

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

UNITED STATES POSTAL SERVICE

and

**Cases 28-CA-068385
28-CA-075708
28-CA-077161
28-CA-077164
28-CA-078376**

**NATIONAL ASSOCIATION OF LETTER
CARRIERS, SUNSHINE BRANCH 504,
affiliated with NATIONAL ASSOCIATION
OF LETTER CARRIERS, AFL-CIO**

GENERAL COUNSEL'S ANSWERING BRIEF

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I. INTRODUCTION

Counsel for the Acting General Counsel (General Counsel) files this Answering Brief in response to Respondent’s exceptions to the decision of Administrative Law Judge John J. McCarrick (ALJ) in JD(SF)-45-13, dated September 25, 2012 (ALJD).¹ The ALJ found, and the record supports, that United States Postal Service (Respondent) violated Section 8(a)(5) of the Act by unilaterally changing its practice of providing its employees with a representative of their choosing in fact finding investigative interviews without notice to or bargaining with the Union and violated Section 8(a)(1) of the Act by: (1) threatening its employees with a fact finding investigation because they engaged in Union activities; (2) threatening its employees with unspecified reprisals because they said they would file a charge with the National Labor Relations Board; (3) threatening its employees that it would be futile for them to request a Union representative of their choosing to represent them in an

¹ All dates herein are 2012, unless otherwise noted. United States Postal Service will be referred to as “Respondent.” National Association of Letter Carriers, Sunshine Branch 504, affiliated with National Association of Letter Carriers, AFL-CIO will be referred to as “Union”. References to the official transcript will be designated as (Tr.), with appropriate page citations. References to the General Counsel’s and Respondent’s Exhibits will be referred to as (GC), respectively, with the appropriate exhibit number.

investigatory interview; (4) threatening its employees with discipline for failing to obey instructions because they invoked their *Weingarten* rights; and (5) threatening its employees by refusing to inform them of the nature of investigatory interviews that they would reasonably believe could result in discipline.

The defenses raised by Respondent have no merit to overcome the Section 8(a)(1) *Weingarten* and *Weingarten*-related violations found by the ALJ. Respondent's exceptions provide no basis for the Board to overrule the ALJ's findings. The General Counsel urges the Board to reject Respondent's invitation to ignore Board law and adopt the ALJ's findings, except as argued in the General Counsel's Cross Exceptions. For these reasons, the Board should affirm the unfair labor practice findings made by the ALJ.

II. FACTS

A. John Trujillo is denied his request for Union representation when questioned by management

On February 23, Trujillo completed a PS Form 3971 that requested 24 hours of leave from March 1 to March 4. (GC 26; Tr. 102-105) Trujillo mistakenly marked the date on the leave request as being as February 24 when he turned the request into his immediate supervisor Rick Oyer (Oyer). (GC 26, Tr. 104) An unidentified supervisor signed and approved the leave request on February 23. (Tr. 104) Trujillo's leave request was later signed and approved by Oyer on February 25. (GC 26; Tr. 103)

On March 1, Trujillo was on assignment for the Joint Alternative Route Adjustment Procedure (JARAP) working on route adjustments at the Main Office Carrier Annex. (Tr. 105-107) In performing the JARAP work, Trujillo was working with his management counterpart, Supervisor Mel Sanchez. (Tr. 107) While working together in the JARAP office, Trujillo told Sanchez that he was going to take his leave on March 2 and 3. (Tr. 108)

Sanchez asked Trujillo if he had an approved leave slip and Trujillo said he did. (Tr. 108-109) Sanchez then asked Trujillo for a copy of his leave slip. (Tr. 108-109) At that time, Trujillo told Sanchez that he was invoking his *Weingarten* rights and wanted Union President David Pratt to represent him. (Tr. 108-109) Sanchez told Trujillo that giving him a copy of the leave slip was not going to lead to discipline and Trujillo told him to put it in writing which Sanchez did. (Tr. 109) At that time, Trujillo showed Sanchez the leave slip that had been approved. (Tr.109) Sanchez told Trujillo, “give it to me, I want it.” (Tr. 109) Trujillo told Sanchez he would show it to him but not give it to him. (Tr. 109-110)

Sanchez left the JARAP room and a short time later Manager Lacy came into the room and asked Trujillo if he had scheduled leave for Friday and Saturday. (Tr. 110-111) Trujillo told her that he did. (Tr. 111) Trujillo told Manager Lacy that he was invoking his *Weingarten* rights and wanted David Pratt to represent him. (Tr. 111) Lacy said in agitated fashion “Are you kidding?” to which Trujillo said “no, I am not”. (Tr. 111)

Immediately after Trujillo invoked his *Weingarten* rights for representation, Lacy became irate and told Trujillo that his leave was revoked and told him to return to his duty station. (Tr. 111) During his career as a city carrier, Trujillo has filed hundreds of Form 3971s with various leave requests. (Tr. 101) Prior to March 1, Trujillo had never experienced having his approved leave revoked by Respondent or revoked in the manner it was. (Tr. 101-102)

In addition to his Union activities as Chief Shop Steward and Formal Step A Designee, Trujillo was very active in filing unfair labor practice charges against Respondent protesting conduct that violated the Act. (Tr. 99-100) Trujillo has filed quite a few charges during the 15 years he has served as Formal Step A Designee. (Tr. 99-100) His charge-filing

activity has been significant and he has filed as many as 6 charges against Respondent during the year prior to his leave being revoked. (GC 19-35)

B. Respondent informs Rudy Segarra that he needs to attend a fact finding meeting on October 21, 2013

Rudy Segarra (Segarra) is a city letter carrier who works out of Respondent's Highland Station in Albuquerque, New Mexico. (Tr. 132) Segarra has worked out of this station since 1996. (Tr. 132-133) On March 21, Segarra was approached at work by Supervisor Minga Platero-Dreyer (Dreyer) around 9:00 a.m. (Tr. 133-134) (Tr. 134) Dreyer told Segarra that he had to attend a fact finding meeting. (Tr. 58, 134) Segarra asked Dreyer why the fact finding was going to be held but she did not respond to his question. (Tr. 134, 141-142, 143) Segarra had a previous fact finding on March 19, regarding an incident he had with his postal vehicle. (GC 4, Tr. 61, 134, 148) Steward Robert Woodley represented Segarra for this prior investigatory interview. (GC 4; Tr. 61, 134, 148) Segarra told Dreyer that if the new meeting was tied to the prior one, he was requesting Woodley to represent him since he had been with him for the prior interview. (Tr. 62, 134)

III. ARGUMENT

A. The ALJ properly found Respondent violated Section 8(a)(1) by denying Trujillo's request for Union representation.

The right to union representation is triggered when the employee requests representation. *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 257 (1975). When an employee makes a request for union representation, the employer must either grant the request, give the employee the option of going forward with the interview unrepresented, discontinue the interview, or reject the request and end the interview. *Washoe Medical Center*, 348 NLRB 361, fn. 5 (2006) (quoting *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982)). Whether an employee reasonably believes an interview might result in discipline is measured

by an objective standard that considers all circumstances of the case and not simply the employee's subjective motivation. *Weingarten*, 420 U.S. at 257, fn 5; *United Telephone Co. of Florida*, 251 NLRB 510, 513 (1980).

1. The ALJ correctly found that Respondent violated John Trujillo's *Weingarten* rights

When Trujillo was questioned by Supervisor Mel Sanchez about his leave request, he had concerns that there would be questions about the leave slip he had submitted because there were some discrepancies on it. (Tr. 111-112) Based on this concern, Trujillo invoked his rights to have a Union representative present for any further questioning by Sanchez. (Tr. 108-109) There is no dispute that Trujillo put Sanchez on notice that he desired representation before proceeding with any more questioning on the leave matter.

Contrary to Respondent's assertion in its exceptions that no further action was taken, the evidence reflects, and the ALJ correctly found, that Respondent did not end the inquiry. (ALJD at 17: 25-28; Resp. Exceptions Brief at 3) Rather, instead of granting the request for representation, Sanchez went and got his supervisor, Customer Service Operations Manager Marla Lacy, who approached Trujillo in hostile fashion and questioned him further about his leave status. (Tr. 111-112) In response to Lacy's aggressive conduct, Trujillo again requested Union representation. The ALJ correctly found that in response to Trujillo's request, Respondent did not observe his *Weingarten* rights by ending the interview or giving him the option of continuing with the questioning without a representative. (ALJD at 17: 27-30) To the contrary, the evidence establishes that in direct response to the request, Lacy revoked Trujillo's previously approved leave. (Tr.111) The ALJ correctly found that under these circumstances, the evidence established that Respondent had failed to honor Trujillo's *Weingarten* rights in violation of Section 8(a)(1) of the Act.

2. Respondent failed to establish that Trujillo did not reasonably believe his questioning by management could result in discipline.

Respondent argues in its exceptions that Trujillo did not reasonably believe his being questioned by postal management about his approved leave could result in discipline. (Resp. Exceptions Brief at 2) This contention is not supported by credible evidence. Respondent asserts that the only question Lacy asked Trujillo during their encounter was whether he had scheduled leave. (Resp. Exceptions Brief at 2) In its exceptions, Respondent attempts to characterize this question as being “run of the mill” shop discussion that does not require union representation. (Resp. Exceptions Brief at 2) Respondent, however, fails to provide any context that led to Lacy questioning Trujillo and ignores the manner in which the questioning took place.

Missing from Respondent’s recitation of fact is that the questioning of Trujillo originated with his immediate supervisor, Sanchez. When Trujillo invoked his *Weingarten* rights pursuant to that questioning, Sanchez responded by promptly getting his supervisor, Manager Lacy. (Tr. 110-111) The evidence establishes that Lacy did not approach Trujillo to engage him in cordial shop talk as asserted by Respondent, but instead approached him in an aggressive manner and immediately began questioning him about his leave status. As a result, and as found by the ALJ, Trujillo’s concerns about potential discipline regarding his leave slip were heightened, negating any prior assurances that he would not be subject to discipline with the inquiry. (ALJD at 17: 25-27)

Notwithstanding Respondent’s arguments to the contrary, Trujillo’s belief that he was susceptible to potential discipline was reasonable. Respondent admits that there was a date discrepancy on Trujillo’s leave request. (Resp. Exceptions Brief at 2) Respondent tries to

downplay this situation as being an inadvertent entry but ignores the fact that misconduct can be found for falsifying a postal document, an offence which can result in termination. Like the employee in *Weingarten*, who was subjected to an interview because it was reported she committed theft, Trujillo was concerned that management would use his leave slip discrepancies as a means for finding potential misconduct to use to discipline him for fraud or perjury. Under similar circumstances, the Board has found *Weingarten* violations where the employer denied an employee's request to have a union representative present when the investigation involved alleged forms of dishonesty. *Weingarten*, supra, *Exxon Co.*, 223 NLRB 203 (1976).

Respondent also claims in its exception brief that Trujillo had no basis to believe that he would not be disciplined because his supervisor, Ray Oyer, had approved the leave request. (Resp. Exceptions Brief at 2) This assessment ignores the fact that Oyer was not involved with the questioning but that instead the questioning arose from a high level manager who was overseeing the JARAP program at the Respondent's Main Post Office location.

3. Trujillo's concern that inquiry by management could lead to discipline did not end with his supervisor's assurances

In its exceptions brief Respondent contends that Manager Lacy was not aware that Trujillo had previously invoked his *Weingarten* rights when he was questioned by Sanchez. (Resp. Exceptions Brief at 2-3) Respondent argues that the ALJ incorrectly found that "Sanchez brought his superior, Manager Lacy into the inquest." (ALJD at 17:19-20) This argument has no merit. There is no dispute that Trujillo put Respondent on notice that he was invoking his *Weingarten* rights to union representation when he was questioned by Sanchez about his leave status. The fact that Lacy knew or did not know of this is irrelevant when she came in and began questioning Trujillo about the same leave issue. Trujillo had properly

invoked his rights to representation. Even so, this knowledge element was not a factor in the ALJ's decision. Rather, in his decision, the ALJ found that Respondent, through Lacy, had failed to offer Trujillo options of going forward without a representative or stopping the interview. (ALJD at 17: 27-29) The ALJ correctly concluded that Respondent never offered Trujillo these options and instead subjected him to more questioning and adverse action. (ALJD at 17: 29-30) Respondent does not address this but instead interjects a new element that is not required for establishing the violation.

In sum, the circumstances surrounding the questioning of Trujillo clearly establish an objective basis for requesting union representation and Respondent subjecting Trujillo to adverse action and not acting on his request for this representation establish that the ALJ correctly found that Respondent has unlawfully denied Trujillo union representation in violation of Section 8(a)(1) of the Act.

B. The ALJ properly found Respondent violated Section 8(a)(1) by refusing to tell Segarra the purpose of subjecting him to an investigatory meeting.

Respondent takes exception to the ALJ accepting Segarra's testimony at hearing without considering testimony he provided in an affidavit he previously presented to the General Counsel. (Resp. Exceptions Brief at 4-5) Respondent purports this affidavit testimony establishes that at the time he spoke with Supervisor Dreyer, Segarra knew the March 21, 2012 fact finding investigation was a continuation of an earlier investigation. (Resp. Exceptions Brief at 6) Respondent argues this affidavit testimony directly contradicted Segarra's testimony at hearing and, in turn, the ALJ erred in relying solely on this testimony. (Resp. Exceptions Brief at 6) Respondent's argument has no merit.

First, Respondent argues in its exceptions brief that Segarra admitted knowing the purpose of the second fact finding at the time he questioned Dreyer about it. (Resp. Exceptions Brief at 6) This is simply not true. Respondent mischaracterizes Segarra's testimony. Segarra confirmed on cross examination that he did not know prior to the second fact finding meeting that it was a continuation of the first one he had earlier in the week. (141-142) In response to this testimony, Respondent presented Segarra with a statement he prepared about the two fact findings and pointed out that he stated in that statement that the second fact finding was a "continuation of the previous fact finding" he had received earlier in the week. (Tr. 141-142) What Respondent fails to note is that Segarra prepared this statement *after* having been subject to both fact finding meetings. When Segarra prepared the statement, he was already aware of the purpose of both meetings and the second fact finding meeting being a continuation of the first fact finding meeting and so noted this on his statement. Thus, there is no prior inconsistent statement attributed to Segarra's hearing testimony regarding his knowledge at the time he questioned Dreyer about the purpose of the second fact finding meeting.

Second, Respondent also insinuates in its exceptions brief that Segarra asking for Steward Robert Woodley, the steward present at the first fact finding, to represent him for the second fact finding meeting implicates that Segarra already knew of its purpose. (Resp. Exceptions Brief at 6) Such an argument is speculation at most. Respondent ignores evidence that Woodley was a steward at Segarra's station and Segarra was likely to request a steward for whom he was already familiar.

Lastly, and equally important, even if the affidavit and cited testimony were considered by the ALJ, it is not sufficient to warrant finding Respondent did not violate Section 8(a)(1) of the Act by failing to inform Segarra of the purpose of the fact finding. The Board has held that an employer, upon request, must inform an employee and the employee's union representative of the specific charges that are to be discussed during an investigatory interview the employee reasonably believes will result in discipline. *Postal Service*, 345 NLRB 426, 436 (2005), *Postal Service*, 2006 WL 2569957 (2006). The Board has long held that *Weingarten* rights encompass the right to prior consultation with the union representative prior to an investigatory interview so as to allow the employee and his or her union representative to engage in meaningful consultation for the purpose of preparing for the interview. *Postal Service*, 303 NLRB 463, fn. 4 (1991); *Pacific Telephone & Telegraph*, 262 NLRB 1048, 1049, fn. 1 (1982); *Colgate-Palmolive Company*, 257 NLRB 130, 133 (1981); *Climax Molybdenum*, 227 NLRB 1189, 1190 (1977).

Here, even if Segarra had an inkling regarding the purpose of the second fact finding, he was entitled to confirmation of that purpose when he asked Dreyer about it. (Tr. 134, 141-143) Rather than doing so, Dreyer did not respond or answer his question. (Tr. 134, 141-143). Dreyer did not deny at hearing that Segarra asked about the purpose of the meeting or that she failed to respond to his question. Instead, Segarra was left with consulting with a steward without knowing definitively what issues he needed to address with that steward. Such conduct by Respondent flies in the face honoring an employee's *Weingarten* rights as it pertains to an employee being entitled to union representation for a disciplinary situation and such conduct violates Section 8(a)(1) of the Act. *Postal Service*, 345 NLRB at 436.

IV. CONCLUSION

Based on the foregoing, and the entire record evidence, the General Counsel respectfully submits that the ALJ properly found that Respondent violated Section 8(a)(1) and (5) of the Act, as set forth in the ALJD, and Respondent's exceptions should be rejected. The Board should affirm and adopt the ALJ's findings of fact, conclusions of law, and recommended Order, except as argued in the General Counsel's Cross Exceptions. It is further requested that the Board order whatever other additional relief it deems just and necessary to remedy Respondent's violations of the Act.

Dated at Albuquerque, New Mexico, this 25th day of October 2013.

Respectfully submitted,

/s/ David T. Garza

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S ANSWERING BRIEF in Cases 28-CA-068385, 28-CA-075708, 28-CA-077161, 28-CA-077164, and 28-CA-078376. was served by E-Gov, E-Filing, and E-Mail on this 25th day of October 2013, on the following:

Via E-Gov, E-Filing:

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