



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570



December 5, 2007

By Facsimile (202) 682-9276
and First Class Mail

Anton Hajjar, Esq.
O'Donnell, Schwartz & Anderson, P.C.
1300 L Street, N.W., Suite 1200
Washington, DC 20005-4126

Re: Proposed Settlement of Current and Future Weingarten
Cases Filed with the National Labor Relations Board

Dear Mr. Hajjar:

Thank you for arranging for your client to meet with the General Counsel's Office on October 5, 2007, and for sending us two follow-up letters dated November 14, 2007 and November 15, 2007 (the latter submitted by APWU Director of Industrial Relations Gregg Bell.) While we recognize and appreciate the concerns raised at the meeting and in your letters, we have decided to attempt to reach final agreement with the Postal Service on the Pilot Program previously described to you, with several modifications suggested by the concerns raised by you and your client.

As we explained in previous correspondence, the experimental Program we are discussing with the Postal Service has two primary purposes: to explore a method to expeditiously resolve existing and future Weingarten allegations filed with our Regional Offices without resort to protracted litigation; and to obtain more meaningful remedies for employees than are currently available in administrative proceedings before the National Labor Relations Board, but which have been utilized successfully in proceedings governed by the Federal Labor Relations Authority.¹

The features of the proposed Program about which you have raised concerns are as follows:

¹ See, for example, Safford, (35 FLRA 431 (1990)) and Border Patrol (36 FLRA 41) (1990).

- Upon a finding by one of the Board's Regional Offices and/or the CLCB of a prima facie violation of Weingarten rights by the Postal Service, the Pilot Program requires the Postal Service to conduct anew the meeting in the circumstances and manner described below.
- If the meeting resulted in discipline, and upon the request of the affected employee and/or labor organization, the Postal Service will conduct a new meeting, according the employee involved full Weingarten rights. The Postal Service would be prohibited from utilizing any information obtained from the employee at the meeting, either at the reconvened meeting or otherwise. Upon completion of the reconvened meeting, the Postal Service will reconsider the discipline previously imposed and, if the discipline is to be eliminated or modified, will take appropriate steps to rectify the situation, including payment of backpay to the employee.
- If the meeting did not result in discipline, the Postal Service can avoid conducting a requested new meeting by notifying the employee in writing that none of the information obtained by the employee at the meeting will be retained in any Postal Service records and that such information will not be used against the employee in any way. If the Postal Service is unwilling to give those assurances, it must conduct anew the meeting, upon request, in the manner described above

The APWU has argued that this Program is bound to fail and that resort to traditional contempt proceedings is the only effective deterrent to future Weingarten violations by the Postal Service.² Our communications with FLRA representatives and with counsel representing public sector unions concerning utilization of FLRA remedies in their Weingarten cases indicate that this prediction has not been borne out by experience in the non-Postal Service context. Rather, in a significant number of cases the discipline was rescinded or modified after a re-interview. Moreover, contempt proceedings are often quite protracted and can often have only a limited impact. Even if, as we have argued, the D.C. Circuit judgment applies to all Postal supervisors and managers on a nationwide basis, and covers all Weingarten violations, any prospective fine entered as a result of a contempt proceeding would, in our experience, be facility-specific absent evidence of a significantly broader nationwide pattern of violations. And, if a case is deemed not to meet the "clear and convincing" evidentiary standard, thereby precluding the initiation of contempt proceedings, the only remedy currently available in an administrative proceeding would be a cease and desist order and notice-posting. The scope of the Pilot Program currently under discussion is, on the other hand, much more extensive, addresses alleged Weingarten violations that have arisen or may arise at postal facilities throughout the country, and provides a remedy which at least has the potential for more effectively ameliorating the effects of unlawful interviews.

² Specifically, your client asserts that the re-interview remedy is a "reward" rather than a "sanction" to zealous investigators who care more about extracting information from vulnerable employees than they do about their legal obligations to ensure that the targets of their investigation have union representation.

Your client also argues that the APWU grievance procedure is superior to the Pilot Program being proposed, in that a re-interview is not permitted under the contract, and that the Postal Service might attempt to derail the grievance procedure by interposing the existence and/or the terms of the Pilot Program as a defense in grievance-arbitration proceedings. Our response to this expressed concern is three-fold.

First, the procedure we envision will only come into play when unfair labor practice charges are filed or other action in Weingarten cases is sought from our Agency.

Second, we have added language, in response to your client's expressed concerns, to assure that if charges are filed, the NLRA procedure will have no impact on any concurrent grievance procedure. Specifically, Section 5 of the revised proposal provides, in pertinent part, that "nothing contained herein shall be applicable to any grievance or other proceeding;" that no party "may interpose this stipulation, or actions taken thereunder, as a defense in any such proceeding;" and that the procedure agreed upon will not be applicable "in any other proceeding or with respect to any matter not arising under the NLRA." You may rest assured that if, despite this language (or equivalent language agreed upon with the Postal Service), the Postal Service attempts to influence the established grievance procedure by interposing the Pilot Program as a defense, we would view such action as violative of both the letter and spirit of the Program. In such circumstances, the Office of the General Counsel would have the right to unilaterally terminate the Pilot Program.

Finally, as we have made clear, in the event that a charge is filed and there is an ongoing grievance procedure, we will of course consider any request made by the APWU to defer the charge to the grievance procedure during the period that the Pilot Program is in effect.

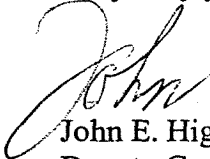
We have also clarified certain other provisions in the proposed settlement in response to concerns raised by your client at our meeting and in your letters. The original proposal required that both the labor organization and the employee had to request a reconvened meeting. This is in accordance with the FLRA procedure. You argued that this would place your client in an untenable position because the APWU would not, as a matter of principal, request a re-interview. Accordingly, we have modified the language to allow either the union or the employee to request the re-interview. Second, we have revised the proposal to eliminate from coverage any allegation that an employee has been disciplined for exercising, or attempting to exercise, his or her Weingarten rights; thus, any such violations would remain susceptible to contempt prosecution. At the APWU's request we have also twice modified the definition of "records" in connection with a requirement that references to discipline or related materials be deleted from employees' records. Initially, at the APWU's request, we changed references in the Program from "personnel files" to a "system of records." In response to your most recent letter, we have substituted "all records" for a "system of records."

Finally, and perhaps most importantly, as we have repeatedly emphasized, this is an experimental Program only. If it turns out that the Program is not working as intended, or that Weingarten violations are significantly increasing, the Office of the General Counsel can unilaterally terminate the Pilot Program with thirty days written notice to the Postal Service. We also anticipate ironing out any potential ambiguities that may arise during the Pilot Program.

We, of course, welcome the APWU's continued input regarding the plan's operation, if and when the Pilot Program is ultimately put into place. Information provided by the Union will be invaluable to us in our efforts to evaluate the effectiveness of the Pilot Program. As we have indicated above, should a pattern of serious violations continue to occur, we retain the option to terminate the Program. In this regard, your suggestion that the proposed Program places an inappropriate burden on your client to monitor compliance by the Postal Service overlooks the fact that our reliance on the public to inform us of violations of the Act or of the negative injunction provisions of extant judgments is the norm. This is particularly so with respect to the Postal Service because, in the vast majority of circumstances, we will have no way of knowing of such violations unless they are brought to our attention by affected individuals and entities.

In short, we urge you to give this experimental Program a chance and to share your client's experiences with us to assist us in effectuating the policies and purposes of the Act.

Very truly yours,



John E. Higgins, Jr.
Deputy General Counsel

cc: Gregg Bell
Stanley R. Zirkin