

As of March 2005 the USPS has informed APWU of our responsibility concerning investigating employee misconduct (internal crimes) which was shifted from the PI to the OIG. All of the rights of the employee has during the investigation. And the role and rights we have as a steward or Union officer in representing the employee in the workplace during such investigation.

The Postal Service has changed the face of law enforcement agency conducting investigations of internal criminal matters, the rights of employees and the American Postal Worker's Union during investigatory interviews has not changed. In carrying out our responsibility in investigatory interviews, Union representatives may attempt to clarify facts, including the purpose of an interview or information that is provided during the interview, and to assist an employee in articulating a response or explanation.

EMPLOYEE'S AND STEWARD'S RIGHTS IN INVESTIGATORY INTERVIEWS CONDUCTED BY THE POSTAL INSPECTION SERVICE (PI) AND/OR USPS OFFICE OF INSPECTOR GENERAL (OIG):

A. ROLE OF A STEWARD IN EMPLOYEE INTERROGATIONS

Under Article 17, section 3 of the National Agreement, "Rights of Stewards" requires that if an employee requests a steward to be present during the course of an interrogation by the PI or OIG, such request will be granted. All polygraph tests will be on voluntary basis.

The steward or Union officer should not allow the inspectors and/or agents to limit our participation to that of a passive observer. The steward or Union officer should not turn the interrogation into an adversarial proceeding and prevent the PI and/or OIG from questioning the employee, the steward should advise and actively assist the employee. The steward or Union officer should attempt to clarify the facts, assist the employee in articulating an explanation, and advise the employee appropriately of the employee's rights to remain silent and to consult with an attorney. The steward may ascertain whether the employee is under arrest and/or whether the employee is subject of a criminal investigation or is suspected of a crime.

In situations where a steward or Union representative believes an employee may be the subject of a criminal investigation and/or there are legal issues that need to be addressed, the steward or Union representative may appropriately advise the employee to remain silent and/or not to sign any statement or forms until they have consult with an attorney.

In situations where the investigatory agent presents the employee with a "Kalkines Warning" which purports to convey a grant of "use immunity". The steward should ask for the name of the U.S. attorney that authorized the granting of "use immunity". In the absences of corroboration that "use immunity" was actually granted by a U.S. attorney authorized to do so, it would not be inappropriate for the steward to advise the employee not to sign the "Kalkines Warning" until the have consulted with legal counsel. The steward may also advise the employee on whether or not to voluntarily submit to a polygraph examination. The steward may advise the employee about the consequences of giving a statement or not answering questions. All of this advise may be given in front of the inspectors or agents, or alone in private, and the steward may interrupt the interrogation in order to speck with the employee.

If the inspectors or agents fail to permit the presence of a steward during an interrogation or fail to respect the role of the steward, both the Local Union and the individual employee who is subject of the interrogation can file unfair labor practices charges with the National Labor Relations Board (NLRB), they can request the assistance of a Union representative. This factor will also bolster an allegation by the Local Union. The Local Union should claim a violation of section 8(a)(1) and 8(a)(5) of the National Labor Relations Act. The employee can claim a violation of section 8(a)(1). The body of such a charge filed by an employee should allege that:

On or about _____, the USPS interfered with, restrained and coerced an employee in the exercise of their section 7 rights by, among other things, failing and refusing to permit the presence and/or participation of a Union representative during the course of an interrogation by the Employer.

A similar charge should be filed by the Local Union alleging the USPS failure and refusal to permit the Union steward's participation in the interrogation of an employee in violation of the Postal

Service's legal and contractual obligations. Both charges can cite NLRB v. Weingarten, 420 U.S. 251 (1975) as supporting authority. A recent NLRB decision supporting this type of charge is Barnard College, 340 NLRB No. 934 (2003).

B. STEWARD'S PRIVILEGE

This information is provide for stewards who are subject to demands that they testy or otherwise disclose information provided to them by the employee in confidence in their representative capacity. A demand by the USPS to interrogate Union steward concerning information communicated to them by the employees they represent in their capacity as Union stewards constitutes a violation of the National Labor Relations Act. These demands which carry explicit or implicit threats of discipline of the steward if the steward does not cooperate are clearly demands to interrogate employees about Union activities.

In these circumstances, the Local should file an unfair labor practices charges against the USPS alleging a violation of section 8(a)(1) of the National Labor Relations Act. The Local should also ask for injunctive relief under section 10(j) of the National Labor Relations Act. 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 the employees to serve as stewards. Such harm cannot be repaired with an eventual NLRB cease and desist order. For that reason, the charge should not be deferred to arbitration. Such a charge should allege as follows:

On or about _____, the USPS interfered with, restrained and coerced employees in the exercise of their section 7 rights by, among other things, demanding under threat of discipline that the 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. 258 NLRB 1230 (1981) when contacted by the Board Agent. It's important to remember that although APWU stewards enjoy a qualified privilege as stated by the Board in the Cook Paint and Varnish Co., as employees of the USPS, they also have an obligation to cooperate with the employer investigation in judicial proceedings.

Steward's Privilege is not an "attorney-client" privilege and is not absolute. Should a steward be subpoenaed to testify before a grand jury or in court, a steward may well be held in contempt if they refuse to testify based upon the NLRB privilege for Union steward. Unlike the "attorney-client" privilege which would be honored, there is not any judicial authority for a Union steward To withhold information when question under oath by law enforcement officials. We contend that the steward's privilege does apply in the context of investigatory interviews by the PI or the OIG. The questioning is not in a judicial forum where "testimonial" privilege is required for a witness to refuse to answer questions. We contend that the same rule which should apply in questioning of stewards by managers or labor relations officials must also apply when stewards are being questioned by PI and/or OIG.

C. ADVICE TO EMPLOYEES

The Union advises the employees to request the presence of an APWU representative if question by the PI and/ or OIG, even if the employee believes they are not guilty of any wrong doing. Employees should keep in mind that that the PI and/ or OIG agents are law enforcement officers who are investigating allegations of a criminal matter. They should remain silent until they have consulted with an APWU representative or attorney.

It is important for the employee to ask that they be advises whether or not they are a suspect in a criminal proceeding. Even if they are told that whatever they say will not be used against them in criminal proceeding, if it is a criminal matter that is being investigated they should advise the agent that they wish to contact an attorney. Under no circumstances should an employee sign any forms or make any statement until they have consulted with an attorney. The fact of the matter is even if a statement they make is not used, it does not necessarily mean they may not be charged in a criminal proceeding. It is important that employees understand their rights and obligations when confronted by law enforcement agents.

D. WEINGARTEN RIGHTS

NLRB v. J. Weingarten, Inc. The Supreme Court decision of 1975 underlines WEINGARTEN RIGHTS provide that a Union represented employee has the right to a steward when facing an investigatory interview. Remember that Weingarten Rights states that management, PI, or OIG is not required to advise you of this right. It is the responsibility of the employee to be aware of this right and to request representation. The Weingarten's decision applies to investigatory interviews: The employee can request Union representation before or at any time during the interview. When an employee asks for representation, the employer must choose from among 3 options (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. If the employer denies the request for Union representation and continues the meeting, the employee can refuse to answer questions.

E. MIRANDA RIGHTS

Employees have the right to remain silent; Miranda v. Arizona, 384 U.S. 436 (1966) the Supreme Court's historic decision, ruled that before law enforcement officer may question an individual regarding the possible commission of a crime, the officer must read the individual's their *Miranda Rights* and must also make sure that the individual understands these rights:

- (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 before they ask you 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 will 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
- (5) Do you understand the rights that have been read to you?

The law enforcement officer is allowed to ask routine questions necessary to help determine a person's true identity before reading the individual *Miranda Rights*.

F. GARRITY RIGHTS / WARNING

The Fifth Amendment to the U.S. Constitution provides that no person shall be compelled in any criminal case to be a witness against themselves. A person may not be required or coerced to disclose any information that they reasonably believes may be used or lead to other evidence that may be used in a criminal prosecution against them. If they are coerced into disclosing information, that information is not admissible in court against them.

The Fifth Amendment rights for USPS employees have additional rights under the Fifth Amendment as public sector employees. These workplace rights arise because in the public sector the government acts as both law enforcement agency and employer.

In 1967 the Supreme Court ruled on Garrity v. New Jersey 385 US 493 (1967) case. The case was where New Jersey police officers were targeted during an internal investigation. They were told that they must respond to questions during the investigation or face discharge for insubordination. They complied to save their jobs, those statements were used in criminal prosecutions against them. The Supreme Court overturned the convictions since the officers were coercive in violating their Fifth Amendment rights. The use of treats or discharge or any other substantial economic penalty against public sector employees during investigation of potentially criminal matters is coercive and that any consequent disclosure is inadmissible in criminal trial of the employee.

G. KALKINES RIGHTS / WARNING

In Kalkines v. United States 473 F.2d 1391, 1393 (Ct. Cl. 1973), the U.S. Court of Claims elaborated on the Supreme Court's holding in finding 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". An employee who given prosecutorial immunity should not expect to rely on their Fifth Amendment rights as a reason not to answer questions and if they do not answer the questions

the government may discipline them for failing to cooperate with the investigation. Any such discipline is subject to the grievance procedures of the collective bargaining agreement. Whether couched as a right or a choice, an employee can always decide whether to answer question or not answer questions. Kalkines Warning provides for the employee who "use immunity" from prosecution, the employee nonetheless may choose not answer questions and instead deal with the consequences of being disciplined. Assertion by the OIG agent that an employee is being granted "immunity" is not the same as an actual grant of immunity from a prosecutor. Questions regarding possible criminal prosecution, custodial vs. non-custodial interrogations, and immunity are legitimate questions that may best be addressed by legal counsel. There is no violation of any Postal Service policy or regulation if an employee who is being subject to an interrogation by law enforcement agents of the Postal Service chooses to remain silent pending consultation with a Union representative and / or legal counsel. There is no such violation if an employee chooses not to sign any forms or statements during an interrogation.

H. CONCLUSION

In situations where a steward or other Union representative believes that an employee may be subject of criminal investigation and / or there are legal issues that need to be addressed. A steward or Union representative may appropriately advise the employee to remain silent and to decline to sign any statements or fill out any forms until after the employee has spoken with legal counsel.

Employees should know that even if they are not guilty of wrongdoing, they should not allow themselves to be interviewed by the Postal Inspector or Office of Inspector General agents without an APWU representative present. These law enforcement officers are investigating criminal matters. Employees should remain silent until they have consulted with a Union representative or an attorney, regardless of what an agent may tell them.