this case was to "disregard the evidence improperly obtained during the investigatory interview." Since the evidence from the interview, which was the grievant's alleged admissions to misconduct, was the only evidence cited in the removal notice, Arbitrator Abernathy concluded that there was insufficient evidence to establish just cause for removing the employee and the grievant should be reinstated and made whole for his losses. Furthermore, Arbitrator G. Allan Dash overturned an employee's removal for alleged falsification due to postal inspectors' denial of his request for

union representation during their interview, among several other reasons. The arbitrator found that management violated Article 17.3 of the contract because of this refusal. (*AIRS #12580 - USPS #E4C-2A-D 36743; 10/13/1987*)

In another case, an arbitrator found that an employee's question to a manager "Do I need a steward?" when he was called to the manager's office but soon afterwards was interviewed by postal inspectors constituted an adequate request for union representation under Weingarten. The manager's response that he didn't need one now but "maybe later" didn't require that the employee state his request again, according to the arbitrator. Arbitrator James Barker remarked that the manager "was guilty of dissembling" in his response since he knew the purpose of calling the employee to his office was for an investigatory meeting with postal inspectors soon after "introductions." As a result of not complying with the grievant's request for a steward, the arbitrator ruled that the employee was deprived of procedural due process and his removal wasn't imposed for just cause. (*AIRS #48627 - USPS #W7N-5D-D 22760; 9/26/1990*)

Another award involved circumstances in which an employee asked for union representation and inspectors continued to question her allegedly about "personal matters" unrelated to the circumstances they were investigating. Arbitrator Thomas DiLauro said the fact that inspectors admitted they questioned the employee after recognizing her request for union representation and while no union representative was present "taints the evidence [in this case] which the Postal Service contends was clear and convincing." Since he wouldn't rely on such evidence, the arbitrator sustained

the grievance challenging the employee's removal. (AIRS #48629 - USPS #C90N-4C-D 96010557; 6/12/1996)

Where an employee requested union representation during an Inspection Service interview but the inspector still requested that the employee initial evidence that was in the inspector's possession, Arbitrator George Shea found that such a request "constituted an improper continuation of the investigatory interview in contravention of the Weingarten rule." He ruled that he wouldn't consider evidence obtained by postal inspectors during the interview in reaching a

decision on whether the Postal Service had just cause for the emergency placement and subsequent removal of the grievant. (AIRS #48628 - USPS #B90N-4B-D

94026415, 94053240 & 94056389; 10/13/1994)

An arbitrator found that a Weingarten violation existed because inspectors continued an interview of an employee after his steward left when the union representative was informed the interview was over and he was directed to return to work by management. The union presented the grievant's testimony that after the steward left, inspectors "badger[ed] him by saying that he destroyed mail – "why not admit it" – and also threatened to get search warrants for the grievant's house and car. The arbitrator found that an inspector's testimony failed to counter this evidence since it was "vague and ambiguous" about the interview once the steward departed.

Another award suggests that where inspectors don't notify an employee of the purpose of their interview, an employee cannot determine that the interview may lead to discipline and therefore cannot give up his or her Weingarten rights due to a failure to request union representation.

representation but was informed by the postmaster merely to do as he was instructed, management's failure to provide him with union representation

Arbitrator Carl Lange then found that the inspectors' failure to discontinue the interview or offer the employee a choice to continue the interview without his union representative constituted a violation of Weingarten. He ruled that since a denial of Weingarten rights is a violation of the just cause principle, it could serve as a basis for reversing disciplinary action. (AIRS #48630 - USPS #W7N-5C-D 2341 & 2342; 8/15/1988)

In circumstances where an employee was instructed to report to the postmaster's office and the employee asked whether he would need union

during a subsequent interview with postal inspectors was ruled to be a violation of Weingarten. At that interview, the employee admitted discarding mail for which he was later removed. Arbitrator Thomas Di Lauro found that the Weingarten violation was evidence that the investigation had not been conducted fairly and objectively, and therefore showed that the employee's removal didn't meet the test for proving just cause as enunciated by Arbitrator Daugherty in Enterprise Wire Co., 46 LA 359. (AIRS #48631 - USPS #E90N-2D-D 93006991; 7/2/1993)

In a case involving a hearing impaired employee, an arbitrator found that inspectors' failure to provide her with a certified interpreter and shop steward even though she hadn't requested this

assistance constituted fatal procedural violations that warranted overturning her removal for allegedly altering medical documentation. Arbitrator Michael Pecklers also noted that the grievant wasn't provided with a Miranda warning and there was no evidence to show that the employee was aware this was a non-custodial interview. The arbitrator reasoned that "the spirit if not the letter of the National Agreement required the Inspectors to ask [the employee] whether she wanted a Union Steward *and* an interpreter." He ruled therefore that the statement the employee gave to inspectors should be suppressed. (*AIRS #38018 - USPS #A00C-1A-D 02102603; 8/21/2002*)

Another award suggests that where inspectors don't notify an employee of the purpose of their interview, an employee cannot determine that the interview may lead to discipline and therefore cannot give up his or her Weingarten rights due to a failure to request union representation. Arbitrator Joseph Cannavo found that in this case, the employee wasn't in a position to request a union representative since he wasn't told what the purpose of the inspector's interview was, wasn't informed that he could be disciplined for statements he made, and wasn't given Miranda rights. The arbitrator found that this deprivation of his Weingarten rights along with "intimidation and coercion" during the interview, and an incomplete investigation by management warranted overturning the employee's removal for allegedly filing a false CA-1. Arbitrator Cannavo also ruled that the employee was entitled to full back pay and benefits (*AIRS #31143 - USPS #A94C-4A-D 98038919; 3/6/1999*) Also see *AIRS #48632 - USPS #AC-N-18, 905-D (2/11/1978)* in which Arbitrator Milton Rubin said that inspectors

should have advised an employee who they interviewed of the nature of the examination, which was concerning alleged sabotage of letter sorting machinery, so that he could have asked for a steward. Also the arbitrator suggested that inspectors should have offered that a steward would be afforded for the employee. Under these circumstances, Arbitrator Rubin reinstated the employee, who had been removed for allegedly jamming machinery, even though the arbitrator found the evidence showed he had intentionally caused the jams.

In an early contract case on this issue, the union asserted that inspectors denied a steward's right to ask inspectors what the subject of a meeting was with an employee, threatened her that if she spoke she would be thrown out of the room, and yelled at the steward and grievant. It maintained that such actions violated the Weingarten rights of the clerk being interviewed by inspectors. Arbitrator Edmund Schedler ruled that management didn't violate Article 17 since the grievant was allowed to have a union representative present during the interrogation. However, he indicated that the steward had a right to confer privately with the grievant if either of them requested such a private conference, a right "after the Inspectors concluded questioning [the grievant], to ask questions to elicit information from [the grievant]" and a right at any time during the interview to advise the grievant to seek legal counsel or remain silent. He said he didn't agree with the union that the steward wasn't allowed to speak and when the steward did speak, the arbitrator found she merely reinforced the grievant's denial of wrongdoing since the steward said "[t]hat's right" following his denial. Also, he said that she shouldn't have let inspectors

intimidate her with their interrogation tactics because stewards frequently encounter such difficult situations, and she should have indicated she expected the inspectors to treat her “in an equal status” with them and to be “civilized” or she and the employee would immediately leave the interview. (*AIRS #9539 - USPS #S4C-3Q-C 10404; 11/2/1986*) But see the previous discussion of NLRB and court decisions that were issued subsequent to this award, which have upheld and explained steward participation rights while employees are being interviewed by the Inspection Service or OIG. In addition, the JCIM provisions indicate that such rights are contractual ones covered by the right to representation under Article 17.

Miranda Rights

If postal inspectors or OIG agents question an employee about information that may be used to support a criminal charge, the employee should be informed of his or her Miranda rights which include the right to a lawyer’s assistance and the right to remain silent. Miranda rights are guaranteed by a U.S. Supreme Court decision in Miranda v. Arizona, 384 U.S. 436 (1966) which held that before a law enforcement officer may interrogate an individual who is in custody regarding the possible commission of a crime, the officer must read the individual his/her Miranda rights and must also make sure the individual understands these rights. In accordance with Miranda, employees must be informed that: (1) You have the right to remain silent; (2) Anything you say can be used against you in court; (3) You have the right to talk to a lawyer for advice before you are asked any questions and to have your lawyer with you during questioning; if you cannot afford a lawyer, one will be

appointed for you before any questioning if you wish; (4) If you decide to answer questions now without a lawyer present, you still have the right to stop answering at any time and you also have the right to stop answering at any time until you talk to a lawyer; and (5) Do you understand the rights that have been read to you? At that point, an employee can either waive his or her rights, or request an attorney. The OIG and Inspection Service may produce a form for an employee to sign indicating that he or she agrees to waive Miranda rights. Such a form should not be signed unless the employee understands his or her rights and knowingly and voluntarily waives them. (*Examples of such forms are at pages 71-72*)

The usual situation is that the OIG and Inspection Service don’t inform an employee of his or her Miranda rights because they have taken the position that employees aren’t in custody or aren’t considered suspects when they are being questioned, and thus aren’t entitled to Miranda rights. However, there are instances when the agents recognize that criminal charges may be filed as a result of their investigations and at that point they will provide an employee with Miranda warnings in order to ensure that any statements made by an employee will be admissible in the court proceeding.

Note that many arbitrators have rejected grievance challenges to admission of statements given by an employee who was not provided with Miranda warnings on the basis that such a constitutional violation doesn’t apply to the arbitration procedure, but rather to criminal proceedings. In addition, such arbitrators have reasoned that these warnings are only required when there has been “a restriction on a person’s freedom as to render him ‘in custody.’” In one of these

cases, Arbitrator Jacquelin Drucker found that a procedural challenge to discipline in the absence of Miranda warnings lacked merit because nothing in the record showed that the employee being questioned by inspectors was under arrest or in custody. (*AIRS # 36500 - USPS #A98V-4A-D 01109937; 9/19/2001*).

But see several awards in which arbitrators have found that Miranda violations warrant either excluding employees' statements to inspectors or constitute a reason to overturn or modify discipline. In *AIRS #1464 - USPS # C1C-4A-D 14023 and 14024; 9/2/1983*, Arbitrator Robert McAllister found that inspectors' failure to advise an employee of his Miranda rights until 1-1/4 hours after inspectors started interviewing him was sufficient to set aside in part his removal and instead reduce it to a long-term suspension. He ruled that statements provided by the employee to inspectors had to be excluded from evidence. The arbitrator reasoned that postal inspectors are federal law enforcement officers, their investigations are targeted both to criminal prosecution and discipline, and the interview in this case was "custodial" in nature since the employee was taken to a private inspection service office and was isolated from outside contact. (Note that the APWU had to file a court action to enforce this award. After the U.S. District Court for the District of Columbia refused to enforce the award, the appeals' court reversed the lower court's decision on the basis that Arbitrator McAllister's decision drew its essence from the collective bargaining agreement, specifically Article 3 of the agreement indicating that management rights to discipline employees must be "consistent with applicable laws and regulations." 789 F.2d 1 (D.C. Cir.1986)) In addition,

see *AIRS #49006 - USPS #S1N-3W-D 20459; 10/10/1983* in which Arbitrator Elvis Stephens overturned an employee's removal on the basis that postal inspectors failed to inform the employee of her Miranda rights before questioning her and obtaining her statement, and the employee's supervisor failed to afford her an opportunity to tell her side of the story. (Also see *AIRS #49007 - USPS #S4N-3D-D 37683* which relied on Arbitrator Stephens' reasoning.) In another award, inspectors' failure to inform an employee of her Miranda rights before obtaining a confession was deemed improper; however, Arbitrator Sirefman ruled that disregarding the investigative memo and confession in this case was insufficient to overturn the employee's removal because of other evidence implicating her in wrongdoing (*AIRS #26170 -- USPS #B90C-4B-D 960109809561; 8/1/1996*)

Because of the possibility that a non-custodial investigation may result in criminal charges even in cases in which agents have not provided Miranda warnings, it is recommended that an employee insist on speaking with a lawyer and refuse to answer any questions until he/she obtains the advice of an attorney where the questions appear to involve criminal conduct.

Garrity and Kalkines Warnings

During its investigative interview with an employee, the OIG may provide warnings that are based on several court rulings; Garrity v. New Jersey, 385 U.S. 493 (1967) and two other U.S. Supreme Court decisions that elaborate on Garrity, and Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973). These cases relate to the requirement that a public employee cannot be disciplined or

discharged because he or she invokes his/her Fifth Amendment privilege against self-incrimination. This constitutional privilege is intended to ensure that a person isn't required or coerced to disclose any information that he or she reasonably believes may be used (or lead to other evidence that may be used) against him/her in a criminal prosecution. If an employee is coerced into disclosing information, that information is inadmissible in court against him or her. In addition to this basic Fifth Amendment right, postal employees have additional Fifth Amendment rights as public sector employees. These workplace rights arise because in the public sector the government acts as both a law enforcement agency and employer.

The Garrity and Kalkines rulings primarily address when evidence obtained during an investigation of a public employee may be used in a criminal proceeding. However, the Kalkines case goes a step further in providing that an employee may be disciplined for refusing to answer questions so long as statements given by the employee or evidence obtained as a result of those statements are not used against him/her in a criminal proceeding.

The Garrity case involved employees of a police department who were informed they would be removed if they didn't answer questions during an internal investigation into alleged fixing of traffic tickets. The officers were informed that they must respond to questions during the investigation or face discharge for insubordination. The officers complied and answered the questions in order to keep their jobs, and statements made by the officers were then used in criminal prosecutions against them. In overturning the convictions, the Supreme Court

held that because they were coerced by the employer's threat of removal if they invoked their Fifth Amendment right against self-incrimination, any subsequent prosecution of the employees couldn't rely on statements of the employees or the "fruits" of such statements. The case now stands for the principle that using the threat of discharge or any other substantial economic penalty against public sector employees during an investigation of potentially criminal matters is coercive and any consequent disclosure is inadmissible in a criminal trial of the employee.

The OIG's Garrity warning (see page 73) to an employee is merely an attempt to create a record that the government hasn't violated the Garrity ruling during its investigation. Though it indicates that the Postal Service cannot discipline an employee for remaining silent, the Postal Service retains the right to use any statement that is voluntarily made even if it incriminates the employee in a subsequent criminal prosecution. The warning typically states in relevant part that: "You have the right to remain silent if your answers may incriminate you. Anything you say or do may be used as evidence in both an administrative proceeding, and any future criminal proceedings involving you. If you refuse to answer the questions posed to you on the grounds that the answers may tend to incriminate you, you cannot be discharged solely for remaining silent"

Following the U.S. Supreme Court's decision in Garrity, the Court issued two decisions that left the door open for allowing the government to ask employees to give statements about potentially criminal acts without obtaining waivers from the employees of their Fifth Amendment rights. In Gardner v. Broderick, 392 U.S. 273 (1968), the

Supreme Court held that the government may not discharge a public employee for refusing to waive his or her constitutional rights. However, the Court noted that the government could discipline an employee if it does not force the employee to give up his Fifth Amendment right, such as by providing the employee prosecutorial immunity (a guarantee that the information disclosed will not be used against the employee in a criminal prosecution). The Court also found, in Uniformed Sanitation Men Association v. Commissioner of Sanitation, 392 U.S. 28 (1968), that public employees “subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them or relinquish their constitutional rights.”

Sometime following these cases, the U.S. Court of Claims issued an opinion in Kalkines v. United States. The Kalkines case dealt with a federal government employee who was being investigated for bribery and refused to answer questions based on his Fifth Amendment rights. The Court of Claims indicated that though the employee can't be discharged for invoking his Fifth Amendment rights, “a governmental employer is not wholly barred from insisting that relevant information be given; the public servant can be removed for not replying if he is adequately informed both that he is subject to discharge for not answering and that his replies (and their fruits) cannot be employed against him in a criminal case.” The court relied on the Supreme Court's holdings that the government has the right to have its employees answer questions about the performance of their official duties so long as the Fifth Amendment prohibition isn't violated by granting employees' immunity. The court stressed

that an employee can be asked to “answer pertinent questions about the performance of an employee's duties ... when that employee is duly advised of his options to answer under the immunity granted or remain silent and face dismissal.” In other words, an employee who is given prosecutorial immunity should not expect to rely on his Fifth Amendment rights as a reason not to answer questions, and if he does not answer the questions the government may discipline him/her for failing to cooperate with the investigation.

The OIG's Kalkines warning indicates that while the government waives its right to use the voluntary statements of an employee that are obtained during an investigation in a subsequent criminal prosecution, an employee who refuses to cooperate in the investigation may be disciplined. However, any evidence that is obtained independently of the employee's statement may be used in a criminal prosecution against the employee. The warning ordinarily states: “You are going to be asked a number of specific questions concerning the performance of your official duties as an employee of the United States Postal Service. You have a duty to reply to these questions and agency disciplinary proceedings resulting in your discharge, may be initiated as a result of your answers. However, neither your answers nor any information or evidence which is gained by reason of such statements can be used against you in criminal proceedings. You are subject to discipline up to and including dismissal if you refuse to answer or fail to respond truthfully and fully to any questions.” (See *page 74 for an example of a Kalkines form*)

Seek confirmation of immunity. Where an OIG agent presents an employee with such a warning which allegedly conveys a grant of ‘use immunity,’ it is appropriate

to ask for the name of the U.S. attorney that authorized the granting of 'use immunity.' In the absence of corroboration that 'use immunity' was actually granted by a U.S. attorney authorized to do so, a steward may advise the employee to not sign the 'Kalkines Warning' until he/she has consulted with legal counsel. For example, there have been situations where a U.S. Attorney didn't grant any kind of immunity but offered only to decline prosecution at that time. Such a decision doesn't protect an employee if prosecution is sought later. A decision of the U.S. Court of Appeals for the Federal Circuit in Modrowski v. Department of Veterans Affairs, 252 F.3d 1344 (Fed. Cir. 2001), has addressed one of these situations. The court found that it was "arbitrary and capricious" for the agency to charge the employee with a refusal to cooperate with its investigation following an alleged grant of immunity since the agency representative's letter describing the U.S. Attorneys' decision not to prosecute the employee and to grant him immunity didn't constitute "an express grant of immunity" and was ambiguous regarding the scope of the immunity.

In addition, a steward should advise the employee of the consequences of giving a statement or not answering questions. This advice may be given in front of the inspectors or agents, or alone in private, and a steward may interrupt the interrogation in order to speak with the employee. If an employee remains silent after being given a Kalkines warning, the OIG agent may threaten the employee with discipline for failing to cooperate in a postal investigation. However, an employee should be made aware that any discipline is subject to challenge in the grievance/arbitration procedure.

Furthermore, an employee should

be made aware that in the event he/she decides to provide inspectors or OIG agents with a statement or answers their questions, false answers could subject them to discipline for providing false statements during an investigation. However, the Postal Service has to prove that the statements are actually false and were made intentionally in a false manner by the employee. It should be noted that the U.S. Supreme Court reversed a federal appeals' court decision that federal agencies may not charge federal employees with the additional offense of making false statements if the employees deny misconduct charges that are later upheld. The Court held that neither the Due Process Clause of the U.S. Constitution or the Civil Service Reform Act at 5 U.S.C Section 7513 precludes a federal agency from sanctioning an employee for making false statements to the agency regarding his alleged employment-related misconduct. (LaChance v. Erickson, 118 S. Ct. 753 (1998))

RIGHT TO INTERVIEW IS AND OIG AGENTS

In investigating a grievance, union representatives should be aware that Article 17.3 of the National Agreement allows stewards a right to interview “aggrieved employee(s), supervisors and witnesses during working hours.” That provision also makes it clear that this request “shall not be unreasonably denied.” Therefore, the Postal Service should provide a steward an opportunity to interview postal inspectors or OIG agents. In addition, it may be possible to obtain notes that an inspector or OIG agent relied upon in preparing an investigative memorandum.

The right to interview a postal inspector or OIG agent has been upheld in a Step 4 settlement. A 1981 NALC settlement with the Postal Service (USPS #N8-N-0224 - see page 75) states that “[t]he Postal Service agrees that a steward who is processing and investigating a grievance shall not be unreasonably denied the opportunity to interview Postal Inspectors on appropriate occasions, e.g., with respect to any events actually observed by said Inspectors and upon which a disciplinary action was based.” Several arbitration awards reinforce and clarify this right. In one case decided by Arbitrator Joseph Gentile, the Postal Service refused to allow a NALC steward to question postal inspectors who had prepared a case against an employee discharged for removing marked quarters from test letters. In the investigative memorandum, one of the inspectors indicated he had obtained the marked quarters from the grievant during an interview. The arbitrator found that the inspector was “clearly a percipient witness to the discovery of the two coins” and should have been

made available to the steward during his investigation of the case. (*AIRS #48646 - USPS #W4N-5E-C 34020; 5/23/1987*)

In another case, Arbitrator Thomas Levak expanded upon the meaning of “witness” for purposes of the provision allowing for steward interviews. He said that “[p]ostal inspectors constitute witnesses within the meaning of Article 17.3 whenever oral or written statements of a postal inspector are relied upon by management, in whole or in part, in reaching a disciplinary decision.” He found that absent a right to interview postal inspectors, “the Union would be left with nothing but a written investigative memorandum itself and a managerial disclaimer that, ‘I just relied on the investigative memorandum.’” He stressed that “an investigative memorandum will never contain all of the observations and events discovered by the investigator, and observations and events – and the manner in which such were observed or not observed – may be crucial to the Union’s defense.” “The Union is entitled to question Postal Inspectors on all their observations and also on the manner in which their surveillance was conducted, in order to determine whether it can be considered reliable,” Arbitrator Levak continued. (*AIRS #48634 - USPS #W4N-5N-D 40950, 40951, 41967, and 41968, interim decision, 10/28/87*) In his final decision in this case, the arbitrator further stated that he “construes and interprets just cause to include the due process requirement that a removed grievant have the right, through the Union, to effectively examine and cross examine her accuser; that notes taken by a Service manager or by a Postal Inspector relative to a

removal are crucial to such an effective examination; and that the denial of those notes therefore denies a grievant her rights under Article 16.” (*AIRS # 48633, final decision, 11/3/87*)

In another case, the Postal Service refused to allow the union to interview an inspector in the preparation of a case involving an employee’s removal due to alleged inappropriate conduct involving a customer. Though the inspector had interviewed the customer, management said the steward

could not speak with either the inspector or the customer. Arbitrator George Eyraud indicated that “the postal inspectors were witnesses under Article 17.3 and should have submitted to interview.” He also concluded that both the refusal to allow the union

access to witnesses and to comply with its request for documents “amounted to a denial of due process to the grievant and are violative of the labor agreement. Any one of the above enumerated violations might be fatal to the removal of grievant here. Certainly, in their totality, they amount to a lack of due process and render the removal of grievant to be invalid and due to be set aside.” (*AIRS # 48635 - USPS #G94N-4G-D 96093648; 1/30/1997*)

Also see *AIRS #48636 - USPS #F98N-4F-D 00254514 & 00251275, 3/23/2001* in which Arbitrator Claude Ames ruled that the Postal Service violated Articles 17.3 and 31.3 by denying

the union’s request to interview postal inspectors who had been involved in investigating circumstances for which an employee was removed. The arbitrator ordered that management cease and desist from further violations of these Articles. In addition, see *AIRS #48637 - USPS # G94N-4G-D 99272440; 12/22/1999*. In that case, Arbitrator J. Reese Johnston sustained a grievance challenging an employee’s removal on the basis that the Postal Service deprived

the grievant of his due process rights by failing to provide the union with copies of notes and tapes relied upon by the postal inspector in preparing his investigative memorandum.

A Step 4 settlement also provides support for a request for an inspector

or OIG agent’s notes. In *USPS #E90N-1E-C 93048688, 7/14/1997* (see pages 76-77), the NALC sought the Inspection Service’s notes during its investigation. The parties agreed that “it appears that the notes and tapes relied upon to prepare the investigative memorandum should have been made available to the union.”

Note, however, that a regional arbitration award has denied the union’s request that evidence obtained by inspectors from its viewing gallery should be disallowed because the Postal Service denied the union access to the gallery. The union cited Article 31, Section 2, that the Postal Service will make available

Arbitrator Eyraud indicated that “the postal inspectors were witnesses under Article 17.3 and should have submitted to interview” ... [and] ... the refusal to allow the union access to witnesses and to comply with its request for documents “amounted to a denial of due process to the grievant and are violative of the labor agreement.”

for inspection by the unions all relevant information. The arbitrator found that the gallery does not come within the scope of the word “information” in Article 31 since it is an investigative technique. Arbitrator Marvin Feldman found that the union’s request, to determine the line of sight inspectors referred to regarding their viewing from the gallery, could be obtained just as easily from looking from the floor area to the gallery perch used. He stressed, however, that “[a]ny notes ... made from the viewing from the gallery or any information of a written nature, of whatever kind, is subject to the Article 31 admonition” In addition, Arbitrator Feldman rejected the union’s argument that an investigative memorandum should be ruled to be inadmissible since only

one of three inspectors involved in the investigation signed it and the inspector whose signature was on the memorandum didn’t participate in all phases of the investigation. The union further asserted that the document contained much opinion rather than facts and was written in a confusing manner. The arbitrator indicated that the document, which was prepared in the ordinary course of duties of an Inspection Service investigation constituted proper evidence and was admissible, editorializing didn’t render its admission inappropriate, and all three postal inspectors involved in the investigation testified in this case to its veracity. (*AIRS #2883 & 2884 - USPS #C8C-4G-D 13334 and 13332; 5/27/80*)

RIGHT TO COPIES OF I.M. & OTHER DOCUMENTS

Under the contract and the National Labor Relations Act, the Postal Service is required to provide the union with documentation that is relevant to the processing of a grievance. In the case of Inspection Service and OIG documentation, obtaining a copy of the Investigative Memoranda and related documentation is critical to defending against an employee’s discipline. Even though the Inspection Service and OIG may appear to be separate entities from Postal Service management, they are covered under the same contractual provisions as management regarding information requests. Management also has an obligation to provide information that is requested regarding an OIG or Inspection Service investigation even if the information isn’t in its files. Responses by the OIG to questions put forth by the APWU indicate the recognition of this obligation. Therefore, requests

for information regarding investigative memoranda and other documentation compiled by the Inspection Service and OIG should be made directly to Postal Service management.

If the Postal Service refuses to provide this information, the union should file a grievance and can bring NLRB charges against management for not providing the information. The NLRB doesn’t defer information request charges to arbitration; therefore, the added prospect of an NLRB proceeding may assist in speeding up the Postal Service’s compliance with the union’s request.

During grievance proceedings on discipline following an inspector or OIG agent’s investigation, the longer the Postal Service refuses to provide a copy of the Investigative Memorandum and related information the more likely an arbitrator will be to overturn or modify discipline on the basis of this refusal. In

several arbitration awards, arbitrators have indicated that not only does a violation exist in these circumstances under several provisions of the contract, but due process considerations warrant overturning grievances where the Postal Service hasn't provided or has delayed in providing the union a copy of an investigative memorandum. In one case involving a window technician placed on an emergency suspension for allegedly misusing postal funds, an arbitrator rejected management's argument that it was justified in not providing copies of

the investigative memorandum among other information because it hadn't obtained copies from the Inspection Service and the IS's investigation was ongoing. Arbitrator I.B. Helburn ruled that management

violated Articles 17.3 and 31.3 by not providing the union with information that it requested. He said that "[i]f the Postal Service felt that providing [the Investigative Memorandum and the Disciplinary Action Request, as well as other documents] would compromise an ongoing investigation, then it had the option of placing [the grievant] on Administrative Leave with pay rather than on emergency placement." "The Service did not have the option of disciplining [the grievant] while withholding the documents which would allow the Union an understanding of the specific basis for the discipline," he stressed. He then overturned the employee's removal because "[t]he possible cumulative impact of this shortage

of information on the ability of the grievant to defend himself is too great to overlook or ignore. (AIRS #28030 - USPS #H94C-4H-D 97041098; 11/9/1997)

Another award also held that the Postal Service's refusal to provide the union with requested information, including all the pages of a signed statement provided by a grievant to an OIG agent, warranted overturning a removal charging improper conduct for shortages alleged to be in the amount of \$74,726.47 in an office during the time the grievant was an acting supervisor. Arbitrator James Rimmel

Arbitrator Thomas ruled that the Postal Service denied the grievant his due process by failing to provide the union with "critical information" that it requested, which included a copy of the investigative memorandum, before the parties met at Steps 1 and 2 of the grievance procedure.

indicated that "a considerable amount of relevant data" had not been made available to the union and management failed to show that the request was unreasonable. He noted

that though it was unclear whether the "unwillingness/inability to provide the requested/relevant data rests with the OIG office, the Baltimore District Internal Audit Unit and/or local Management," he couldn't "ignore" "Management's total disregard of a Union request for information." (AIRS #44713 - USPS #K00C-4K-D 05161638 and 05126445; 10/30/2006) A third award found that despite a grievant being provided a copy of an OIG report during an EEO proceeding, the report was never given to the union representative upon his request during the grievance procedure and only was first produced during the arbitration hearing. Arbitrator Robert Brown found that such production should have been

to the party to the contract (the union) and should have been provided no later than the Step 2 appeal. (*AIRS #46659 - USPS #K06C-4K-D 07222327; 8/6/2008*)

Note, however, that in a case in which the Postal Service failed to provide the union with investigative reports, the union didn't meet its responsibility to request this information from the Postal Service during the grievance procedure. Arbitrator Fred Butler denied the union's request to exclude the investigative reports from evidence on the basis that the information would have been made available upon the union's request. (*AIRS #42487 - USPS #F00C-1F-D 04178971 and 04214029; 4/27/2005*)

In several other awards, arbitrators have held that disclosure of OIG reports is required during the earlier steps of the grievance procedure. In one case, in which the union was deprived of an OIG report until the time a Step 2 appeal was processed, Arbitrator King ruled that where the evidence showed that the OIG's report had been made available to the Postal Service before it conducted a predisciplinary interview more than three weeks before the Step 1 meeting, the grievant was entitled to this documentation ("complete disclosure of the basis for the accusations against him") at the time of the predisciplinary interview and at a minimum prior to the Step 1 hearing. (The report wasn't provided until sometime during the processing of the Step 2 appeal.) Since the grievant was placed at a disadvantage in not being able to defend against management's accusations at an early stage in the grievance procedure, according to the arbitrator, his due process rights were violated and settlement in accordance with the contract was not possible. On this basis as well as the merits, he sustained the union's grievance

(*AIRS #46089 - USPS #E06C-1E-C 07152539 and E06C-1E-D 07162397; 2/7/2008*)

In addition, an award set aside a letter of warning that had been issued to an employee following an Inspection Service investigation into alleged problems with following proper registry procedures. Arbitrator Irene Thomas ruled that the Postal Service denied the grievant his due process by failing to provide the union with "critical information" that it requested, which included a copy of the investigative memorandum, before the parties met at Steps 1 and 2 of the grievance procedure. She cited the fact that at Step 1, the union was severely prejudiced because the Postal Service made an offer of settlement and the union had not had an opportunity to review the evidence before it rejected the settlement offer. (*AIRS #37540 - USPS #A98C-1A-D 02037171; 5/21/2002*)

Other awards have held that the Postal Service's refusal to provide a copy of the Investigative Memorandum or other related documents prior to a Step 2 meeting or before management issued its Step 2 decision violated the National Agreement and warranted sustaining grievances challenging employees' discipline. In one of these awards, management failed to make available to the union at Step 2 the investigative summary by an inspector concerning an alleged confrontation between an employee and a security police officer, as well as the written statement of the police officer, and statements of several employee witnesses. Arbitrator G. Allan Dash ruled that such an omission required reversal of the grievant's discharge on the basis "of the proven defective procedures of the United States Postal Service" in processing the grievance. (*AIRS #2447 - USPS #AB-E-1057-D; 5/17/1974*) In

another award, Arbitrator Irving Tranen accepted the union's argument that introduction of any evidence relating to an OIG investigation should be excluded due to the Postal Service's failure to provide such evidence at Steps 1 and 2 of the grievance procedure. He found persuasive the union's contention that management's refusal to provide such information violated Article 15, Section 2, Step 2(d) which requires the parties to make a full and detailed statement of facts and contractual provisions relied upon. As a result, the employee's placement on emergency suspension due to alleged misrepresentation of her physical restrictions, was ruled to be null and void because no just cause supported this action. (*AIRS # 45705 - USPS #H00C-4H-D 06245326; 7/2/2007*)

An arbitrator ruled that the investigative memorandum and an edited version of a videotape were inadmissible in a hearing concerning an employee's placement on emergency status and her removal. The arbitrator indicated that despite the union's repeated requests for such information, the Postal Service refused to provide them until after the Step 3 meeting (in the case of the investigative memorandum) and the arbitration hearing (in the case of the videotape). She based her decision on the requirement that the parties exchange all relevant information necessary to process a grievance at Step 2 of the grievance procedure (Articles 31.3 and Article 15.2 Step 2(d)). She rejected the Postal Service's contention that there must be a showing of prejudice for the evidence to be excluded. (*AIRS #41920 - USPS #E00T-4E-D 04043651; 11/24/2004*)

Note, however, that in a case in which the Postal Service delayed providing an investigative memorandum to the union until Step 2 and didn't provide it

with a copy of a surveillance video, the arbitrator ruled that the employee's due process rights weren't violated. Arbitrator Sherrie Talmadge determined that at the time the SDO offered to hold off issuing a Step 2 decision until the union had been provided with a copy of the IM and therefore attempted to comply with Article 15.2 Step 2(d). Moreover, she noted that the Postal Service never possessed a copy of the surveillance video and thus couldn't provide it to the union. (*AIRS #46123 - USPS #A00C-1A-D 07059435, 07072037; 3/13/2008*) However, note that documentation possessed by the Inspection Service constitutes information that must be provided under Article 17.3, even if Postal Service management doesn't physically possess a copy of such information.

In several other awards, arbitrators have decided that delays in the production of Investigative Memoranda of three and five months after the information was requested adversely impacted the union's right to represent grievants who had been removed in violation of due process. These errors, however, also were compounded by other procedural violations which resulted in overturning the employees' removals. (*AIRS #27941 & 46380 - USPS #E94C-1E-D 97012692 and K00C-1K-D 07061590; 10/26/1997 and 5/22/2008*)

In addition, a Step 4 settlement between the APWU and the Postal Service indicates that Inspection Service worksheets prepared during an audit are required to be released for review, unless they contain "confidential information that is precluded from release by the Privacy Act or Freedom of Information Act" (*USPS #H8C-3T-C 27940; 8/19/1981 - see pages 78-79*) Also see the prior discussion regarding obtaining Inspection Service notes (Section on Right to Interview Inspectors and OIG agents).

DELAYS IN IS OR OIG INVESTIGATIONS

Several arbitration awards have found that delays as a result of Inspection Service investigations or issuance of their reports deprived grievants of due process and were a reason or one of several reasons for overturning their discipline. In one case, Arbitrator Lionel Richman ruled that an 11-month delay between the beginning of an Inspection Service investigation and its end, on the issue of discrepancies between the actual date three money orders were issued and when they were reported issued, handicapped the grievant in the preparation of her defense. He said that “[e]xpecting an employee to remember the specifics of the issuance of three money orders, almost a year before, is expecting too much.” (*AIRS #34788 - USPS #F98C-4F-D 0015232 & 00198646; 12/15/2000*) In another award, the Inspection Service didn’t issue its report until a year after the inspector had first interviewed an employee’s doctor, regarding whether a return-to-work form had been altered. The arbitrator said that since the inspector had the “fundamental facts” after he interviewed the doctor, he couldn’t understand why he hadn’t communicated this information to the Postal Service for a year. He stressed that “[o]ne of the elements of due process is the right of an employee to have discipline imposed in a reasonable time, considering the circumstances of the case.” In addition, according to the arbitrator, “[d]elay in imposing discipline can make it more difficult for an employee to mount a defense, as documents may be destroyed, and witnesses may become difficult to locate” and “[t]he memories of witnesses tend to fade over time.” (*AIRS #31108 -*

USPS #K94V-1K-D 99019887; 4/8/99)

Arbitrator Patricia Plant ruled that a 2½ year delay by the Inspection Service in completing its investigation and issuing its memorandum from the last incident of an employee’s alleged misconduct was unreasonable. She found that this “severe” delay “infringes on the right of a party to call a witness and harms that party in the full presentation of its case and limits an arbitrator from all that could be relevant to a full understanding of the grievance.” The arbitrator also cited testimony from a union official that two witnesses were no longer available to testify. For this reason as well as management’s failure to conduct its own investigation, the arbitrator concluded that the “cumulative effects of the procedural defects loom large” and warranted overturning the employee’s removal for failing to report earned income while receiving workers’ compensation. (*AIRS #23716 - USPS H90C-4H-D 94036734; 12/8/1994*)

Also see *AIRS #48638 - USPS #H98N-4H-D 02174594, 1/31/2003* in which Arbitrator J. Reese Johnston found that a delay in the Inspection Service’s completion of its investigation amounting to 18 months, along with an additional three-month delay before the inspector’s report was provided to management and a notice of removal was issued, violated the grievant’s due process rights. He found that this error, in addition to the Inspection Service’s failure to afford the grievant her Weingarten rights during their investigation, warranted setting aside her removal. Another award held that postal inspectors’ delay of approximately a year in reporting to management that an

employee had been involved in an illegal drug transfer required a conclusion that just cause was lacking for her removal. (AIRS #48639 - USPS #F90N-4F-D 95069289 & 96008155; 5/2/1996)

Note, however, that a couple of other awards have held that a four or five-month delay between the start of an OIG investigation and the bringing of charges by the Postal Service was not unreasonable, and a three-month delay between management's referral of a situation for investigation and the OIG's release of a report was not violative of due process. (AIRS #46054 & 46124 - USPS #B00C-4B-D 07105592 and C00C-1C-D 06136104; 2/18/2008 and 3/17/2008) Also, an award by Arbitrator Linda Klein determined that a delay of about seven months between the time the OIG received an anonymous call claiming that an employee was selling real estate while on duty and the employee's emergency suspension was not unreasonable or excessive on the basis that "[t]here was no rush to judgment here and the grievant was not denied due process" (AIRS #43634 - USPS #E00C-4E-D 05179391; 2/16/2006)

But another award held that an eight-month delay between the time an investigative memorandum was issued and the Postal Service's pre-disciplinary interview constituted a violation of due process. Arbitrator Jacqueline Drucker indicated that it wasn't unreasonable for the grievant to assert she had "no specific recollection of her activities on the days at issue [which were the subject of eventual disciplinary charges]." She reasoned that "[o]ne of the reasons ... delays compromise due process is that memories of the employees and witnesses fade and evidence disappears, thus impairing the employee's ability to present an effective

defense." (AIRS #36500 - USPS #A98V-4A-D 01109937; 9/19/2001)

In addition, delay is more harmful when an employee has been placed on an emergency suspension during an investigation and isn't receiving pay. See AIRS #45943 in which Arbitrator Hamah King ruled that a delay of more than a month between the date investigative activity was completed and an OIG report was prepared, another month-long delay between the date an investigative memorandum was received by management and the date of a predisciplinary interview, as well as an additional month's delay between the time of the predisciplinary interview and issuance of a notice of removal without a "credible explanation" violated the principles of just cause. (AIRS #45943 - USPS #E00C-4E-D 06265912 and E06C-4E-D 07138245; 11/14/2007)

STEWARDS' "PRIVILEGE"

In the event an inspector or OIG agent subjects a steward to interrogation regarding information disclosed or communicated to him/her by an employee while the steward is acting in the capacity of a representative, such interrogation may constitute a violation of the National Labor Relations Act. The reason is that such demands carry explicit or implicit threats of discipline of the steward if the steward doesn't cooperate and are clearly demands to interrogate employees about their union activities. An NLRB case on this issue is Cook Paint and Varnish Company, 258 NLRB 1230 (1981).

In order to protect the steward in the event of such a demand, the steward and/or local officer(s) should inform both management officials, as well as the inspector or OIG agent, that the Local is going to file an unfair labor practice charge against the Postal Service alleging violations of Section 8(a)(1) if the inspector or OIG agent goes ahead with questioning. The Local should request injunctive relief under Section 10(j) of the National Labor Relations Act since the damage done by such a demand is irreparable because of the ongoing chilling effect that it has both on an employee's willingness to consult stewards, and on the willingness of employees to serve as stewards. The harm in such a case cannot be repaired with an eventual NLRB cease-and-desist order. For this same reason, the charge should not be deferred to arbitration. Such a charge should allege as follows:

On or about _____, the U.S. Postal Service interfered with, restrained and coerced employees in the exercise of their Section 7 rights by,

among other things, demanding under threat of discipline that union officials submit to interrogations about their union activities. Injunctive relief under Section 10(j) is requested.

The Local should cite Cook Paint and Varnish Co. when contacted by the Board Agent.

It is important to note that that though stewards enjoy a qualified privilege, as employees of the Postal Service they also have an obligation to cooperate with employer investigations in judicial proceedings. The steward's "privilege," therefore, isn't equivalent to an "attorney-client" privilege. Should a steward be subpoenaed to testify before a grand jury or in court, a steward can be held in contempt if he/she refuses to testify based upon the NLRB privilege for union stewards. Unlike an attorney-client privilege, which would be honored, there doesn't appear to be any judicial authority for a union steward to withhold information when questioned under oath by law enforcement officials. However, the steward's "privilege" applies in the context of investigatory interviews by postal inspectors or OIG agents. In these cases, the questioning isn't taking place in a judicial forum where a "testimonial" privilege is required to refuse to answer questions. This privilege should therefore apply not only to questioning of stewards by managers or labor relations officials but also when stewards are questioned by postal inspectors and/or OIG agents.

In a regional arbitration case, an arbitrator relied on the Cook Paint and Varnish decision in ruling that evidence improperly obtained by

coercive interrogation of a union steward representing a grievant couldn't be considered by him. Arbitrator Timothy Buckalew refused to allow the Postal Service's introduction of written and verbal statements made by the steward during management's interrogation regarding what the steward had told a grievant before she was charged with unacceptable conduct. The Postal Service was attempting to obtain evidence to show that the steward told the employee she wasn't entitled to premium pay before the grievant told the timekeeper she was, in an effort to show bad motivation by the grievant. The arbitrator acknowledged

that the NLRB has ruled that "forcing a steward to disclose the substance of conversations with a grievant amounts to unlawful interference with Section 7 rights in violation of Section 8(a)(1) [of the NLRA] and ordered the employer to cease and desist." He thus ruled that "evidence adduced as a result of that coerced disclosure may not be offered as evidence in this arbitration and should not have been considered by management in deciding to discipline [the grievant]." (*AIRS #39018 - USPS #B98C-4B-D 02058369; 1/10/2003*)

DEFENSES IN DISCIPLINE INVOLVING IS OR OIG

In defending against discipline issued following an Inspection Service or Office of Inspector General investigation, the union can assert arguments directly related to inspectors' or OIG agents' involvement in a case in addition to any other defenses available in discipline cases. Some of the most successful arguments are that the Postal Service improperly relied on an Inspection Service or OIG Investigative Memorandum without conducting its own investigation and that the Inspection Service or OIG improperly influenced management's issuance of discipline by recommending a specific course of action. In addition, inspectors' or OIG agents' use of particularly deceptive or egregious interview techniques may be sufficient in certain cases to overturn an employee's discipline. Also, there are arguments that have been successful in defending against a charge that an employee failed to cooperate in an Inspection Service or OIG investigation.

Management Reliance on IS or OIG Investigative Memoranda

A majority of arbitration awards reviewed have held that management's reliance on an Inspection Service or OIG Investigative Memorandum in issuing discipline, without conducting its own investigation, is a basis for sustaining a grievance challenging the discipline. In reaching this conclusion, arbitrators have reasoned that the failure to conduct a thorough investigation is a violation of the Memorandum of Understanding on the Role of the Inspection Service in Labor Relations Matters. The memo provides in part that "[t]he parties ... acknowledge the necessity of an independent review of the facts by management prior to the issuance of disciplinary action, emergency procedures, indefinite suspensions, enforced leave or administrative actions." Awards also indicate that management's lack of a thorough investigation fails to meet criteria used in establishing

whether there is just cause for discipline under arbitral precedent and the EL-921 Handbook, Supervisors' Guide to Handling Grievances. In addition, some have relied on general due process considerations which include the fact that an Inspection Service or OIG Investigative Memorandum can't substitute for the requirement that management has to afford an employee a predisciplinary interview or a "day in court" privilege before discipline is initiated.

Improper Reliance on Ambiguous Admissions in Memos

Several awards in which arbitrators found that there had been improper reliance on an Inspection Service memorandum involved ambiguous admissions or statements made by an employee to postal inspectors. One case involved an employee who had been removed for allegedly misappropriating funds after an audit revealed a shortage in her accountability. When the employee was interviewed by the Inspection Service, she signed a written statement saying that probably (with the word "maybe" crossed out) she forgot to pay for a book of stamps, a roll of quarters, and a money order. However, later on she found the money order in her home as well a receipt showing she had purchased it from another clerk and contacted the inspector with this information but he didn't return her call. In the award, Arbitrator Jacquelin Drucker found that the record clearly established that management relied solely on information stated in the Inspection Service's Investigative Memorandum and didn't conduct any independent investigation with the exception of an examination of the grievant's 1412s following the audit. She said that these inactions

by management created "procedural flaws that are fatal to the USPS's case," observing that the "overwhelming majority" of arbitrators that have addressed this issue have concluded that "in all but the most extraordinary cases, questioning an employee by Postal Inspectors does not supplant the need for Management to conduct a pre-disciplinary interview of that employee." She further stressed that an investigation by the Inspection Service doesn't replace management's obligation to make an "inquiry into the equities of the case." She noted that the Investigative Memorandum's finding that the grievant said she had taken stamps, a roll of quarters and a money order that she hadn't paid for "overstate[d] the contents of the Grievant's written statement." The written statement that "probably [maybe crossed out] [the grievant] forgot to pay for" the items "was fraught with such uncertainty that it was imperative for Management to take some reasonable steps to obtain independent verification of the IM information," according to the arbitrator. Therefore, communication with the grievant prior to imposition of the removal was essential in order to give the grievant the opportunity to explain the reasons she felt her statement was being misconstrued. (*AIRS #27618 & 27619 – USPS #A94C-4A-D 97050845 and 97062427; 8/20/1997*)

Another case involved an employee who was issued a notice of removal from the Postal Service and was arrested for misappropriation of funds. (The criminal charges against the grievant were dismissed subsequently.) The arbitrator's award in this case found that the grievant's admission, which was included in the inspector's Investigative Memorandum, was ambiguous and was the sole basis for the employee's removal. He concluded

that the grievant's statement didn't rise to a clear admission that he stole postal funds because of many factors. He cited the fact the employee hadn't been given Miranda warnings and didn't have union representation at his interview with a postal inspector, this inspector wasn't made available to testify at the hearing, the grievant's statement wasn't written, and management failed to conduct its own interview with the grievant in order to deal with the ambiguity in his statement. (*AIRS #30683 - USPS #A94C-1A-D 98109718; 1/18/1999*)

Improper Reliance on Unreliable or Hearsay Information in Memos

Several other cases have involved Inspection Service or OIG memoranda which included unreliable or hearsay information. In addition, some cases involving placement of employees on indefinite inspections have indicated that the Postal Service's reliance merely on arrest charges and an arrest warrant or the fact that an employee was indicted were insufficient to support the suspensions.

In one of the cases involving hearsay information in a memo, an arbitrator decided that management overreacted to the Office of Inspector General's discovery of what it believed to be pieces of delayed business reply mail in discharging an employee who was the only regular BRM clerk in the office. The union challenged the discipline in part on the basis that management didn't conduct an independent investigation into the alleged offense. The arbitrator found that "the case against grievant reduces to largely illegible photocopies and the hearsay account contained in the OIG report." He noted that the supervisor who proposed the employee's removal testified

that "at best, she only 'glanced' at the photocopies [of the alleged delayed mail]." Moreover, he noted that the OIG agent wasn't called as a witness and thus wasn't subject to cross-examination regarding his conclusion that the mail he found was delayed BRM mail. Though he noted that management later reduced the grievant's removal to a seven-day suspension, Arbitrator Andrew Strongin ruled that "the lack of any independent investigation by management precludes the Arbitrator" from addressing the issue as to whether the alleged delays in BRM mail were attributable to management problems rather than the grievant's misconduct. (*AIRS #46444 - USPS #K06C-4K-D 07241575; 6/4/2008*)

Arbitrator Hamah King ruled that testimony from an OIG agent and his report should be "stricken from consideration" because it contained hearsay. The case involved an employee's discharge, partly for alleged falsification of CA-20 forms (attending physician forms for injury compensation purposes). The agent's testimony and report attest to conversations between himself and the doctor and the doctor's medical director concerning denials that they altered the forms. The arbitrator noted that the OIG agent never obtained a "sworn statement or even a plainly written statement from the doctor or his clinic director" and the Postal Service didn't attempt to have the doctor or director testify during arbitration. He found that such reliance on hearsay is rejected "because it allows an unfair factor to enter a system where an attempt is being made to obtain truth and justice." Moreover, Arbitrator King noted that the agent also relied on oral statements from a nurse which were hearsay. Accordingly, he found that there was no basis for the Postal Service's charge. (*AIRS #45282 -*

USPS #G00C-1G-D 06150136; 2/25/2007)

Several other arbitrators have overturned discipline because of unreliable information in Inspection Service investigative memoranda. In one case involving an employee's removal for improper conduct based on alleged underreporting of postal sales and mishandling of money orders, Arbitrator Michael Zobrak concluded that the Postal Service had improperly relied on an Inspection Service investigative memorandum that contained material misstatements of fact. The arbitrator found that the postal inspector indicated he had questioned postal customers to verify that they made purchases of stamps on particular dates but the customers testified at the hearing unequivocally that the Inspection Service didn't contact them. In addition, he noted that one of the witnesses couldn't have responded to a regular telephone call because she was hearing impaired. The arbitrator concluded that since he "can only base a decision on information that is deemed credible and reliable," the Postal Service didn't meet its burden of proving that the grievant acted as charged (*AIRS #34425 - USPS #C98C-1C-D 99120835; 10/5/2000*)

In another case involving an employee's removal for alleged threats against a supervisor, Arbitrator John Fletcher found that there was no support for a hearsay statement in the Investigative Memorandum which was that the grievant's steward said that the grievant had made a threat. He noted that the steward denied the statement when he was interviewed by the Inspection Service and under oath before the arbitrator, and the Postal Service provided no evidence to refute his testimony at arbitration. On the basis that there was no witness corroboration that a threat had been made

by the grievant other than allegations made by the complaining supervisor, the arbitrator sustained the union's grievance (*AIRS #36029 - USPS #J98C-1J-D 00066062 & 00107640; 6/22/20001*)

In a case involving an employee's placement on an emergency suspension and later an indefinite suspension based on his arrest for possession of narcotics, an arbitrator found that the suspensions should be set aside. The employee had been arrested for felony as well as misdemeanor charges for possession of narcotics in his vehicle while off duty. Arbitrator William Miller found that the Postal Service merely relied on the Postal Inspection Service's investigative memorandum in making its decision and that memorandum inaccurately stated that the grievant had been arraigned on all the charges. The evidence showed that the grievant hadn't been arraigned on charges when the suspension was issued and the felony charges were later withdrawn. The arbitrator found that management made no attempt to verify the information in the investigative memorandum and never conducted a pre-disciplinary interview. Based on such a lack of evidence at the time the grievant was placed on an emergency suspension and its failure to conduct an investigation before it issued the indefinite suspension, Arbitrator Miller found that management improperly disciplined the employee. (*AIRS #36409 - USPS #C98C-4C-D 0110854; 9/15/2001*) Also see *AIRS #12580 - USPS #E4C-2A-D 36743 (10/13/1987)* in which Arbitrator G. Allan Dash overturned an employee's removal for alleged falsification of a disability certificate because of the Postal Service's exclusive reliance on an investigative memorandum which contained inaccuracies and inconsistencies. However, the arbitrator

also relied on other reasons for his decision, including management failure to provide the employee representation during the inspectors' interview.

In another award, Arbitrator Floyd Weatherspoon found that the Postal Service lacked just cause to place an employee on an indefinite suspension based on his arrest for aggravated assault and endangering the welfare of a child. All of the alleged offenses occurred while the grievant was off-duty and away from postal premises. The arbitrator found that the Postal Service merely relied on the Postal Inspection Service's investigative memorandum that simply repeated charges in the arrest warrant; he noted that the Supervisor of Maintenance Operation testified that he based his decision to place the grievant on the suspension because of the filing of charges and the arrest warrant. Arbitrator Weatherspoon ruled that reliance on the investigative memorandum and the warrant were insufficient to meet the just cause standard. (*AIRS #29426 - USPS #C94T-1C-D 96076156; 6/25/1998*)

In an award dealing with imposition of an indefinite suspension, Arbitrator George Eyraud reversed the suspension because of management's failure to investigate the matter and to comply with review and concurrence procedures. The arbitrator noted that the Supervisor of Mails who issued the notice of indefinite suspension, based on an indictment on two counts of cocaine possession with intent to distribute, "entirely relied" on the investigative memorandum of the Postal Inspection Service. He found that management lacked just cause to issue the independent suspension because it failed to interview the grievant before initiating the indefinite suspension. (*AIRS #21017 - USPS #S0C-3E-D 7907; 10/13/1992*)

Improper Reliance on Verbal Representations of IS or OIG Agents

Arbitrators also have sustained grievances regarding discipline on the basis that management improperly relied exclusively on Inspection Service or OIG agents' verbal representations. Arbitrator Christopher Miles set aside an employee's emergency suspension on the basis that the Postal Service improperly relied on a postal inspector's representations without conducting its own investigation in issuing the discipline. A postal inspector observing and videotaping employees at the Miami, Florida for possible embezzlement of funds informed the Supervisor of Customer Service that the employee had been improperly reporting postal sales. The manager conceded on cross-examination that the postal inspector didn't show him any information, and that he placed the employee off the clock before he even performed a count of her drawer. The clerk testified that the manager didn't ask her any questions regarding the postal inspector's allegations before placing her off the clock. Arbitrator Miles found that "[i]n the case at hand, there was no detailed investigation or questioning and although the IM makes reference to [the grievant's] actions being videotaped, no such video recording was provided." He also said that "it is clear that there was no 'review of the facts' by the Supervisor prior to placing [the grievant] in a non-duty status without pay" and "[t]he verbal representation of the Postal Inspection Service was all that he relied upon in his determination to invoke Article 16, Section 7." He concluded that "it is clear that the just cause standard requires the Postal Service to conduct a thorough and objective investigation before imposing any discipline," and since

this was not done in this case, “it is found that just cause was not established and the action by [the Postal Service] was improper.” (*AIRS #41233 - USPS #H00C-4H-D 03209250; 6/28/2004*)

Arbitrator Barry Baroni overturned an emergency suspension, which had been issued on the basis of an inspector’s verbal representation that the employee had been “caught trying to sell computers which were stolen.” He noted that in this case inspectors never issued a written investigative memorandum. The arbitrator found that management failed to conduct an “independent review of the facts of the case and did not give the Grievant an opportunity to explain what happened prior to assuming criminal guilt and issuing the emergency placement.” He further indicated that had such an investigation or predisciplinary interview been conducted, management would have learned that the grievant was not arrested but was “merely detained by police” for questioning in order to find out whether the computers he obtained from his roommate were stolen. The arbitrator determined that these failures, as well as a lack of timely notice and reasons for the Article 16.7 action, constituted “harmful errors which interfered with the Union’s ability to process the grievance” and were sufficient to reverse the emergency placement action. Moreover, he said that emergency placements under Article 16.7 constitute discipline and are subject to “the same requirements of ‘Due Process’ as are other forms of discipline” and therefore require “proof of just cause for the discipline; a Pre-Disciplinary Interview; an independent investigation” (*AIRS #28028 - USPS #G94C-1G-D 97060010; 10/28/1997*)

In another similar case, Arbitrator Linda Byars overturned an employee’s emergency suspension for alleged

misappropriation of government property at the VMF, in part because the Postal Service relied on verbal statements from OIG agents and didn’t conduct its own investigation. She cited an e-mail from a manager to an acting labor relations specialist that stated that he had contacted the Manager of Operations Program Support “of what OIG agents verbally told us and that he has a postal employee who appears to be implicated in some postal property misappropriation.”

Arbitrator Byars noted that there was no investigative memorandum, notes of interviews conducted by OIG agents, or any other documents supporting the emergency suspension. In addition, she said the evidence showed that the Manager of Operations Program Support issued the suspension without speaking to the OIG agents directly, without conducting an interview with the grievant, or conducting any investigation. She also observed that “there is no evidence in the record ... on which [the manager] could have made an ‘independent review of the facts’ as required in the Memorandum of understanding regarding the ‘Role of Inspection Service in Labor Relations Matters.’” (*AIRS #45993 - USPS #H06V-4H-D 07301328; 1/22/2008*)

Violation of EL-921 Handbook and Due Process

In another award, an arbitrator overturned an employee’s removal for falsifying a CA-1 form on the basis that the Postal Service violated the employee’s due process by relying on an Inspection Service investigation and not conducting its own investigation and a predisciplinary interview. In this case, the Inspection Service conducted surveillance of an employee’s activities after he had

requested continuation of pay (COP) due to an injury and subsequently interviewed him. The MDO admitted that he and other management officials had never interviewed the employee or conducted its own investigation. However, management argued that since the Inspection Service had conducted a thorough investigation, no further investigation was warranted. Arbitrator Margo Newman determined that a thorough investigation is required in order to afford an employee due process and is one of the criteria that must be met in order to establish just cause as set out in the EL-921, Supervisor's Guide to Handling Grievances. She found that "[w]hile the role of the Inspection Service is to gather facts, 'it is the decision-maker who must hear from the employee regarding his side of the story and any evidence of mitigation concerning the possible penalty prior to making a determination.'" The arbitrator also stressed that the MDO admitted not conducting an independent investigation and relied exclusively on the investigative memorandum and videotapes from the Inspection Service. She noted that the MOU concerning the Role of the Inspection Service in Labor Relations matters "fully acknowledges 'the necessity of an independent review of the facts' by management prior to the issuance of disciplinary action" and the investigative memorandum should be "only one factor that must be weighted [in issuing discipline] and cannot be presumed to be accurate or complete without independent analysis." (*AIRS #36276 - USPS #C98C-1C-D 00105522; 6/18/2001*)

Violation of MOU on Role of Inspection Service and Due Process

Frequently, the Postal Service relies on Inspection Service or OIG investigative memos in issuing removals due to alleged falsification of employment applications. In one of these cases, a notice of removal was issued to a transitional employee after the Inspection Service informed management that the grievant had been arrested and charged with homicide (knife) and the disposition of the charge was unknown. The employee had failed to disclose a criminal conviction on her application. The Postal Service requested an explanation regarding her arrest, and the grievant supplied a record from the probation office that she had been sentenced to five years of probation for second degree assault but had subsequently been discharged from probation as improved. The arbitrator found that the disciplining supervisor failed to conduct "any independent investigation of the facts upon which the charges were based or attempted to verify the Postal Inspector's Investigative Memorandum in any way." He noted that even though the probation officer said in his letter to the grievant that she had been "sentenced" to a period of probation, the disposition of the criminal charges remained unknown at the time the notice of removal was issued to the grievant. In addition, there are two conflicting interpretations from this circumstantial evidence; i.e., that the court had continued the matter pending completion of a probationary period and then dismissed the matter at the end of the probation period or the grievant had been convicted of a crime. Since no investigation was conducted and the Postal Service failed to show that the grievant had been afforded a

predisciplinary interview, the arbitrator concluded that the grievant had been deprived of “due process protection guaranteed by the Agreement”

In his decision, Arbitrator George Shea stressed that a disciplining supervisor may rely on “the investigative expertise” of the Inspection Service to conduct an investigation into criminal background, but “the disciplining supervisor remains contractually responsible for the completeness and accuracy of the investigation and must conduct the investigation of facts regarding the employment aspects of the charged offense.” He also noted the applicability of the MOU on the Role of the Inspection Service in which the parties agreed that an “independent review of the facts by management” must be conducted prior to issuance of a disciplinary action.

Moreover, Shea defined the elements of due process that were violated in this case. “The fundamental elements of due process afforded an employee by the just cause standard, prior to imposition of discipline, [are] (a) to have benefit of a complete and objective investigation of the events precipitating the discipline by the individual making the decision to discipline, (b) to have access to the information upon which the decision to discipline will be based, (c) to respond to that information, and (d) to inform the decision maker of his/her denial, explanation or justification of the charged acts or any other potentially mitigating information which the employee may wish the disciplining supervisor to consider before determining the severity of the discipline, if any, to be imposed.” (*AIRS #29839 - USPS #A94C-1A-D 97085126; 7/27/1998*)

Another award involved an employee’s placement on an emergency

suspension following the employee’s interview with postal inspectors dealing with a \$2000 shortage at a postal station. An inspector contacted the station manager and indicated that during the course of the interview, the employee allegedly admitted to stealing postal funds. Arbitrator Randall Kelly found that the Postal Service failed to comply with “the explicit terms of the Memorandum of Understanding re: Role of Inspection Service in Labor Relations Matters” because the station manager didn’t conduct an “independent review of the facts ... prior to the issuance of ... emergency procedures.” He then ruled that the suspension should be overturned due to management’s violation of the National Agreement. (*AIRS #30484 - USPS #A94C-4A-D 98065969; 12/23/1998*)

Just Cause Requirements

In another award, Arbitrator Charlotte Gold set aside an employee’s removal for allegedly misappropriating postal funds. The arbitrator found that there was no dispute that management didn’t conduct its own independent investigation into whether the grievant mishandled COD funds, but rather relied exclusively on the findings of the Inspection Service. Though the supervisor who issued discipline said that he felt that the investigative memorandum was “comprehensive” and he didn’t want to repeat what the Inspection Service had already done, Arbitrator Gold said that an investigative memorandum “is just one element or factor that must be weighed and it cannot be presumed to be accurate or true without independent analysis.” In this case, management failed to obtain the grievant’s side of the story before issuing

discipline. Arbitrator Gold further stressed that “[a]ny Supervisor who relies solely on the findings of the Inspection Service does so at his or her own peril” since management has the responsibility under just cause requirements to conduct a full investigation of the facts before assessing discipline. (*AIRS #19703 - USPS #S7C-3D-D 38401; 1/13/1992*)

In another case, Arbitrator Andree McKissick overturned an employee’s emergency suspension and removal on the basis that the Postal Service failed to conduct a thorough investigation. The arbitrator indicated that the Postal Service relied on a representation by an OIG agent that the grievant had been divorced since 1991 yet continued to keep her ex-husband on her health insurance policy. He found that while the investigative memo indicated that the grievant continued to live with her husband, the Postal Service didn’t comply with “an affirmative duty of due diligence to fully investigate the circumstances of this case” and determine whether the relationship between the employee and her husband constituted a “valid common law marriage.” The arbitrator stressed that “a condition precedent to just cause, is the need for a fair and thorough investigation to fully acquire information before invocation of Emergency Placement or a Notice of Removal is issued.” (*AIRS #46528 - USPS #C06C-4C-D 07344515 and 07344538; 7/3/2008*)

Also see *AIRS #45943 (USPS #E00C-4E-D 06265912 and E06C-4E-D 07138245; 11/14/2007)* in which Arbitrator Hamah King found that the Postal Service violated the requirement to find just cause in relying on the report of the OIG and not conducting an independent investigation before initiating an employee’s discharge for falsifying waivers of signatures on

express mail. The arbitrator indicated that an OIG agent examined six labels for express mail that had been assigned to the clerk to deliver while he was working as a letter carrier and noticed that the signature blocks contained a similar illegible squiggly line. This agent also interviewed only two customers regarding whether they had signed the waiver of signature authorizations. The arbitrator noted that the grievant’s supervisor only testified that he read the inspection report, looked at the squiggly signatures, and conducted a predisciplinary interview before he issued the removal. He ruled that just cause requires the Postal Service to “conduct a thorough and impartial investigation” and the “investigation must include a consideration of any other reasonable possibilities and an exploration of all the facts necessary to exclude them.” In this case, according to the arbitrator, the Postal Service relied on the OIG investigative memorandum and improperly focused its entire investigation on the grievant while not pursuing any other possibilities.

Due Process Considerations

Arbitrator Leroy Bartman set aside an employee’s removal, for alleged misrepresentation of facts to obtain OWCP, on the basis of several procedural defects including inspectors’ failure to interview the grievant and two other employees who would have backed the grievant’s defense. The arbitrator indicated that management conceded it based its decision to remove the grievant totally on an inspector’s report, and the inspector’s report didn’t include an interview with the grievant. He stressed that such a failure, along with management’s failure to conduct

a predisciplinary interview, violated the requirement that there be a complete and thorough investigation and the employee's due process rights. (*AIRS # 40308 - USPS #G00C-1G-D 03162113; 12/19/2003*)

Another arbitrator found that the Postal Service's reliance solely on information from an investigative memorandum and limited information it obtained from a predisciplinary interview was insufficient to uphold an employee's removal for unacceptable conduct due to her alleged receipt of overtime pay for hours she didn't work. Arbitrator Jacquelin Drucker found that in this case, there was "no suggestion that Management participated in the investigation or that, after the Investigative Memorandum was issued, Management conducted any further inquiries or examination of the situation or evidence." She reasoned that in cases in which management works with inspectors and an investigative memorandum reflects information "gathered by both," she would find that an independent investigation other than a predisciplinary investigation is not required. Also, the arbitrator indicated that if matters being investigated are "criminal in nature and are related to possible criminal prosecution," she has found that management may rely on the findings of the inspectors as long as an employee is "given an opportunity to be heard on issues of discipline." However, in this case where no criminal investigation was being conducted and there was no collaboration between management and in the Inspection Service in the investigation, the Postal Service's failure to conduct its own investigation constituted procedural error. She found that this deficiency, along with a delay in issuing discipline and management's misleading remarks in the predisciplinary interview that the employee

wasn't being investigated further and no charges were at issue, were considered together as "present[ing] a very weak foundation of due process" that provided one basis for overturning the employee's removal in addition to the Postal Service's failure to meet its burden of proving that discipline was warranted. (*AIRS # 36500 - USPS #A98V-4A-D 01109937; 9/19/2001*)

In another case, a supervisor relied on an OIG agent's report and an employee's statement to the OIG to support his removal for submitting falsified Vehicle Maintenance Work Orders. When he conducted an investigative interview, he failed to ask specific questions regarding prospective charges against the grievant. Arbitrator Irving Tranen found that "[i]t is clear that [the supervisor] did not conduct a thorough investigation but rather relied totally on the report of [the] Special Agent...." He reasoned that the supervisor's interview of the employee was "pro forma" and neither "[t]he requirements of Article 16, as agreed to in the USPS-APWU Joint Contract Interpretation Manual nor the acknowledgment by the Parties in the Memorandum of Understanding as to the necessity of an independent review by management prior to issuance of discipline, were met in this instance." He ruled that the supervisor's actions in this case were a violation of due process and therefore just cause for the removal was lacking in this case. (*AIRS #44796 - USPS #H00V-1H-D 06124081; 11/10/2006*)

But see *AIRS #46208 - USPS #B00C-4B-D 07043071; 3/26/2008* in which Arbitrator Eileen Cenci ruled that a grievant wasn't deprived of due process by "over-reliance on the OIG report or a failure on the part of management to conduct an independent investigation." She based her ruling on the fact that

management had conducted a preliminary investigation which showed that shortages increased when the grievant worked in a particular office, and the postmaster conducted a predisciplinary interview of the grievant in which he was allowed an opportunity to tell his side of the story. She thus indicated that the notice of removal was based on information resulting from the PDI and an initial local management investigation as well as information in the OIG report.

Also, see *AIRS # 46315 - USPS #J06C-4J-D 07176682 (4/2/2008)* in which Arbitrator Gerald Cohen found that although the circumstances presented “a relatively close question”, they established that review of the facts set out in an OIG report by the supervisor who recommended an employee’s removal and later a concurring official’s predisciplinary interview with the grievant were sufficient to withstand an argument that management didn’t conduct an independent investigation. Another award found that there was no showing that management’s reliance on an OIG report resulted in “rubber stamp[ing]” the OIG’s report and “predetermin[ing] Grievant’s guilt.” Arbitrator Ann Kenis indicated that the Postal Service gave the grievant an opportunity to provide her own explanation or any information to refute the OIG’s findings, and she chose not to do so. (*AIRS #45972 - USPS # J00C-4J-D 07075005; 11/19/2007*)

Procedural Defects

An award by Arbitrator Patricia Plant determined that management unduly relied on an inspector’s investigative memorandum without conducting its own investigation before issuing a notice of removal to an employee. She overturned

the employee’s discharge on the basis of this error, combined with evidence that the employee’s supervisor withheld almost the entire investigative memorandum and all attached exhibits from the employee during a predisciplinary interview along with inspectors’ delay in conducting an investigation and issuing an investigative memorandum. (*AIRS # 23716 - USPS #H90C-4H-D 94036734; 12/08/1994*)

In another award, Arbitrator M. David Vaughn found that the OIG’s investigative report was “on balance” “a prosecution document, rather than a search for truth.” He observed that “[i]t contains too much supposition and too many conclusory statements relative to any common-sense analysis of what was actually proven.” Moreover, “[m]anagement, in turn, appears to have engaged in a rather uncritical review of the OIG Report, accepting its conclusions without examining the actual proof supporting them.” He reasoned that management committed “numerous small errors” including relying on the OIG report rather than conducting an independent investigation, delaying the release of the report to the union, and failing to submit a timely Step 2 answer. The arbitrator concluded, however, that such errors aren’t “fatal” to management’s case but stressed that its “handling [of the case] does not do the process justice”, while noting that the union’s testimony on how these errors impacted the employee’s due process rights was “vague and confusing.” Arbitrator Vaughn then disposed the case on the merits, overturning the employee’s removal for allegedly engaging in outside employment which exceeded the medical limitations imposed on her by her on-the-job injury. (*AIRS # 46064 - USPS #K00C-4K-D 07033956; 2/26/2008*)

Insufficient Proof of Misconduct from OIG Report and Investigative Interviews

An award by Arbitrator James Odom, involving an employee's removal for allegedly submitting fraudulent medical certificates after being on sick leave, determined that management relied on an OIG report that wasn't thorough or adequate to provide clear and convincing proof that the grievant committed a fraudulent act. The arbitrator overturned the grievant's removal on this basis. He noted that "[a]s a general observation" there isn't "a presumptive due process violation" when management fails to "go outside an OIG report and an Investigative Interview for information to support a disciplinary decision." However, Arbitrator Odom stressed that even if a procedural violation doesn't exist because of management's omissions, discipline won't be upheld if information from an OIG report and management's investigative interview fails to provide proof of the charges against a grievant. In this case, he found that information in the OIG report only indicated that the employee's doctor had been questioned and the agent hadn't interviewed the doctor's staff in order to look into whether the allegedly fraudulent medical excuse had been issued by his staff. (*AIRS # 46844 - USPS #H06C-4H-D 08072304; 7/1/2008*)

Contrary Opinions

In a few cases, arbitrators have ruled that the Postal Service didn't have to conduct an independent investigation and instead could rely on the results of an OIG investigation. One award found that though management is required to conduct a thorough investigation in discipline cases, it "has the discretion,

in cases involving criminal charges, to delegate that investigation to the Office of Inspector General." According to Arbitrator Stephen Dorshaw, this should be "to the benefit of the Grievant with respect to the fact that the OIG Special Agents are trained in these matters, and Postal Service Supervisors are generally not, and, therefore, the Special Agents are more likely to ensure that the constitutional rights of an accused employee are not violated." (*AIRS #45677 - USPS #G00C-4G-D 07024260; 8/10/2007*)

In addition, see *AIRS #43634 - USPS #E00C-4E-D 05179391 (2/16/2006)* in which Arbitrator Linda Klein rejected the union's argument that management's reliance on the results of the OIG investigation was improper. The arbitrator found that a postal service manager was present at the interview of an employee that was conducted by the OIG, and when the employee admitted using a postal computer, fax and phone for her real estate business "[t]here was nothing further to investigate". Arbitrator Klein also noted that management conducted a predisciplinary interview that afforded the grievant an opportunity to tell her side of the story. She stressed that "[t]he Special Agents have the experience, expertise and resources to obtain the information needed so that local Management may make a determination as to whether or not a violation of postal rules and regulations has occurred." "Local Management is not required to 'repeat' the same investigation," according to the arbitrator, and her "due process right was recognized during the predisciplinary interview." *AIRS # 46502 - USPS #E06C-1E-D 07335014 (6/2/2008)* is similar to the prior case and involved an employee issued a removal for improper conduct/misuse of the Postal Service computer system. Arbitrator Carl

Bosland found no merit to the union's argument, that management's failure to conduct an independent investigation warranted overturning the discipline. He reasoned that management may rely on an OIG investigation and isn't "required to conduct a full-blown independent investigation in every case." Citing language in the MOU on the Role of the Inspection Service in Labor Relations, the arbitrator indicated that it permits management to review inspection service documents in deciding to issue discipline. Also, he said that in this case, the grievant admitted forwarding e-mails and images by the use of her postal computer, and was afforded an opportunity to review the e-mails and respond to the charges in a pre-disciplinary interview. "There was nothing further to investigate after the Grievant acknowledged that she had in fact used postal equipment to send e-mails containing sexually explicit or sexually oriented images," according to the arbitrator. Moreover, he said that the union failed to establish that there was material management missed as a result of relying on the OIG investigation and the predisciplinary interview.

In another award, Arbitrator M. David Vaughn rejected the union's argument that a grievance should be sustained since management failed to conduct a fair and objective investigation and simply relied on the OIG's investigative report in issuing discipline. The grievant in this case had been removed for improper conduct, based on her performance of activities outside her restrictions while receiving OWCP benefits. The arbitrator found that the OIG's investigation had been "thorough and objective." In addition, he determined that though management is prohibited from relying solely on the OIG's investigative report in issuing discipline,

it "lacks the expertise or time to make a detailed and independent investigation of this type of charge" and it "lacks expertise to interview physicians" who probably wouldn't have cooperated in such an investigation because of privacy considerations. Moreover, Arbitrator Vaughn found that the Postal Service's review of documents included in the investigative memo as well as its interview of the grievant was sufficient to meet its obligation to conduct its own investigation. He further stressed that it is "clear" that the OIG didn't tell the grievant's supervisor that she should be disciplined. (*AIRS #45231 - USPS #K00T-1K-D 06122281; 4/1/2007*)

Several other arbitrators have held that the Postal Service is "entitled to rely upon the OIG and Postal Inspection Service based upon their expertise" and isn't required to "undertake a new and independent investigation." See *AIRS #43900 - B00C-4B-D 05113695; 4/18/2006* and *AIRS #48640 - S7N-3S-D 9397; 1/20/1989*. However, one arbitrator cautioned that "if management elects to accept uncritically and unquestioningly the results of ... a faulty investigation, management does so at its peril" and though it has a right to rely on an investigation memorandum, "such reliance must not preclude due process rights guaranteed the grievant by the National Agreement." (*AIRS #21442 - USPS #S0C-3E-D 13607; 2/2/1993*)

Undue Influence by Inspection Service or OIG

Relying on the Memorandum of Understanding on the Role of the Inspection Service in Labor Relations Matters, a number of arbitration awards have held that the Inspection

Service or OIG have unduly influenced management's decision to initiate discipline by improperly giving an opinion or recommendation about discipline. The issue in one of these awards involved an employee's removal for improper conduct, based on his failure to disclose an arrest on his application for employment. The removal notice was issued after a postal inspector informed the Human Resources Department that the employee had been arrested and charged with assault/ domestic violence on July 9, 1997 but had not listed this charge when he applied for his postal job in August 1997. Letters written by an employee in the Human Resources Department and another management official indicated that the inspector felt that the "employee is a time bomb" waiting to go off and "strongly urges us to get rid of this person" or "recommended terminating him." The inspector also attended a predisciplinary interview of the employee conducted by a Human Resources Specialist. Arbitrator Linda Klein determined that the removal must be overturned because of two significant procedural errors by management. She indicated that one of the errors was "undue influence" by the Inspection Service on the decision to issue discipline, citing the letters written by management upon learning of the employee's arrest and charges from the Inspection Service. She also noted that the Inspection Service's influence continued when an inspector attended the grievant's predisciplinary interview. (*AIRS #35002 - USPS #C98T-1C-D 99141683; 1/15/2001*)

In another award, Arbitrator Klein ruled that a window clerk was denied due process and the MOU re: the Role of the Inspection Service in Labor Relations Matters was violated because OIG agents

provided "conclusionary" statements in their Investigative memorandum which were an "attempt to unduly influence Management." The arbitrator cited comments in the memo that the grievant had "taken money" and by her failure to properly enter transactions she was "able to embezzle the postal funds." She reasoned that such comments were prejudicial and "slanted against" the employee whereas the OIG Report "should only reflect the facts gathered during the investigation." Moreover, she noted that OIG influence was clear based on management's charge in its original notice of removal to the grievant that her discipline was based on "theft of postal funds." Because of this violation, the arbitrator found that removal had to be overturned; however, she concluded that the grievant's offenses warranted discipline due to serious violations of the F-1 Handbook and ELM so she would not be awarded back pay. (*AIRS #45970 - USPS #J00C-4J-D 07075554; 12/19/2007*)

Arbitrator Klein determined in another case, that the Inspection Service provided an opinion in its investigative memorandum which said that the employee "misrepresented" an injury in a CA-1 form provided to the Postal Service's Injury Compensation Unit and the Department of Labor and "made false statements in furtherance of gaining compensation benefits." She noted that this conclusion violated the MOU on the Role of the Inspection Service in Labor Relations Matters. Though she didn't rely on this "opinion" alone to overturn the employee's discharge, she indicated that it constituted one of the factors for sustaining the union's grievance. (*AIRS #43669 - USPS #E00C-1E-D 05063560; 3/3/2006*)

In a similar case to the one above,

in which an employee had been issued a notice of removal for allegedly misrepresenting an OWCP claim, Arbitrator Joseph Cannavo set aside the employee's removal in part because of management's reliance on conclusions by a Special Agent of the OIG that the grievant "submitted a falsified DOL Form CA-2." The arbitrator indicated that this conclusion "made it impossible for the Grievant to be the recipient of a fair investigation conducted by her immediate supervisor and other local Management officials." He stressed that "[t]hese words deprived the Grievant of her due process rights, notice and the right to be heard, as her guilt was prejudged prior to Management's independent investigation of the allegation; and prior to the Grievant's 'day in court' where she has the opportunity to give her side of the story." He also reasoned that this opinion violated Article 15, Section 2 Step 1(c), that the supervisor has the authority to settle the grievance, since a supervisor wouldn't do that "in the face of such an open and notorious adverse conclusion by a Special Agent of the OIG." Accordingly, he found that "the OIG's drastic departure from what has heretofore been acceptable conduct made it impossible for the Advocate for the Postal Service to establish just cause." (*AIRS #46081 - USPS #J00C-4J-D 06258997; 2/13/2008*)

A recent award overturned an employee's removal for allegedly exceeding limitations of an on-the-job injury, because of due process violations including undue influence by the OIG. Arbitrator Michael Pecklers found that the OIG's actions violated the APWU's National Agreement and the JCIM, Article 15.5.C "Role of Inspection Service." He indicated that one such violation was that the OIG Special Agent "exceeded the

scope of her responsibilities" by providing a conclusion in her cover letter to the plant manager that indicated her "investigation determined that [the grievant] was misrepresenting his degree of disability to his physician, to the Postal Service and the Department of labor in order to continue to receive workers' compensation benefits." In addition, he cited the Special Agent's statement at the hearing that she had developed the written statement that was subsequently signed by the employee's doctor. He stressed that "this further demonstrates an attempt to influence the process" and suggested that the OIG agent should have provided a handwritten statement from the employee's doctor and attached it to the report completed by him. Also, the arbitrator found that though the OIG may edit surveillance tapes in workers compensation fraud cases, the union was entitled to the "unedited version" of the tape "so that it may be of assistance in the preparation of an informed defense to the charges." Though the union was supplied the tape after the case was appealed to arbitration, management's failure "to provide this evidence in timely fashion" was "at its own peril." (*AIRS #48582 - USPS #C06C-1C-D 08072723; 3/25/2009*)

Another award determined that Article 16 was violated when the "Inspection Service by its blatant and open and notorious interference with the grievance procedure, ... and by its interference with the arbitration process when this matter was postponed again and again in order to give the U.S. Attorney time to issue an indictment." Arbitrator Cannavo found that the Inspection Service put pressure on local management to issue the grievant an emergency suspension and notice of removal for allegedly misappropriating postal funds. He noted also that the inspectors' investigation was "incomplete,

baseless and deleterious” because there was no evidence that the employee took money while servicing a self-service vending machine. The arbitrator found that the inspectors didn’t interview other employees, several supervisors or the grievant and took no statements, and didn’t check the employee’s bank account or search his home in reaching their conclusion. Moreover, he noted that a three-page statement wasn’t included with the investigative memorandum, and significantly contained “exculpatory evidence.” Arbitrator Cannavo also said that the U.S. Attorney didn’t decide that the matter was “worthy of prosecution” yet “the Inspector saw fit to arrest the Grievant at work, cause him public humiliation, and all this in the face of the Inspector’s assertion that he does not know if the Grievant took the money or was simply negligent.” Accordingly, he found that the “authority of local Management was usurped by the Inspector” and the employee was deprived of due process. He ordered that the grievant be reinstated to his former position with back pay and benefits. (*AIRS # 37763 - USPS#A98C-4A-D 02134602 and A00C-4A-D 02085846; 6/17/2002*)

Also see *AIRS #48793 - USPS #E06M-1E-D 08227787; 2/19/2009* in which Arbitrator Cannavo determined that the OIG’s influence throughout the disciplinary process “deprived the Grievant not only of a fair and objective investigation but also of his due process rights necessary for the Postal Service to establish just cause.” He cited evidence that a labor relations specialist emailed the OIG agent a copy of the notice of removal and then said in later email that she made changes to the notice on the basis of the agent’s suggestion. The arbitrator concluded that “sending a draft copy of a Notice of Removal to an OIG Agent is a

drastic departure of acceptable procedures and represents an open and notorious violation of the Memorandum” and the actions of the OIG Agent in responding to the draft and making suggested changes “is an equal violation of the Memorandum.” He further cited testimony that the OIG agent sent questions to the grievant’s supervisor, for use in the predisciplinary interview, and determined that this action also resulted in “interference in the ‘dispute resolution process’ by the OIG.” Finally, Arbitrator Cannavo found that “opinions” made by the OIG agent in his investigative report showed that he was attempting to influence management regarding a particular disciplinary action.

In addition, an employee’s removal for allegedly falsifying an injury claimed on a CA-1 form was overturned in part because an investigative memorandum of the Inspection Service upon which management relied was “unduly prejudicial.” The employee said that his injury, a pinched nerve in his neck, had been caused when he handed a supervisor a radio. An inspector videotaped the employee reaching for his wallet, holding a pizza box, opening and closing house doors, smoking cigarettes and moving a trash can that was on wheels. The inspector’s memorandum said that the employee showed “no signs of distress or discomfort except after bringing the trash/recycling container to the sidewalk”, “demonstrated he is capable of doing the duties of his job”, and “the credibility of this injury having occurred is very suspect.” Arbitrator Richard Danehy found that the remarks the inspector made in his investigative memorandum, upon which the Postal Service relied, “are prejudicial and taint his investigation” and therefore he would give the memorandum “no weight.” (*AIRS #42976 – USPS*

#F00T-1F-D 04184492; 8/10/2005)

Arbitrator Patricia Plant reinstated an employee who had been removed for falsifying medical documentation to support an on-the-job injury. In this case, an inspector had been called to investigate merely on the basis of a supervisor's suspicion about the fact that the employee's injury occurred immediately preceding the day of her denied leave request. The inspector conducted surveillance, gained entry to the grievant's home, and demanded that the grievant supply him with medical documentation for her absence. His investigative memorandum indicated that the grievant's treating physician informed him that he determined the employee had been able to return to work, a conclusion that conflicted with the medical documentation. The arbitrator found that the supervisor failed to conduct an investigation, including making contact with the treating physician to deal with the inconsistency between the doctor's alleged statement to the inspector and medical documentation he filled out. Instead, she indicated that management relied on the investigative memorandum. Arbitrator Plant concluded that the "Grievance fails in part for the collusionary [sic] and conspiratorial efforts of the Grievant's supervisor, the Inspector, the Step 2 designee, the Plant Manager and the second Tour 3 supervisor involved in this case." (AIRS # 31295 - USPS #H94C-1H-D 98066995; 4/16/1999)

An award by Arbitrator Thomas Erbs ordered an employee to be reinstated following her discharge for altering a return-to-duty document given her by the medical unit to retain a limited duty assignment. The document indicated that the employee should be placed in regular duty since her doctor's statement failed to indicate her necessary restrictions. In

reaching his decision, the arbitrator relied in part upon the fact that management didn't conduct an adequate investigation, which would have included making "a routine telephone call" to the employee's doctor to find out if she had restrictions. Also, the arbitrator cited the supervisor's admission that a postal inspector "told" him to issue the removal. According to the arbitrator, the supervisor testified he was given the investigative memorandum of the inspector and a pre-typed notice of removal at the same time. Arbitrator Erbs found that such actions "taint[ed] the entire discipline process." However, since the grievant admitted that she altered the documentation, the arbitrator required that the removal be converted to a long-term suspension. (AIRS #44126 - USPS #J00C-1J-D 05114923; 5/31/2006)

In an award regarding an employee's removal for improper conduct regarding an alleged violation of medical restrictions prescribed on a CA-17 form, the Postal Service relied on an OIG Special Agent's determination, from observing and videotaping the employee while he was mowing his lawn and power-washing his patio. The OIG agent testified that he concluded that these activities exceeded the employee's restrictions "based on his own reading of the restrictions" without seeking medical advice. Arbitrator Andrew Strongin found that the Postal Service "adopted the lay opinion of the OIG" that the grievant exceeded his limitations, but the employee's limitations were for an eight-hour workday and though she had a weight limitation over 10 pounds the record failed to show what force was required to operate the lawnmower which weighed more than 10 pounds. (AIRS #46546 - USPS #K06T-1K-D 07148447, 07158779, and 0719466; 7/3/2008)

Also see AIRS #48641 - USPS #E1N-

2D-D 3643; 2/26/1983 in which Arbitrator G. Allan Dash reasoned that management improperly relied on inspectors' findings that an employee should be disciplined and didn't conduct its own investigation including taking remedial steps or corrective measures to warn the employee of problems in order to avoid his discipline.

Use of Deceptive or Coercive Tactics in Interviews

Some awards have pointed to deceptive tactics on the part of inspectors or OIG agents during the interview process and coercive methods used during Inspection Service or OIG interviews, including use of polygraph examinations, as reasons for overturning employees' discipline. It is important to note that since some arbitrators may uphold confessions during or following polygraph examinations, employees should refuse to undergo such testing when requested by postal inspectors, the OIG or management. In addition, the National Agreement provides that "polygraph tests will continue to be on a voluntary basis." (Article 17, Section 3)

An early award by Arbitrator Benjamin Aaron cited problems with procedures used by postal inspectors in their interview with an employee. He noted that the interrogation lasted about three hours and involved an inspector saying continually that the employee threw away mail he was supposed to deliver so he should admit it. In addition, the arbitrator cited testimony that when the employee refused to admit any misconduct, the inspector said that the U.S. Attorney will "look down hard upon this" for having to spend thousands of dollars to prosecute him and he left the room to allegedly call the U.S. Attorney.

Arbitrator Aaron said that "it is quite clear that [the inspector] was convinced before the interrogation began that [the grievant] was guilty, and that both he and [the other inspector] put impermissible pressure on [the grievant] to confess." He found also that when the employee didn't confess, the subsequent "investigation of the discarded mail incidents was purely perfunctory."

On this basis, he found that the grievant had been deprived of due process to which he was entitled due to the failure of inspectors to conduct the investigation "with the requisite conscientiousness and fairness to which all employees accused of such a serious offense are entitled." He also found that a statement given by the grievant to inspectors that he delivered all the mail that was taken on his route and his subsequent testimony that he inadvertently left some behind could be excused because the grievant was "scared to death" by the inspectors, "who kept insisting that he was guilty and held out the possibility that he might be thrown in jail." He thus found that there wasn't clear and convincing evidence supporting his removal, and the removal should be overturned. (*AIRS # 48642 - USPS #W-1219-76N, W-1231-76N, and W-1422-76N; 12/13/1976*)

Arbitrator Cannavo has found problems with the Inspection Service's investigation methods in several awards. In one of these awards, he found that the "conduct of the Postal Inspection Service in the investigation deprived the Service of providing the Grievant with the due process rights necessary for a removal to be sustained." He indicated that "the investigating Inspector openly and notoriously deceived the Grievant; and the Postal Service used the information obtained by this deception in the Notice of Removal." In this case, an employee

had been charged with falsification of an on-the-job injury after an Inspection Service investigation. Arbitrator Cannavo found that the inspector ordered that the grievant come to his office; “informed her that he was conducting a survey to help injured employees return to work more efficiently” but then asked her specific questions about her activity while she was on COP and was totally disabled and used this information in his investigative memorandum. He noted that the inspector testified that “such deception is permissible and that Inspectors are trained to use such deception.” “By engaging in this open and notorious deception,” according to the arbitrator, “the Postal Inspector deprived the Grievant of her due process rights, that being ‘notice and the right to be heard’” since she didn’t know that the interrogation would lead to discipline. Also, since the employee was unaware that the results of the investigation could lead to discipline, the arbitrator found that her Weingarten rights were violated. Furthermore, he stressed that “the Inspector’s deception and conduct is such an egregious departure from Article 16 of the National Agreement, the EL-921 and basic principles of due process as established by arbitral authority.” Therefore, he determined that the grievant should be reinstated to her former position. (*AIRS # 43910 - USPS #A00C-1A-D 04119667; 4/18/2006*)

Arbitrator Christopher Miles addressed the union’s argument that an employee had been deprived of due process due to investigative techniques used by the OIG including its misrepresentations to her during an interview and “consensual monitoring” of the interview. Following the OIG’s investigation, the employee was issued an emergency suspension and notice

of removal for falsifying a worker’s compensation claim. During the interview, the agent misrepresented that he was a Shared Services employee and only indicated that the purpose of the meeting was to discuss her Workers’ Compensation claim. He didn’t tell her that she was being recorded, and didn’t inform her until the end of the interview that if her statements weren’t truthful and honest she could be disciplined and criminal charges could be brought against her. The OIG agent testified that “consensual monitoring” in this case had been authorized by the Assistant Attorney General. However, the arbitrator said that “[s]uch deceitful tactics beg the question why is it acceptable to use fraud to identify fraud by obtaining information under false pretenses?” Also, he stressed that monitoring “is hardly consensual when the person consenting to be recorded is the person who wants the information and not the person from whom the information is being solicited.” According to Arbitrator Miles, the deceitful tactics “are not acceptable in order to establish just cause which is the standard required by Article 16....” But he found that a review of the transcript of monitoring by the agent posed as a Shared Service’s employee didn’t reveal any information favorable to the Postal Service’s position. He then overturned the employee’s removal on the merits since the OIG’s surveillance of the employee failed to show that she was performing activities outside of her medical restrictions. (*AIRS # 47206 - USPS #C00C-1C-D 06076468 and 06151641; 10/3/2008*)

In another award, Arbitrator Cannavo found that intimidation and coercion during a postal inspector’s interview with an employee constituted one of the reasons for overturning an employee’s removal

for allegedly falsifying a CA-1 form. The arbitrator found credible an employee's testimony that the inspector advised him to withdraw his compensation claim or he might be arrested and to admit that he wasn't injured on the job in order to retain his job. The arbitrator said he was convinced the Postal Inspector was "not forthright and intellectually honest." Also, in setting aside the employee's discipline, Arbitrator Cannavo was influenced by a finding that the postal inspector's investigative memorandum was "unacceptably incomplete" since the inspector didn't interview the supervisor on duty at the time the grievant was injured or any other employees on duty at that time, didn't secure information from the grievant's doctor to determine whether the grievant told him the cause of his injury, and failed to consider information that the grievant already had a chronic back problem that could have been aggravated when he was injured. In addition, Arbitrator Cannavo noted that the inspector failed to obtain sworn statements from the two witnesses he interviewed, and omitted unfavorable witness statements from his report even though they were included in resumes of testimony attached to the memorandum. In reaching his decision, the arbitrator also relied on his conclusion that the grievant was deprived of Weingarten rights since his failure to request union representation was due to the inspector's not informing him of the purpose of the interview and that it would lead to discipline. The arbitrator ruled that that the employee was entitled to reinstatement and full back pay. (*AIRS # 31143 - USPS #A94C-4A-D 98038919; 3/6/1999*)

In an award dealing with an employee's removal, for failing to disclose the severity of a preexisting medical

condition during the preemployment evaluation process, Arbitrator Cannavo found that the "statements made by the [postal] inspector in the presence of the Postmaster ... 'poisoned' any objectivity that the Postmaster needed to make a valid decision regarding the issuance of discipline." He cited evidence that the inspector conducted an interview of the grievant with the postmaster and stressed that "she should be in jail, that she committed fraud and that if he had anything to do with it, she would be locked up." He concluded that "[t]here is no doubt that once [the inspector] made his statements to the Grievant about going to jail in the presence of the Postmaster, the die was cast; the waters were muddied; and the Grievant's fate was sealed."

Arbitrator Cannavo found that this type of conduct was what prompted the Postal Service and the APWU to agree to the Memorandum of Understanding re: the Role of the Inspection Service. On the basis of this conduct and the lack of thoroughness of the Inspection Service's examination, the arbitrator ordered that the grievance be sustained in part and the grievant be reinstated. (*AIRS #31451 - USPS #A94C-4A-D 97034108; 9/22/1997*)

Also see *AIRS #33388, USPS #W8N-5D-D 18580 and 18537 (4/9/1982)* in which Arbitrator Carlton Snow determined that a confession wasn't proof of an employee's wrongdoing because it was obtained following inspector intimidation, which caused the employee's "disorientation," and after inspectors placed a "gag" on the steward which prevented him from speaking during the interview in violation of the Weingarten decision.

Polygraph Examinations

Arbitrator Randall Kelly ruled that an employee's confession was improperly coerced by how a polygraph examination was conducted. The arbitrator found that this was one basis for overturning the employee's removal, which had been issued in part due to his admissions to inspectors he took stamps. The employee agreed to a polygraph examination which inspectors undertook of clerks at a facility following a postmaster's report to the Inspection Service of a missing bank deposit. Arbitrator Kelly said that his concern in this case was "with the use of the polygraph to yield confessions in areas which were not the target of the original polygraph examination and especially, confessions which are cajoled out of an employee based on the representation that they are intended to help him 'pass' the polygraph examination." He pointed to the Inspection Service's actions when the grievant allegedly showed signs that he was dishonest when he was asked a general question as to whether he ever stole or took anything from the postal service. At that point, according to the arbitrator, "the examiner goes to the examinee and tells him that he failed, but that the examiner wants him to pass so that he can be eliminated as a suspect." She then asked him to change the question so he could answer it truthfully, suggesting a dollar limit on the question which resulted in the employee agreeing to a statement that in his time as a clerk he had "probably taken an accumulative amount of stamps of more than 1 dollar but less than 100 in my total career to the best of my knowledge." Arbitrator Kelly noted that use of the word "taken" could mean what he'd actually given to customers "on credit" and later paid for,

which written statements by customers indicated had occurred. He found that "the Grievant's ambiguous 'confessions' to matters totally auxillary [sic] to the underlying investigation in the context of being told that 'getting it off his chest' would help him to pass the polygraph examination and exonerate him as a suspect in the theft of the deposit was coercive." Since grievant's admissions were tainted and the Postal Service failed to conduct a thorough investigation by properly interviewing the grievant, he ruled that the grievances should be sustained. (AIRS #23895 - USPS #B90C-4B-D 94038712; 23/8/1994)

Another arbitrator set aside an employee's placement on an emergency suspension which had been based on the employee's statement to inspectors following a polygraph examination and over seven hours of questioning by inspectors without breaks or food. Inspectors had been informed of a \$15,000 shortage in a station, and decided to investigate by interviewing employees at the station. The grievant, who had worked as a Sales and Service Associate there for six years, was told to go to the inspectors' office where she was asked if she would take a polygraph examination because the inspectors were trying to find out what happened to the funds. The employee agreed to take the exam, and was informed they couldn't obtain an accurate reading. Thereafter, they asked her whether she'd take another test which she was told she failed. The inspectors interviewed her and at first, the grievant said she never took postal products without intending to pay for them but finally said her daughter gave her money to buy stamps on two occasions and she couldn't remember whether she paid for the stamps when she took them. After

seven hours of questioning, she agreed to a written statement in which she took responsibility for part of the shortage, including 20 books of stamps. Arbitrator Margo Newman found that it wasn't reasonable to conclude solely on the basis of the employee's statement "and the context within which it was procured", which included two polygraph exams and over seven hours of questioning without breaks and food, that retaining the employee could have resulted in a continued loss of funds. (*AIRS # 38987 - USPS #C00C-1C-D 02231243; 1/27/2003*)

In another award, an arbitrator found that a confession obtained following a polygraph exam and over four hours of questioning by inspectors was "tainted". An investigation was conducted by inspectors after a registered mail package containing stamp stock worth \$1560 was found missing. When an employee, who was a Lead Sales and Service Associate and had 20 years of service, was interviewed she agreed to take a polygraph test. Inspectors indicated that her test results showed that she was being deceptive and they asked her to provide an explanation for such results. The employee then told inspectors that she borrowed \$60 of postal funds to lend a friend one time because she'd forgotten to make a withdrawal from her bank before her friend showed up, but later also admitted in writing to having borrowed approximately \$1500 from 1990 until the present. The next day, the \$1560 worth of stamp stock was located by her. However, she was removed for misappropriation of funds based on her confession. Arbitrator Wellington Davis found that "the major part of the 'confession' was manipulated even if not maliciously by her interrogators ..." and "the damning evidence was solicited through some implied or assumed quid pro

quo." He said he didn't believe that the inspectors merely obtained the confession by telling the grievant to tell the truth, but instead they must have discussed with her "some scenarios." He based this conclusion on the "coincidental 'amount of past transgressions' (\$1500) being incredibly similar to the amount of missing stamp stock (\$1560)." He reasoned that if the employee knew that such admissions would end in discharge, he would deny the grievance. However, the fact that the grievant agreed to "[a]n 'independent' story about other borrowing 'over the years' almost equaling the missing stamp stock is highly suspect" when this incrimination occurred after almost five hours of a polygraph session on a completely different subject from the instant charges. Arbitrator Davis thus ordered the grievant reinstated but without back pay and on a one-year probationary basis due to the grievant's admission of borrowing \$60 from her accountability. (*AIRS # 45589 - USPS #A00C-4A-D 06188810; 5/26/2007*) But see *AIRS # 5141 - USPS C8C-4K-D 29492 (12/23/1981)* and *AIRS #42414 - USPS #C00C-4C-D 05017281 (4/26/2005)* in which arbitrators denied the union's arguments that employees were coerced into making a confessions following polygraph exams, and their confessions should be disregarded because of these circumstances.

Note that arbitrators have refused to rely on results of a polygraph due to the unreliability of the test. In one case in which an employee refused to submit to a polygraph test, Arbitrator Fletcher said not only does he view such exams as unreliable and he hasn't accepted results of the exam in any cases, he viewed the Postal Service's "offer" to provide the employee with a polygraph exam "as a suggestion that [the grievant] prove his

innocence [of charges alleging threats against a supervisor].” He stressed that “[u]nder just cause standards the Service must prove [the grievant’s] guilt, he need not prove his innocence when the Service has doubts about the allegations placed against him.” (*AIRS #36029 - USPS #J98C-1J-D 00066062 & 00107640; 6/22/2001*) Also see *AIRS #34001; USPS #G98C-4G-D 99237796; 7/21/2000* in which Arbitrator Debra Neveu said that the results of the grievant’s polygraph exam were entitled to “little, if any, weight” due to the unreliability of such exams and the fact that there was no direct evidence by the polygraph examiner of the questions and answers used during the exam.

However, one arbitrator relied on the fact that an employee denied any wrongdoing only until she received polygraph results allegedly showing she was lying. He indicated that he wouldn’t consider the results of the polygraph exam in a case involving an employee’s removal for failing to properly maintain her accountability by having a shortage in the amount of \$3,336. The grievant’s admissions following a polygraph exam were that she took \$50 and \$80 on two separate occasions. The arbitrator said “[t]he results of the polygraph exam are not relevant to this decision, but the fact that [the grievant] denied taking the money *until* she was told the exam showed she was deceptive is important,” according to the arbitrator. He then found that the Postal Service met its burden of proof. (*AIRS #36881 - USPS #H98C-1H-D 01242872 & 02023912; 1/27/2002*)

Another arbitrator considered an employee’s admissions during a polygraph exam, but found that they were insufficient to prove that she had actually engaged in misconduct. The grievant admitted she may have used three books of stamps

or five postcards without paying for them while she was on medication for a back problem but wasn’t sure of this fact. In addition, she provided an affidavit to the inspector stating she “may have taken up to six books of stamps and up to five postcards without paying.” In the written statement, she also said that “I can’t remember – During that time I was taking quite a few pain pills and muscle relaxants resulting from back surgery.” Arbitrator Edna Francis reasoned that “[h]ere, the grievant’s admissions establish nothing beyond the *possibility* that she *may have or may not have* paid for stock that she obtained from herself” and “[t]here is no independent evidence which transforms that possibility in [sic] a probability supported by sufficient facts to justify discipline.” (*AIRS #600262 - USPS #W7C-5L-D 651; 4/26/1988*)

Defenses in Failure to Cooperate Cases

In cases when the Postal Service or Inspection Service or OIG conducts an investigation of an employee in a discipline case involving the potential also for criminal charges, several arbitrators have found that management is required to notify the employee of his or her rights under the Kalkines v. U.S. and Garrity v. New Jersey decisions. One of these cases involved a grievance in which the Postal Service charged that an employee failed to cooperate in a postal investigation and involved the issue of the employee working another job on days he was taking FMLA-designated leave. This case arose when the supervisor conducted a predisciplinary interview of the employee during which he told her that the Postal Service didn’t intend to press criminal

charges against her. The employee, on the advice of her union representative, declined to answer questions during the interview, and was issued a notice of removal.

The arbitrator found that an employee may decline to respond to the charges based on the “incriminating implications” of the interview and “the employer does not have just cause to discipline the employee for declining to avail himself/herself of these opportunities.” With regard to giving the employer an opportunity to question the employee in order to determine his/her involvement in circumstances giving rise to the discipline, Arbitrator George Shea found that an employer’s “right to inquire of the employee and the employee’s corresponding obligation to respond are not absolute” since “the public employer’s right to inquire of its employee is ... limited by the employee’s constitutional right against self incrimination.” Citing the Kalkines and Garrity cases, the arbitrator said that the employer is “legally required to notify the employee that (a) the interrogation may elicit responses which would expose him/her to criminal prosecution, (b) the employee has a constitutional right to remain silent, (c) the employer intends to discharge the employee if he/she refuses to respond to its inquiries and, (d) the information voluntarily provided by the employee and the investigative fruits of that information may not be used in a criminal prosecution of the employee on related criminal charges.” In the absence of such a notification, Arbitrator Shea said that “a public employer may not discipline, discharge or remove an employee from his/her public employment based upon the charge that the employee failed to cooperate in the employer’s administrative investigation when that investigation

may expose an employee to criminal prosecution.” In addition, Arbitrator Shea stressed that the court in Kalkines further held that an employer should delay or suspend an interrogation when an employee requests the presence of his/her attorney. In summary, he said that “when the Service disciplines an employee for a violation of ELM Section 666.6, the just cause standard requires the Service to establish that it provided the employee with the notification required by the Garrity and Kalkines decisions.” In this case, he ruled that the supervisor’s statement that the Postal Service was not intending to press charges was insufficient notice and this fact “is fatal to the Service’s claim that it had just cause to Remove the Grievant for a violation of ELM Section 666.6.” (*AIRS #44144 – USPS #C00C-1C-D 05132381; 5/22/2006*)

In a second award in which Arbitrator Shea overturned another removal for failing to cooperate in a postal investigation regarding allegations that an employee had misrepresented or concealed facts to obtain COP benefits, he repeated the reasoning he used in the above award. In this case, a supervisor afforded an employee the right to participate in a predisciplinary interview and the employee declined the opportunity. During the interview, the supervisor also said that management didn’t intend to press criminal charges. The arbitrator reiterated that when the Service disciplines an employee for violating the provision concerning noncooperation with a postal investigation, “the just cause standard required the Service to establish that it provided the employee with the notification required by the Garrity and Kalkines decisions.” Finding that such proof was absent, he determined that such an omission is “fatal to the Service’s claim

that it had just cause to Remove the Grievant for a violation of ELM Section 665.3.” (*AIRS #44143 - USPS #C00C-1C-D 05164426; 5/22/2006*)

In another award, an employee was removed for failing to cooperate with a postal investigation by an OIG agent to determine whether she was exceeding her medical limitations while on OWCP status. The agent attempted to interview the grievant, but the employee didn’t want to be questioned. He informed her that she was required to cooperate with postal regulations but the grievant said she wanted to speak with her attorney first. The agent claimed she never requested union representation. The arbitrator found first of all that there was no basis for finding that the grievant’s Weingarten rights had been violated since she hadn’t requested union representation during the interview with the special agent. However, Arbitrator Irving Tranen determined that the special agent’s failure to notify her of her right to remain silent or his failure to give her Kalkines warnings or issue her “use immunity ... is fatal to the Service’s claim that it had just cause to remove the Grievant for a violation of ELM Section 666.6.” In reaching this decision, he relied on the absence of testimony by the special agent or information in the investigative memorandum that these steps had been taken. Moreover, he stressed that “[t]he Grievant could certainly have feared that the Postal Service was undertaking an investigation that could have resulted in criminal action against her.” (*AIRS #45623 - USPS #K00C-4K-D 06170752; 3/7/2007*) But see *AIRS #45192 & 45086 - USPS #H00C-1H-D 06190275; 1/11/2007* and *USPS # J00C-1J-D 05090201; 3/2/2006* for contrary results. Also, see *AIRS #46720 - USPS #A06C-4A-D 07127681; 7/23/2008* in which Arbitrator Joseph

DeMarco found that an OIG Special Agent didn’t read an employee a Garrity warning in one interview, but also that the evidence showed that the grievant did cooperate with the agents.

Another arbitrator set aside a letter carrier’s removal for refusing to cooperate in a postal investigation which occurred after the employee relied on his Fifth Amendment right to remain silent during an interview with postal inspectors. Arbitrator Claude Ames indicated that “[a]s a general principle of law, the privilege against compulsory self-incrimination (right to Remain Silent), may be asserted in ‘any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory,’ when an individual reasonably believes that his/her statements may be used against him or her.” He stressed that “in order to remove an employee for failure to answer possible incriminating questions in an investigation, an agency must first advise the employee that (i) his refusal to answer may result in a removal and, (ii) any statement(s) made during the interview will not be used against him/her in a criminal proceeding*Kalkine v. United States ... Uniformed Sanitation Men v. City of New York ...*” Arbitrator Ames found that in this case even though the employee sought through her attorney assurances that no criminal investigation was pending, management failed to provide unequivocal and sufficient assurances to this effect and it also didn’t advise the employee that it would not seek discipline against him. Accordingly, he ruled that the grievant’s assertion of a right to remain silent was “constitutionally protected” in this case. (*AIRS #48636 - USPS #F98N-4F-D 00254514 & 00251275; 3/3/2001*)

Another arbitrator overturned a charge of failing to cooperate in an investigation

because the employee had not been afforded her Weingarten right during an Inspection Service interview. This case arose when an employee was being interviewed subsequent to an altercation between her husband and a supervisor. After an inspector directed that the employee be interviewed, she requested a steward but the request was denied on the basis that she wasn't entitled to Weingarten rights. Later, she was issued a suspension for failing to cooperate in the investigation. The inspector claimed she wasn't entitled to representation by a steward because she was being interviewed as a witness to the incident involving her husband. However, the evidence showed that the employee hadn't observed the events and the inspector actually wanted her to swear to a written statement she had previously provided to a supervisor. Arbitrator Norman Bennett said that given the entirety of the circumstances, the evidence showed that the employee had a reasonable belief that discipline might result and therefore was entitled to be represented by a steward. Since she was refused such representation, he determined that the grievance should be sustained and the 14-day suspension be rescinded. (*AIRS #31937 - USPS #G94C-4G-D 99087423; 7/22/1999*)

Another case discussed a failure to cooperate charge in the context of investigative or predisciplinary interviews with management, but this case may be useful in cases involving interviews by postal inspectors or OIG agents. The arbitrator found that a charge that an employee failed to cooperate in an investigation by not complying with a request to participate in a predisciplinary interview lacked merit. The arbitrator said that the grievant had been arrested

previously as a result of an Inspection Service investigation for possessing money orders with the intent to convert without proper payment. Arbitrator Alan Walt recognized that in light of the criminal charge, the grievant "clearly had the constitutional right to remain silent and not to participate in a 'predisciplinary' interview with management, the sole purpose of which involve the alleged theft of the same postal money orders which were the subject of the then pending criminal action in U.S. District Court." (*AIRS #37260 - USPS #J98C-4J-D 00167707 and 00275913; 4/10/2002*)

In another award, an arbitrator found that a union steward's removal for allegedly interfering with the official duties of the Inspection Service and failing to cooperate in an investigation should be overturned. The Postal Service argued that the basis for the charges was the steward's knowledge that inspectors were performing surveillance of a post office box, during its investigation of employees for inappropriately handling customers' business reply mail. In addition, management asserted that the steward improperly notified other employees about the investigation and allegedly assisted an employee in correcting an error on a receipt. Arbitrator William Belshaw found that the first two charges didn't constitute offenses, and there wasn't sufficient evidence to prove that the grievant informed an employee how to avoid trouble. Moreover, the arbitrator found that the charge of failing to cooperate with an investigation hadn't been proven. He said that once it became logical for the grievant to conclude that he could be prosecuted and he hired a lawyer, "[c]ooperation in such a situation, particularly if it is one where the allegations are false (or even *might* be), is not within the purview of the

cooperation mandate of the [Employee and Labor Relations] Manual.” With regard to the grievant’s posting of a notice, which the Service charged as “instruct[ing] others not to cooperate”, the arbitrator found that though it “seemed in ... bad taste”, it couldn’t have had very much impact on these matters because it mainly dealt with the right of employees to union representation. (*AIRS # 1831 - USPS #C1C-4A-D 16361; 7/15/1983*)

STEWARD RIGHTS

The following outlines basic steward rights:

- The right to investigate and adjust grievances or to investigate a specific problem to determine whether to file a grievance.
- The right to review documents, files, and other records which are necessary for processing the grievance or determining if a grievance exist.
- The right to interview the aggrieved employee, supervisors and witnesses.
- The right to represent an employee during an Inspection Service **or the Office of Inspector General (OIG)** interrogation, when requested by the employee (See Weingarten rights, below).
- The right to reasonable time on the clock to complete grievance forms and write appeals, including Step 3 appeals and the union's additions and corrections to management's Step 2 decision.
- The right to process post-removal grievances provided the grievance is non-disciplinary, not related to the removal action and initiated prior to the date of separation from Postal Service rolls.
- All of the above activities are compensable pursuant to Article 17.4.

-
5. Does an employee have a right to have a steward present during an investigatory interview or an interrogation by the Inspection Service **or the Office of Inspector General (OIG)**?

Response: Yes, in those circumstances in which the employee is involved in an investigatory interview which he/she reasonably believes will result in discipline against him/her, and the employee requests representation, the Postal Service must provide a representative if the interview is to continue. If an employee requests a steward or union representative to be present during the course of an interrogation by the Inspection Service **or the Office of Inspector General (OIG)**, such requests will be granted.

WEINGARTEN RIGHTS

Federal labor law gives each employee the right to representation during any investigatory interview which the employee reasonably believes may lead to discipline. This right originated in *NLRB v. J. Weingarten*, U.S. Supreme Court 1975, and is commonly called the “Weingarten rule” or “Weingarten rights.”

The Weingarten rule only applies to an investigatory interview when management is searching for facts relevant to determining an employee’s guilt or deciding whether to impose discipline. Weingarten rights do not apply when management issues a disciplinary action to an employee (for example, handing an employee a letter of warning).

Weingarten representation rights apply where an employee reasonably believes that discipline could result from the investigatory interview. Whether or not an employee’s belief is “reasonable” depends on the circumstances of each case.

The steward cannot exercise Weingarten rights on the employee’s behalf. Unlike “Miranda rights,” which involve a criminal investigation, management is not required to inform the employee of the Weingarten rule.

The Weingarten rule includes the right to a pre-interview consultation with a steward. Federal Courts have extended this right to pre-meeting consultations to cover Inspection Service interrogations. (*Postal Service v. NLRB*, D.C. Cir. 1992).

The employee has the right to a steward’s assistance, not just a silent presence, during an interview covered by the Weingarten rule. An employee’s Weingarten rights are violated when the union representative is not allowed to speak or is restricted to the role of a passive observer.

Although ELM, Section 665.3 requires all postal employees to cooperate during investigations, an employee with Weingarten rights is entitled to have a steward present before answering questions. The employee may respond that he or she will answer questions once a steward is provided.

**MEMORANDUM OF UNDERSTANDING
BETWEEN THE
UNITED STATES POSTAL SERVICE
AND THE
AMERICAN POSTAL WORKERS UNION,
AFL-CIO**

**Re: Role of Inspection Service in Labor Relations
Matters**

The parties recognize the role of the Postal Inspection Service in the operation of the Postal Service and its responsibility to provide protection to our employees, security to the mail and service to our customers.

Postal Inspection Service policy does not condone disrespect by Inspectors in dealing with any individual. The Postal Inspection Service has an obligation to comply fully with the letter and spirit of the National Agreement between the United States Postal Service and the American Postal Workers Union, AFL-CIO and will not interfere in the dispute resolution process as it relates to Articles 15 and 16.

The parties further acknowledge the necessity of an independent review of the facts by management prior to the issuance of disciplinary action, emergency procedures, indefinite suspensions, enforced leave or administrative actions. Inspectors will not make recommendations, provide opinions, or attempt to influence management personnel regarding a particular disciplinary action, as defined above.

Nothing in this document is meant to preclude or limit Postal Service management from reviewing Inspection Service documents in deciding to issue discipline.

* * *

**APWU Questions and USPS Answers
Regarding Office of Inspector General (OIG) Investigations**

- Q1. The February 7, 2005, memorandum makes reference to the “Postmaster General’s September 9, 2004 memorandum, which announced that changes would be made in the responsibility for investigating certain internal crimes.”

Please provide a copy of the Postmaster General’s September 9, 2004, memorandum announcing the investigation changes.

- A1. The Postmaster General’s September 9, 2004, memorandum is enclosed. Attachment A.**

- Q2. The February 7, 2005, memorandum also stated that “effective immediately, allegations of employee embezzlement, record falsification by employees, workers’ compensation fraud by postal employees, contract fraud, on-duty employee narcotics violations, and miscellaneous employee misconduct (application falsification, theft of property or services, non-postal crimes, etc.) will be referred to your local Office of Inspector General (OIG) Special Agent in Charge, who will coordinate with the Inspection Service to determine appropriate investigative action.”

We have no record of receiving the required notification pursuant to Article 19 of this change. If the required Article 19 notification was provided, please provide confirmation of such notice. If not, why not?

- A2. The transition of certain types of investigatory assignments from the Inspection Service to the Office of Inspector General (OIG), as explained in the March 22, 2005, letter to Mr. Burrus, will not restrict, eliminate, or otherwise adversely affect any rights, privileges, or benefits of Postal employees. This transition does not directly relate to wages, hours and working conditions. Therefore, it is the Postal Service’s position that Article 19 notification, as defined in the National Agreement was not required. The March 22, 2005, letter is enclosed. Attachment B.**

- Q3. It has been the parties’ historical past practice consistent with applicable regulations, collective bargaining agreements, settlements and memoranda that the law enforcement officers who conduct interrogations of bargaining unit employees regarding criminal matters are the Postal Inspection Service officers. Whereas, management is responsible for handling non-criminal matters in which an employee may be subject to discipline, including discharge. In addition, OIG has oversight responsibilities of activities of the Postal Inspection Service. Please identify the specific regulations that support the Postal Service’s decision to replace Inspection Service Officers with OIG Officers to investigate and/or interrogate bargaining unit employees.

- A3. The United States Postal Service Office of Inspector General (OIG) was created by Congress in September 1996 by amending the Inspector General Act of 1978 and the Postal Reorganization Act of 1970. The inspector General Act provides that the OIG may conduct audits and investigations in the Postal Service as it considers appropriate. See 5 U.S.C. app. 3 § 8G(f). Investigations of bargaining unit employees fall within the OIG's statutory responsibility to conduct audits and investigations pertaining to the Postal Service and are within the OIG's discretion to conduct.**
- Q4. The Chief Postal Inspector reports directly to and is under the general supervision of the Postmaster General. Does the Inspector General report to and work under the general supervision of the Postmaster General? Will the OIG also be subject to the same authority of the Postmaster General and the Postal Service's Office of Labor Relations? If not, please explain why not?
- A4. The Inspector General does not report to or work under the general supervision of the Postmaster General. The Inspector General Act ensures OIG independence by stating that the Inspector General "shall not report to, or be subject to supervision by, any other officer or employee" of the Postal Service. See Id. § 8G(d).**
- Q5. Will this transition result in any changes related to how bargaining unit employees are treated, investigated or interrogated by the Postal Inspection Service regarding the above-referenced allegations? If so, please explain how and what impact or effect the transition will have on employees.
- A5. The Inspector General Act of 1978, as amended, provides, "nothing in this Act shall restrict, eliminate, or otherwise adversely affect any of the rights, privileges, or benefits of either employees of the United States Postal Service, or labor organizations representing employees of the United States Postal Service, under chapter 12 of title 39, United States Code [39 USC § § 1201 et seq.], the National Labor Relations Act [29 USCS § § 151 et seq.], any handbook or manual affecting employee labor relations with the United States Postal Service, or any collective bargaining agreement." See Id. § 8G(f)(3)(C)(3).**
- Q6. Please explain the purpose and reasoning behind the changes relating to the transitioning of certain types of workplace investigations to OIG from the Inspection Service.
- A6. The transitioning of certain types of investigations from the Inspection Service to the OIG fulfills the OIG's responsibilities under the Inspector General Act.**

- Q7. Please describe whether the Inspection Service will have any role in investigation of the matters assigned to the OIG concerning bargaining unit employees and, if so, describe what that role will be.
- A7. The Inspection Service may have a role in investigations assigned to the OIG, on a case-by-case basis. A Postal Inspector's role would be to refer allegations to the OIG and/or participate in the investigation with the OIG Special Agent.**
- Q8. Article 17.3 of the APWU National Agreement states that if an employee requests a steward or Union representative to be present during the course of an interrogation by the Inspection Service, such request will be granted. Will OIG comply with this requirement of Article 17.3 during the course of an interrogation?
- A8. The OIG will comply with the requirements of Article 17.3 as it relates to an employee request for a steward or Union representative during the course of an interrogation.**
- Q9. The APWU has a Memorandum of Understanding with the Postal Service concerning the "Role of Inspection Service in Labor Relations Matters." Will this MOU also apply to the OIG, the same as the Inspection Service? If it does not, in whole or in part, please explain which specific parts of the MOU do not apply and why.
- A9. The OIG will comply with the MOU entitled, "Role of Inspection Service in Labor Relations Matters."**
- Q10. Where there have been decisions, settlements, and memoranda of understanding reached through the grievance/arbitration process, the National Labor Relations Board, or the courts that apply to the Postal Inspection Service, will the OIG be obligated and bound those decisions in the same way as the Postal Inspection Service?
- A10. Generally speaking, the OIG will comply with those decisions, settlements, and memoranda of understanding that were reached through the grievance/arbitration process, National Labor Relations Board, or judicial process that apply to the Inspection Service. However, without identifying a specific decision, settlement, or memorandum of understanding, a more definitive answer cannot be provided.**
- Q11. Will OIG investigators comply with employees' Weingarten rights, the same as Postal Inspectors, allowing a union steward to consult with the employee before, and be present during, an OIG interview if requested by the employee?
- A11. OIG investigators (Special Agents) will comply with Weingarten rights in**

the same manner as Postal Inspectors.

- Q12. Will OIG investigators issue or act as the concurring official in discipline issued by the Postal Service in accordance with Article 16 of the APWU National Agreement?
- A12. Special Agents will not issue or concur in disciplinary action outlined in Article 16 of the National Agreement.**
- Q13. Will the OIG recommend and/or mandate that disciplinary action be issued to a bargaining unit employee?
- A13. Special Agents will not recommend and/or mandate the issuance of discipline to bargaining unit employees.**
- Q14. The current official Postal Service form that bargaining unit employees are subject to and may be asked to review or sign during an interrogation is “PS Form 1067, July 1987 - *USPS Postal Inspection Service — Warning and Waiver of Rights*.” However, it has been called to our attention that bargaining unit employees are being asked to review and/or sign unofficial forms during interrogation by OIG Inspectors. Please provide copies of any forms that bargaining unit employees may be asked to review or sign or both during the course of an investigation by the OIG. Among these forms, please provide the primary document authorizing or describing the use of these forms including what has been referred to as “IGM 410 and its attachments.”
- A14. Enclosed are the investigatory forms the OIG uses during an interrogation. Attachments C, D and E.**
- Q15. We have received from the field a copy of a form titled “Administrative Warning: Duty to Cooperate” (copy enclosed). Although this form may be included in your response to Question 14, we have no record of this form (which bargaining unit employees are currently being subject to) being authorized as an official Postal Service form, similar to PS Form 1067 which is used by the Postal Inspection Service. It is not clear whether the PS Form number is simply missing from the copy that we have and therefore it is requested that you provide the PS Form number and effective date. It is also requested that you also explain the genesis and intended use of this form.
- A15. An employee’s duty to cooperate during an official postal investigation is not new. See ELM § 665.3 (formerly ELM § 666.6). The OIG has the authority to use its own forms.**
- Q16. What effect, if any, is there on the investigatory process or the disciplinary process if an employee refuses to sign the *Administrative Warning: Duty to*

Cooperate or other similar official PS Forms the OIG might use? For example, there have been occasions depending on the fact circumstances where employees have exercised their right not to sign the Postal Inspection Service “Warning and Waiver of Rights” PS-Form 1067.

A16. An employee's refusal to sign the Administrative Warning: Duty to Cooperate does not necessarily trigger an adverse result. It would depend on the circumstances surrounding the refusal on a case by case basis and as determined by management.

Q17. The “*Administrative Warning: Duty to Cooperate*” form indicates that neither an employee’s answer, nor any information or evidence which is gained by reason of your statements can be used against you in criminal proceedings. Do OIG investigators have authority to grant immunity from prosecution? If so, please describe the authority. If not, who is authorized to grant immunity from prosecution?

A17. Special Agents do not have authority to grant immunity from criminal prosecution. The Justice Department or an office of the United States Attorney has the authority to grant immunity from criminal prosecution. Provision of the form, “Administrative Warning: Duty to Cooperate,” means that the OIG has obtained a waiver of prosecution from the Justice Department or United States Attorney Office.

Q18. If OIG investigators do not grant immunity, how and from whom do they secure immunity from prosecution?

A18. See response to paragraph 17.

Q19. How is an employee who is being interviewed informed of the granting and scope of immunity from prosecution? For example, does OIG contact the appropriate authorizing official first, and get approval to grant immunity from prosecution before offering immunity from prosecution during the interrogation?

A19. Special Agents obtain authorization to offer immunity from criminal prosecution prior to conveying that immunity to an employee.

Q20. Will an employee be allowed legal representation prior to and/or during an OIG investigatory interview?

A20. An employee may invoke their right to counsel in a custodial interrogation.

Q21. Under Miranda v. Arizona, 384 U.S. 436 (1966), before a law enforcement officer may question an individual regarding the possible commission of a

crime, he/she must read to the employee his/her “Miranda Rights” and must also make sure that the individual understands these rights. It is not sufficient to simply inform employees that “neither their answers nor any information or evidence which is gained by reason of their statements can be used against them in criminal proceedings.” Such a statement does not relieve the OIG officers of their obligation to advise the employees of their full “Miranda Rights,” including the right to remain silent and the right to be represented by counsel. Why is it that the “Administrative Warning: Duty to Cooperate” form does not advise employees of their full “Miranda Rights,” including the right to be represented by counsel and the right to remain silent?

- A21. When applicable, the Special Agent will advise the employee of his/her Miranda rights. If an employee is not in custody, and is free to leave, the OIG does not provide Miranda rights.**
- Q22. Can OIG investigators grant employees immunity from administrative disciplinary proceedings that could arise based on the substance of the employees’ responses? If so, how will that immunity be conveyed to employees?
- A22. It is a management responsibility to determine whether to issue discipline. Special Agents do not have the authority to grant employees immunity from adverse administrative actions.**
- Q23. Will OIG investigators use other warnings and explanations of employees’ legal rights? If so, please specify the warnings or explanations given and their purpose.
- A23. The Special Agent will provide Miranda rights when interrogating employees in custodial situations; and either Kalkine or Garrity warnings in non-custodial interrogations.**
- Q24. Is there a general protocol and/or procedure for the OIG’s investigation of allegations? If so, please provide us with that protocol and/or procedure.
- A24. The OIG commences investigations after receiving allegations or otherwise discovering apparent wrongdoing. The OIG may produce a report at the end of the investigation.**
- Q25. Describe the type and/or form number of internal reports generated by the OIG during an investigation. Also, will OIG comply with APWU’s right to be provided such information pursuant to Article 17, Section 3 and Article 31 of the National Agreement?
- A25. The OIG’s report of investigation is similar in substance to the Inspection Service’s investigative memorandum. Upon request, the Union will be**

provided information consistent with Article 17, Section 3 and Article 31.

Q26. The APWU presently has the right to interview Inspection Service officers regarding investigations that result in or relate to discipline of bargaining unit employees. Will OIG comply with APWU's right to interview OIG Inspectors, the same as Postal Inspectors?

A26. The APWU may have the right to interview Special Agents consistent with the provisions of Article 17 and 31, depending on the circumstances.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴

ORDER

The Respondent, United States Postal Service, Fremont, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to permit union representatives to consult with employees prior to investigatory interviews conducted by postal inspectors which the employees reasonably believe will result in disciplinary action and refusing to permit employees to speak with union representatives prior to such interviews.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facilities where employees are represented by the American Postal Workers Union, copies of the attached notice marked "Appendix."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

¹⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be, and it is, dismissed insofar as it alleges that the Respondent violated the Act other than found herein.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to permit union representatives to consult with employees prior to investigatory interviews conducted by postal inspectors which the employees reasonably believe will result in disciplinary action and WE WILL NOT refuse to permit employees to speak with union representatives prior to such interviews.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

UNITED STATES POSTAL SERVICE



CHIEF POSTAL INSPECTOR
Washington, D.C. 20260

April 5, 1979

Mr. Emmet Andrews
General President
American Postal Workers Union, AFL-CIO
817 Fourteenth Street, N.W.
Washington, D.C. 20005

Dear Mr. Andrews:

Reference is made to the telephone conversation between you and Deputy Chief Inspector, Kenneth H. Fletcher, on March 30, 1979, regarding the role of union representatives in Inspection Service interrogations.

The Inspection Service recognizes that a bargaining unit employee has a right to have a union representative present during the course of an Inspection Service interrogation if the employee so requests. In our view, the union representative's purpose, or role, in such interrogations is to safeguard the interest of the individual employee who perceives a threat to job security and to protect the interests of the entire bargaining unit. With respect to the individual employee, we believe that a union representative may attempt to clarify the facts, suggest other sources of information, and generally assist the employee to articulate his/her explanation. At the same time, exercise of the employee's right may not interfere with legitimate Inspection Service prerogatives, and the Inspector has no duty to bargain with any union representative. An Inspector may properly insist upon hearing only the employee's own account of the matter under investigation and need not listen to the representative's version of what has transpired.

In criminal matters, employees are entitled to exercise their Constitutional rights against self-incrimination by remaining silent or refusing to answer questions except in the presence of their attorney. Before conducting a custodial interrogation of an employee during a criminal investigation, the Inspector must

advise the employee of the procedural safeguards articulated in the Miranda case to secure the employee's privilege against self-incrimination. Included is his/her right to the presence of an attorney, either retained or appointed. The presence of a union representative does not discharge the Inspection Service's obligation required under Miranda. Thus, a union representative should not and cannot properly assume an attorney's role. The employee is entitled to the presence of both.

In sum, the interests of all can be protected and furthered if both union representatives and Inspectors approach such interrogations in a good faith effort to deal fairly and reasonably with each other. In this regard, please be assured that the Inspection Service requires that Inspectors comply fully with the letter and spirit of the National Agreement, including the provision pertaining to union representation. And I am confident that union representatives will likewise comply fully with the Agreement.

We are not unmindful of your obligations as a collective bargaining representative and trust that you appreciate the obligations and responsibilities of the Inspection Service as the law enforcement arm of the Postal Service. If you have any suggestions as to how the Inspection Service and your Union may foster a better understanding of each other's responsibilities and a more cooperative relationship in this area, I would welcome hearing from you.

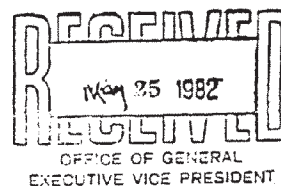
Sincerely,



 C. Neil Benson
Chief Postal Inspector



CHIEF POSTAL INSPECTOR
Washington, DC 20260



May 24, 1982

Mr. William Burrus
General Executive Vice President
American Postal Workers Union, AFL-CIO
817 14th Street, N.W.
Washington, DC 20005

Dear Mr. Burrus:

This replies to your May 10, 1982, letter to Senior Assistant Postmaster General Joseph Morris concerning the role of stewards or union representatives in investigatory interviews. Specifically, you expressed concern that the Inspection Service has adopted a policy that union representatives be limited to the role of a passive observer in such interviews.

Please be assured that it is not Inspection Service policy that union representatives may only participate as passive observers. We fully recognize that the representative's role or purpose in investigatory interviews is to safeguard the interests of the individual employee as well as the entire bargaining unit and that the role of passive observer may serve neither purpose. Indeed, we believe that a union representative may properly attempt to clarify the facts, suggest other sources or information, and generally assist the employee in articulating an explanation. At the same time, as was recognized in the Texaco opinion you quoted, an Inspector has no duty to bargain with a union representative and may properly insist on hearing only the employee's own account of the incident under investigation.

We are not unmindful of your rights and obligations as a collective bargaining representative and trust that you, in turn, appreciate the obligations and responsibilities of the Inspection Service as the law enforcement arm of the U. S. Postal Service. In our view, the interests of all can be protected and furthered if both union representative and Inspector approach investigatory interviews in a good faith effort to deal fairly and reasonably with each other.

Sincerely,

K. H. Fletcher
K. H. Fletcher



American Postal Workers Union, AFL-CIO

817 14TH STREET, N. W., WASHINGTON, D. C. 20005

May 10, 1982

Joseph Morris
Senior Assistant Postmaster General
Employee and Labor Relations Group
U.S. Postal Service Headquarters
Washington, D.C. 20260

Dear Mr. Morris:

The United States Postal Service Inspection Service has adopted policy that stewards or union representatives under the Collective Bargaining Agreement are prohibited from participating in investigative interviews of bargaining unit employees. Stewards or union representatives are instructed to remain silent, participating as passive observers throughout the interview.

This issue has been resolved in several court decisions, including Weingarten and Texaco. In the Texaco decision the Court stated:

A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or too inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview.

In refusing to permit the representative to speak, and relegating him to the role of a passive observer, the respondent did not afford the employee the representation to which he is entitled, (NLRB v. Texaco, Inc., 108 LRRM 2850 (October 16, 1981)).

Please notify the appropriate postal officials that stewards or union representatives may not be relegated to a role of passive observers in investigative interviews, however if there is disagreement as to the interpretation or application of the above stated provisions, please respond

Joseph Morris
Senior Assistant Postmaster General
Employee and Labor Relations Group

May 10, 1982
page 2

in writing that we may invoke applicable procedures to resolve such dispute.

I am available to discuss this issue and may be reached at
842-4250.

Sincerely,

William Burrus,
General Executive Vice President

WB:mc

April 24, 1986

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
817 14th Street, N.W.
Washington, D.C. 20005-3399

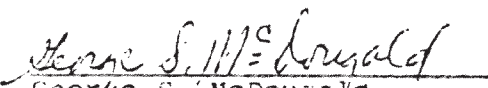
Dear Mr. Burrus:

Recently, you met with Sherry Cagnoli, Office of Labor Law, in prearbitration discussion of case number HLC-MA-C 96, Washington, D.C. The parties mutually agreed to a full and final settlement of this case as follows:

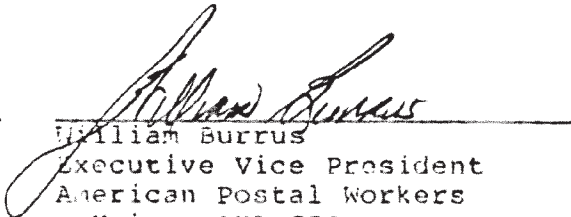
The parties agree that the right to a steward or union representative under Article 17, Section 3 applies to questioning of an employee who has or may have witnessed an occurrence when such questioning becomes an interrogation.

Please sign and return the enclosed copy of this letter acknowledging your agreement to settle this case, and withdrawing HLC-MA-C 96 from the pending national arbitration listing.

Sincerely,


George S. McDougald
General Manager
Grievance and Arbitration
Division
Labor Relations Department

Enclosure


William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO

4-24-86
(Date)



UNITED STATES POSTAL SERVICE
OFFICE OF INSPECTOR GENERAL
1735 NORTH LYNN STREET
SUITE 10000
ARLINGTON, VA 22209-2020

MIRANDA RIGHTS

I, _____, have been advised by Special Agent _____, who has identified himself/herself to me as a Special Agent of the United States Postal Service, Office of Inspector General, that he/she is conducting a criminal investigation.

I have also been advised that:

- _____ 1. I have the right to remain silent;
- _____ 2. Any statement I make can be used as evidence against me in a court of law;
- _____ 3. I have the right to consult with an attorney prior to and during any questioning;
- _____ 4. If I cannot afford an attorney, one will be appointed to me by the court without cost, prior to any questioning;
- _____ 5. I have the right to request an attorney at any time during this interview; and
- _____ 6. I have the right to terminate this interview at any time, for any reason.

I have read my rights or had them read to me as set forth above and I understand my rights. With this understanding, I am willing to make a statement and answer questions. I do not wish to consult with an attorney at this time, and I do not wish to have an attorney present during this interview. I make this decision freely, knowingly, and voluntarily, and without any threats, promises, or coercion of any kind being made against me.

Signature: _____

Date & Time: _____

Investigator: _____

Date & Time: _____

Witness: _____

RESTRICTED
INFORMATION
MIRANDA

This report is furnished on an official need to know basis and must be protected from dissemination which may compromise the best interests of the U.S. Postal Service Office of Inspector General. This report shall not be released or disseminated to other parties without prior consultation with the Office of Inspector General. UNAUTHORIZED RELEASE MAY RESULT IN CRIMINAL PROSECUTION.

UNITED STATES POSTAL INSPECTION SERVICE WARNING AND WAIVER OF RIGHTS

Place: _____

Date: _____ Time: _____

WARNING

BEFORE YOU ARE ASKED ANY QUESTIONS, YOU MUST UNDERSTAND YOUR RIGHTS.

- You have a right to remain silent.
- Anything you say can be used against you in court.
- You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.
- If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.
- If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

I have read this statement of my rights (This statement of my rights has been read to me) and I understand what my rights are.

(Date)

(Time)

(Signature)

WAIVER

I am willing to discuss subjects presented and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

(Date)

(Time)

(Signature)

Witnessed by: _____

Title: _____

Witnessed by: _____

Title: _____



UNITED STATES POSTAL SERVICE
OFFICE OF INSPECTOR GENERAL

1735 NORTH LYNN STREET
SUITE 10000
ARLINGTON, VA 22209-2020

ACKNOWLEDGEMENT OF RIGHTS

I, _____, have been advised by Special Agent _____, who has identified himself/herself to me as a Special Agent of the United States Postal Service, Office of Inspector General, that he/she is conducting an investigation into a matter affecting my official duties.

In connection with this, I have been advised that:

- _____ 1. I have the right to remain silent if my answers may tend to incriminate me.
- _____ 2. Anything I say or do may be used as evidence in administrative proceedings, civil proceedings, or any future criminal proceeding involving me.
- _____ 3. If I refuse to answer the questions posed to me on the grounds that the answers may tend to incriminate me, I cannot be discharged solely for remaining silent.
- _____ 4. However, my silence can be considered in an administrative proceeding for its evidentiary value that is warranted by the facts surrounding my case.
- _____ 5. This interview is strictly voluntary and I may leave at any time.

I have read the Acknowledgement of Rights or had them read to me and I understand them as set forth above.

Signature: _____

Date & Time: _____

Investigator: _____

Witnessed: _____

Place: _____

RESTRICTED
INFORMATION
GARRITY

This report is furnished on an official need to know basis and must be protected from dissemination which may compromise the best interests of the U.S. Postal Service Office of Inspector General. This report shall not be released or disseminated to other parties without prior consultation with the Office of Inspector General. UNAUTHORIZED RELEASE MAY RESULT IN CRIMINAL PROSECUTION.



UNITED STATES POSTAL SERVICE
OFFICE OF INSPECTOR GENERAL
1735 NORTH LYNN STREET
SUITE 10000
ARLINGTON, VA 22209-2020

ADMINISTRATIVE WARNING: DUTY TO COOPERATE

- ____ 1. You are going to be asked a number of specific questions concerning the performance of your official duties as an employee of the United States Postal Service.
- ____ 2. You have a duty to reply to these questions. Agency disciplinary proceedings, including your dismissal, may be initiated if you refuse to answer or fail to reply fully and truthfully.
- ____ 3. Neither your answers nor any information or evidence which is gained by reason of your statements can be used against you in criminal proceedings; except that you may be subject to criminal prosecution for any false oral or written answers made by you during the course of this interview.
- ____ 4. YOU ARE SUBJECT TO DISCIPLINARY ACTIONS UP TO AND INCLUDING DISMISSAL IF YOU REFUSE TO ANSWER OR FAIL TO RESPOND TRUTHFULLY AND FULLY TO ANY QUESTIONS, OR GIVE MISLEADING INFORMATION.

acknowledgement

I have read the above warning or had it read to me, and I understand my rights. I have been advised of the nature of the inquiry and I am willing to discuss the subject(s) presented to me. No promises, threats, or coercion of any kind have been made against me. I know and understand what I am doing.

Date Time Signature

Print Name

Investigator Date Time

Witness Date Time

RESTRICTED
INFORMATION
KALKINES

This report is furnished on an official need to know basis and must be protected from dissemination which may compromise the best interests of the U.S. Postal Service Office of Inspector General. This report shall not be released or disseminated to other parties without prior consultation with the Office of Inspector General. UNAUTHORIZED RELEASE MAY RESULT IN CRIMINAL PROSECUTION.

M 00225



UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20006

March 10, 1981

Mr. Vincent R. Sombrotto
President
National Association of Letter
Carriers, AFL-CIO
100 Indiana Avenue, N.W.
Washington, D. C. 20001

Re: NALC Branch
Springfield, MA
NB-N-0224

Dear Mr. Sombrotto:

In settlement of the above-described grievance, the parties agree to the following:

1. The Postal Service agrees that a steward who is processing and investigating a grievance shall not be unreasonably denied the opportunity to interview Postal Inspectors on appropriate occasions, e.g., with respect to any events actually observed by said Inspectors and upon which a disciplinary action was based.
2. The Postal Service and the NALC disagree as to whether in other circumstances such as those in the above-captioned case, the steward should be given the opportunity to interview the involved Inspector.
3. The parties agree that the above-captioned grievance will be withdrawn and that the disciplinary action taken against the employee in whose behalf the steward had requested an interview will also be withdrawn. Additionally, the employee in question will be granted the \$25.00 assessed for the lost parcel. These withdrawals are non-precedential.

Sincerely,

William E. Henry, Jr.
William E. Henry, Jr.
Director
Office of Grievance
and Arbitration
Labor Relations Department

Vincent R. Sombrotto
Vincent R. Sombrotto
President
National Association of Letter
Carriers, AFL-CIO

M-01308

LABOR RELATIONS



RECEIVED

JUL 1 1997

CONTRACT ADMINISTRATION UNIT
N.A.L.C. WASHINGTON, D.C.

Mr. William H. Young
Vice President
National Association of Letter Carriers, AFL-CIO
100 Indiana Avenue, NW
Washington, DC 20001-2197

Re: E90N-1E-C 93048688
CLASS ACTION
PORTLAND, OR 97238-9998

Dear Mr. Young:

Recently, Richard Murmer met you in pre-arbitration discussion of the above-captioned grievance.

The issue in this grievance is whether management violated the National Agreement by failing to turn over requested postal inspection service notes and video tapes during the investigation of a grievance.

During our discussion, it was mutually agreed that the following constitutes full and final settlement of this grievance:

The USPS understands its obligation to release properly requested information to the union that is relevant and necessary for collective bargaining and/or contract administration.

In this case, it appears that the notes and tapes relied upon to prepare the investigative memorandum should have been made available to the union.

However, inasmuch as the grievance on the discipline which was imposed has been decided by an arbitrator, the requested information is no longer relevant and need not be provided in this particular case.

475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-4100

M-01308

William Young
re: E90N-1E-C 93048688
Page 2

Please sign and return the enclosed copy of this letter as your acknowledgment of agreement to settle case E90N-1E-C 93048688 and remove it from the pending national arbitration listing.

Sincerely,



Pete Bazylewicz
Manager
Grievance and Arbitration



William H. Young
Vice President
National Association of Letter Carriers,
AFL-CIO

Date: 7-14-97



UNITED STATES POSTAL SERVICE
475 L'Enfant Plaza, SW
Washington, DC 20260

August 19, 1981

Mr. Gerald Anderson
Executive Aide, Clerk Craft
American Postal Workers Union, APL-CIO
817 - 14th Street, NW
Washington, DC 20005

ARTICLE	17
SECTION	
SUBJECT	
INFORMATION REQUEST	
INSPECTION REPORT	

Re: Class Action
Oklahoma City, OK 73125
HBC-3T-C-27940

Dear Mr. Anderson:

On August 6, 1981, we met with you to discuss the above-captioned grievance at the fourth step of our contractual grievance procedure.

The matters presented by you as well as the applicable contractual provisions have been reviewed and given careful consideration.

The question in this grievance is whether or not management violates Article XXXI of the National Agreement when information requested by the Union was not provided.

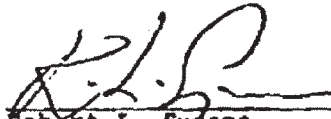
The Union has asked to review a worksheet prepared by the Inspection Service during an audit conducted on several stations in October of 1979. A complete copy of the Inspection Service's report that was prepared from this worksheet was provided to the Union.

If the Union has established the relevancy of the report, then the relevancy of the worksheet is obvious. Unless the worksheet contains confidential information that is precluded from release by the Privacy or Freedom of Information Acts, it shall be released for review, it still exists.

-2-

If you agree that the above resolves this particular grievance, please sign the attached copy of this decision.

Sincerely,


Robert L. Eugene
Labor Relations Department


Gerald Anderson
Executive Aide, Clerk Craft
American Postal Workers Union,
AFL-CIO

CBR

Industrial Relations Department
American Postal Workers Union
1300 L Street N.W.
Washington, D.C. 20005

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