

## American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

March 27, 2006

Greg Bell, Director  
Industrial Relations  
1300 L Street, NW  
Washington, DC 20005  
202-842-4273 (Office)  
202-371-0992 (Fax)

**National Executive Board**  
William Burrus  
President

Cliff "C.J." Guffey  
Executive Vice President

Terry R. Stapleton  
Secretary-Treasurer

Greg Bell  
Industrial Relations Director

James "Jim" McCarthy  
Director, Clerk Division

Steven G. "Steve" Raymer  
Director, Maintenance Division

Robert C. "Bob" Pritchard  
Director, MVS Division

**Regional Coordinators**  
Sharyn M. Stone  
Central Region

Jim Burke  
Eastern Region

Elizabeth "Liz" Powell  
Northeast Region

Frankie L. Sanders  
Southern Region

Omar M. Gonzalez  
Western Region

### VIA FACSIMILE AND REGULAR MAIL

Mr. David C. Williams, Inspector General  
United States Postal Service Office of Inspector General  
1735 N. Lynn Street, 10<sup>th</sup> Floor  
Arlington, VA 22209-2020

Dear Mr. Williams:

I am in receipt of your letter dated January 11, 2006, concerning my article in *The American Postal Worker* magazine about the Office of Inspector General's internal investigations of postal employees.

I note at the outset your equivocal comment about the OIG voluntarily adhering to the APWU collective bargaining agreement. I hope that, consistent with the Postal Service's intent to implement a proper and purposeful transition of certain investigations from the Inspection Service to the OIG, neither you nor the Postal Service loses sight of your legal obligations regarding labor relations with the APWU and its bargaining unit members. The Postal Service and its law enforcement agents' (Postal Inspection Service or OIG) obligation to adhere to the APWU collective bargaining agreement is mandatory, not optional or voluntary. I have been unable to find any authority to the contrary. Accordingly, when the Postmaster General transferred certain types of workplace investigations of employee misconduct to the Office of Inspector General from the Inspection Service, the APWU was provided the following assurances:

*This transition will not restrict, eliminate, or otherwise adversely affect any rights, privileges, or benefits of either employees of the Postal Service, or labor organizations representing employees of the Postal Service, under Chapter 12 of Title 39, United States Code, the National Labor Relations Act, any handbook or manual affecting employee labor relations, or any collective bargaining agreement.*

In addition, as you know, the Inspector General Act of 1978 at 5 U.S.C. §8G(f)(3) provides the following:

*Nothing in the Act shall restrict, eliminate, or otherwise adversely affect any rights, privileges, or benefits of either employees of the Postal Service, or labor organizations representing employees of the United States Postal Service, under Chapter 12 of Title 39, United States Code, the National Labor Relations Act, any handbook or manual affecting employee labor relations with the United States Postal Service, or any collective bargaining agreement.*

Issues such as those addressed in my article should not raise any disputes given that they relate to fundamental principles of labor relations and labor law as they pertain to investigations of employees.

#### The Right to Remain Silent

Regarding your comments concerning the applicability of Miranda rights, the APWU is aware of and understands the extent of a person's Constitutional rights to remain silent and to the assistance of counsel. Your assumption that OIG agents "will always make clear at the beginning of an interview whether the interviewee is under arrest (in custody) or is free to go" may be a factor in any misunderstanding about my guidance to employees. Since the OIG has undertaken investigating internal crimes, local reports from across the country suggest that your agents rarely give such an explicit explanation at the outset of an interview. To the contrary, I have received reports that, in some cases, Union representatives who have sought clarity on these points during an employee's investigatory interview have been treated with hostility and even expelled from the interview by your agents. Therefore, it may not be as clear as you suggest whether an employee is being subjected to a custodial interrogation.

In fact, I am concerned that your reference to OIG "voluntarily adhering to pertinent collective bargaining agreement provisions" and "allow[ing] employees who are interviewed to have representatives with them during the interviews" may lead your field OIG agents to incorrectly believe that they have an option, as opposed to an obligation, to grant an employee's request that a Union representative be present during the course of an interrogation. Such misconceptions may be a factor related to the above-referenced reports. As you know, a 1975 United States Supreme Court decision (NLRB v. Weingarten) provides that a union-represented employee has the right to assistance from a union steward when facing an investigatory interview. The employee has the right to request union representation before or at any time during the interview. Moreover, the requirement to provide an employee a steward or union representative during an interrogation upon an employee's request is also provided for in the APWU collective bargaining agreement, and such requirement applies equally to the Inspection Service and OIG agents of the Postal Service. Both the collective bargaining agreement and the Supreme Court's Weingarten decision make it clear that the obligation to grant an employee in an investigatory interview his or her request to union representation is mandatory, not optional or voluntary. I am hopeful that the reports we are receiving are isolated incidents and do not reflect the policy of the Postal Service or the OIG.

You made reference that my "article overlooks some nuances of law and provides some advice that may unintentionally cause an employee to violate Postal Service policy" and stated that "Postal Service employees are required to 'cooperate in any postal investigation, including Office of Inspector general investigations' according to the Postal Service Employee and Labor Relations Manual (ELM), Section 665.3." However, there is no violation of any Postal Service policy or regulation, including Section 665.3 of the ELM, 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. Moreover, there is no such violation if an employee chooses not to sign any forms or statements during an interrogation. I have been unable to find any authority to the contrary.

In any case, as you are surely aware, there are many factors in addition to arrest that bear on whether an interrogation is custodial, or whether an employee should remain silent pending consultation with a Union representative and/or legal counsel. My advice was intended simply to encourage employees to be knowledgeable of their rights, to consider their options, and to explore, if necessary, these factors with your agents, which may require seeking the advice of an attorney or Union representative in order to insure that their contractual rights, Constitutional rights, and rights under the National Labor Relations Act (NLRA) continue to be protected.

We are mindful of the responsibilities of the Inspection Service and OIG as the law enforcement arms of the Postal Service. However, the Union's role and purpose in investigatory interviews is to safeguard and represent the interests of the individual employee as well as the bargaining unit. You should know that we have received reports of incidents where OIG agents have deprived employees of their right to Union representation, and in our view used intimidating and coercive tactics to obtain statements. In addition, in one situation, OIG agents attempted to force a Union representative to submit to an investigatory interview and disclose information obtained during the course of his performance as a Union representative. As I am sure you are aware, such union representation activities are protected union activity under the NLRA and it would be improper and unlawful for the OIG to question or interrogate a Union representative concerning discussions or conversations that have occurred with an employee who he or she is representing. Fortunately, OIG abandoned their attempt to have the Union representative submit to an interview – but only after intervention by counsel representing the APWU.

#### Advice of Rights Forms

You mention as well Garrity and Kalkines rights and the grant of immunity which nullifies an employee's Fifth Amendment concerns. Here, too, the APWU has local reports that your agents are not properly applying these legal principles. The mere assertion by an OIG agent that Garrity rights are being afforded an employee is not the same as an actual grant of immunity from a prosecutor. We are being told of circumstances, for example, where an Assistant United States Attorney has not granted any kind of immunity but has offered only to decline prosecution at that time. You will undoubtedly agree that declination is hardly a sufficient protection of a postal employee's Fifth Amendment rights as contemplated under Garrity.

In regard to what OIG refers to as "new advice of rights forms," the APWU has several concerns with these forms and intends to pursue our concerns further. Ultimately, however, I must reiterate that postal employees always have the option to remain silent, and the option not to sign any forms or statements. Whether couched as a right or a choice, an employee can always decide whether to answer questions or not to answer questions. In regard to the Kalkines warning, for example, if an employee is actually provided "use immunity" from prosecution, the employee nonetheless may choose not to answer questions and instead deal with the consequences of being disciplined. Any discipline would, of course, be subject to the grievance procedure pursuant to the collective bargaining agreement.

Although, the Postal Service may have changed the face of the law enforcement agency conducting investigations of certain internal criminal matters, the rights of employees and the American Postal Workers 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 being provided during the interview, and to assist an employee in articulating a response or explanation. 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, a steward or Union representative may appropriately advise the employee to remain silent and/or not to sign any statements/forms until they have consulted with legal counsel. And, surely you will agree that questions and inquiries regarding issues such as Miranda rights and Garrity and Kalkines rights and warnings, possible criminal prosecution, custodial interrogations vs. non-custodial interrogations, and immunity, are legitimate questions that may best be addressed by legal counsel.

My article was intended to explain these rights, choices, and consequences so that employees can make informed decisions when involved in a Postal Inspection Service/OIG investigation. We believe the interest of all can be served and protected if we approach investigatory interviews in good faith, recognizing the rights and responsibilities of all parties (employee, Union and Postal Service law enforcement agents). In that spirit, I hope that I have been helpful and responsive to your inquiry and concerns.

Sincerely,

  
Greg Bell, Director  
Industrial Relations

cc: Anthony J. Vegliante

GB:MH/pjr  
opeiu#2/afl-cio



January 11, 2006

Mr. Greg Bell  
Director, Industrial Relations  
American Postal Workers  
Union, AFL-CIO  
1300 L Street, N.W.  
Washington, DC 20005-4128

Dear Mr. Bell:

We would like to address some of the concerns raised in your article in the November/December 2005 issue of The American Postal Worker Magazine, "What's Behind Changes in Internal Investigations?" Generally, your advice to American Postal Worker Union (APWU) members is quite helpful. I wish to assure you that the transition of investigations of bargaining unit employee to the Office of Inspector General (OIG) has a statutory basis—the Inspector General Act—and did not occur for any inappropriate purpose. Further, as you note in the magazine article, the OIG is voluntarily adhering to pertinent collective bargaining agreement provisions, and allows employees who are interviewed to have representatives with them during the interviews. However, the article overlooks some nuances of the law and provides some advice that may unintentionally cause an employee to violate Postal Service policy:

The Right to Remain Silent

I am concerned that the article incorrectly states that APWU members have an unequivocal right to remain silent during an interview by the Office of the Inspector General by virtue of Miranda v. Arizona<sup>1</sup>. The article suggests that OIG agents must provide Miranda warnings to all employees prior to their interview, and that the employee may always refuse to answer questions absent a grant of immunity. This is incorrect.

In Miranda, the Supreme Court established a prophylactic, procedural mechanism that safeguards a defendant's Fifth Amendment privilege against the inherently coercive nature of custodial interrogation.<sup>2</sup> Although Miranda rights

---

<sup>1</sup> 384 U.S. 436 (1966)

<sup>2</sup> Id. at 444.

apply to civil investigations which may result in criminal prosecutions, they are limited to custodial interrogations.<sup>3</sup>

While custody is subjective, an OIG agent will always make clear at the beginning of an interview whether the interviewee is under arrest (in custody) or is free to go. The written advice of rights statements discussed below clearly inform employees that they are free to go.

In Garrity v. New Jersey<sup>4</sup>, the court held the threat of removal from one's government position for lack of cooperation constitutes "coercion" where there remains a possibility of criminal prosecution. Such coercion renders any statements compelled under such a threat to be inadmissible in a criminal proceeding.<sup>5</sup> The Garrity exclusionary rule amounts to a "use immunity" which the employer cannot force the employee to waive.<sup>6</sup> Subsequent to Garrity, the court found in Kalkines v. U.S.<sup>7</sup> that where there is no threat of criminal prosecution, an employee may be compelled to speak with investigators. Courts have long held that once an individual's statements are immunized, the employee no longer has a right to remain silent.<sup>8</sup>

Postal Service employees are required to "cooperate in any postal investigation, including Office of Inspector General investigations" according to the Postal Service Employee and Labor Relations Manual (ELM), Section 665.3. In a memorandum to officers dated September 9, 2004, the Postal Service General Counsel reiterated this duty. While noting an employee's right to remain silent in criminal cases, the General Counsel reminded officers that once "use immunity" has been provided to an employee, typically through the use of a Kalkines warning, he or she no longer enjoys the right to remain silent. An employee may be disciplined for refusal to cooperate or for providing false statements if he or she does submit to questioning.

#### Advice of Rights Forms

The article questioned OIG use of new advice of rights forms. The forms were designed to be consistent with the guidance provided in Garrity and Kalkines. The Department of Justice has recommended the use of these types of advice of

<sup>3</sup> Mathis v. United States, 391 U.S. 1, 4 (1968), Oregon v. Mathiason, 429 U.S. 492, 494-95 (1977); Anderson v. U.S. Postal Service, 8 M.S.P.R. 686 (1981).

<sup>4</sup> 386 U.S. 493 (1967)

<sup>5</sup> Id. at 500

<sup>6</sup> Uniformed Sanitation Men v. City of New York, 392 U.S. 280, 283 (1968).

<sup>7</sup> 473 F.2d 1391 (1973)

<sup>8</sup> Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977)

rights forms in order to ensure that employees are fully informed of their rights. The OIG has long used similar forms.

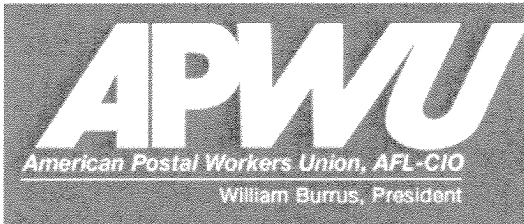
The Assistant Attorney General has encouraged OIGs to utilize the forms to ensure employees are advised of their rights; to safeguard Department of Justice interests in the cases; and to achieve uniformity. We use these forms to accomplish these goals.

I hope this information is helpful to you.

Sincerely,

*for Scott Wilson*  
David C. Williams  
Inspector General

cc: A. Vegliante



*(This article was first published in the Nov/Dec 2005 issue of The American Postal Worker magazine.)*

## **What's Behind Changes in Internal Investigations?**

**Greg Bell, Director  
Industrial Relations**

In March 2005, the Postal Service informed the APWU that the responsibility for investigating certain types of employee misconduct (internal crimes) was being shifted from the Postal Inspection Service to the Office of Inspector General.

According to an internal USPS Memorandum, as of Feb. 7, 2005, "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 [the] local Office of Inspector General (OIG) Special Agent in Charge, who will coordinate with the Inspection Service to determine appropriate investigative action."

Although we were informed that this transition would not adversely affect the rights of employees or of the union, we have several concerns about this unilateral change.

In response to a series of APWU questions, the Postal Service said that OIG agents "will comply with Article 17.3 as it relates to an employee request for a steward or Union representative during the course of an interrogation." In addition, we have been told that the OIG will comply with the Memorandum of Understanding between the parties entitled "Role of Inspection Service in Labor Relations Matters."

Their responses to our questions do not satisfy all of our concerns, however. It has been the past practice, consistent with applicable regulations, collective bargaining agreements, and settlements, that Postal Inspection Service agents are the law enforcement officers who conduct interrogations of bargaining unit employees for internal crime investigations.

One of our concerns has to do with the relationship among the OIG, the Postal Inspection Service, the Postmaster General (PMG), and the Board of Governors: The Chief Postal Inspector reports directly to the Postmaster General, while the Inspector General reports directly to the Board of Governors, and is not under the PMG's supervision. Our contractual relationship is with the PMG, not with the Board of Governors.

We are suspicious of the purpose of the change and wonder whether it is intended to manipulate and intimidate employees into answering questions during an interrogation. This is nothing new. However, this change of responsibility may represent a different approach. Your rights and entitlement to representation, however, have not changed.

In addition, we question the forms that OIG agents are asking employees to sign during interrogations. For example, the PS Form 1067 (the Postal Inspection Warning and Waiver of Rights) is commonly referred to as the Miranda warning. However, OIG agents have been using their own forms, with no identifying PS form number, including two new forms: the Kalkines and Garrity warnings.

### **If You're Called In**

Even if you believe you are not guilty of wrongdoing, you should not allow yourself to be interviewed by a Postal Inspector or OIG agent without an APWU representative being present. These law enforcement officers are investigating internal criminal matters, and you should remain silent until you have consulted with your union rep or an attorney.

The first thing you want to know is whether you are a suspect. If you are, even if you are told that nothing you say can be used against you, you should inform them that you wish to contact an attorney. Under no circumstances should you sign any forms or make any statements until you have consulted with an attorney. That is your most basic right.



## **Weingarten Rights**

A 1975 Supreme Court decision (NLRB v. J. Weingarten, Inc.) provides that a union-represented employee has the right to a steward when facing an investigatory interview. The important thing to remember about your "Weingarten Rights" is that management does not have to notify you of this right: The employee is responsible for being aware of the right to request representation.

Under the Weingarten decision, the employee can request union representation before or at any time during the interview. The employer then has three 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 ending the interview or continuing the interview without representation.

If the employer denies the request for representation, the employee can simply refuse to answer questions.

## **Miranda Rights**

You have the right to remain silent. A historic Supreme Court ruling (Miranda v. Arizona, 1966) holds that not only must a law enforcement officer advise an individual of certain rights, the officer must be sure that these rights are understood.

Before being questioned by a postal inspector or OIG agent, you must be told: (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 being asked any questions, and to have a lawyer with you during questioning (and if you cannot afford a lawyer, one will be appointed); (4) even if you choose to answer questions without a lawyer present, you have the right to stop at any time.

Finally, the Miranda decision holds that you must be asked: "Do you understand the rights that have been read to you?"

## **Garrity Rights**

The Fifth Amendment provides that no one in a criminal case can be forced to be a witness against him- or herself. Information obtained through coercion is not admissible in court. In addition to these basic Fifth Amendment rights, Postal Service employees have additional rights because of their "public sector" status. In the public sector, the government acts as both law enforcement agency and employer.

The Garrity Rights were developed through a series of Supreme Court rulings dating back nearly 40 years. In a 1967 ruling (Garrity v. New Jersey), several New Jersey police officers who were targeted in a ticket-fixing investigation were told to respond to questions or face discharge for insubordination.

To save their jobs, the officers complied and their statements were then used in criminal prosecutions against them. The highest court overturned the convictions, citing a violation of Fifth Amendment rights.

This case now stands for the principle that using the threat of discharge or other substantial economic penalty against public-sector employees is coercive – that any consequent disclosure is inadmissible in a criminal trial.

## **Kalkines Warning**

The Garrity decision does not, however, mean that the government may never threaten an employee with discipline for refusing to give a statement about potentially criminal acts. In Gardner v. Broderick (1968), the U.S. Supreme Court noted that the government could discipline an employee if it does not force the employee to give up his Fifth Amendment rights, such as by giving the employee prosecutorial immunity (a guarantee that the information disclosed will not be used against the employee in a criminal prosecution).

In Kalkines v. United States (1973), the U.S. Court of Claims elaborated on the Supreme Court's holdings, 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." In other words, if an employee is given immunity, but nonetheless decides not to answer questions, the government may discipline the employee for not answering the questions. In the Postal Service, any such discipline is, of course, subject to the grievance procedure.

The Kalkines ruling is an attempt to balance the Fifth Amendment's right against self-incrimination with the Supreme Court's holding that the government has the right to have its employees answer questions about the performance of their official duties. In getting this information from employees, according to Kalkines, the Fifth Amendment is not violated so long as the government also grants the employee immunity from prosecution based upon that information.