

**OFFICE OF THE GENERAL COUNSEL  
Division of Operations-Management**

**MEMORANDUM OM 14-78**

**August 12, 2014**

TO: Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Anne Purcell, Associate General Counsel

SUBJECT: Alternative Dispute Resolution Program for United States Postal  
Service Cases Involving Alleged, Violations of *Weingarten* Rights  
**Supersedes Memoranda OM 08-43 and OM 09-33**

In *United States Postal Service v. NLRB*, 969 F.2d 1064 (D.C. Cir. 1992), the court, having found that the United States Postal Service (“USPS” or “Postal Service”) had violated its employees’ *Weingarten* rights,<sup>1</sup> issued a nationwide order requiring that the Postal Service cease and desist from refusing to allow union representatives to consult with employees prior to investigatory interviews that the employee reasonably believes will result in disciplinary action or in any like or related manner violating employees’ Section 7 rights.

On January 26, 2009, the United States Postal Service and the Contempt, Compliance, & Special Litigation Branch (“CCSLB”) (formerly the Contempt Litigation & Compliance Branch “CLCB”) entered into an Amended Joint Settlement Stipulation (“the Joint Stipulation”) that resolved numerous cases arguably violative of the D.C. Circuit’s order and established an Alternative Dispute Resolution (“ADR”) process to resolve alleged *Weingarten* violations arising at Postal Service facilities throughout the country in lieu of contempt proceedings. The ADR process applies to all units and subdivisions of the Postal Service, including the United States Postal Inspection Service and the Postal Service’s Office of Inspector General.

This memorandum will outline the basic actions required of the Regional Office, the Postal Service, and the CCSLB in administering cases involving alleged *Weingarten* violations by the Postal Service.

---

<sup>1</sup> See *NLRB v. Weingarten*, 420 U.S. 251 (1975).

## **Basic Action Requirements of the Regions, the Postal Service, and the CCSLB**

### 1. The initial investigation by the Region

Upon the timely filing of a charge alleging that the Postal Service has violated an employee's *Weingarten* rights, the Region should conduct a complete investigation to determine whether the evidence supports a *prima facie* violation. If the Region determines that there is a *prima facie* violation, it should notify the Postal Service in writing, with a copy to the CCSLB, and enter an HQ Guidance action in NxGen. The Region is not required to obtain clearance from CCSLB before making its *prima facie* determination, but should feel free to - and is encouraged to - consult with CCSLB as to any questions, difficulties, or complications that arise in a particular case. If the Region determines that a *prima facie* violation exists, the charge should be processed through the ADR process (in lieu of either administrative proceedings initiated by a complaint or, as noted above, contempt proceedings). If the Region determines that no *prima facie* violation exists, the charge should be dismissed.

### 2. The Region's initial decision and USPS right to appeal to CCSLB

The Postal Service, within 20 days of receipt of the written notification of a *prima facie* violation, shall notify the Region either: (a) that it accepts the Region's determination and will take the steps required by the Joint Stipulation; or (b) that it will appeal the finding to the CCSLB. If it wishes to appeal, the Postal Service must notify the Region and send the CCSLB a statement of its grounds for appeal, upon which the CCSLB will conduct a *de novo* review of the charge. A *prima facie* determination by the CCSLB shall be final. Thus, if the CCSLB sustains the Postal Service's appeal, the Region should dismiss the charge absent withdrawal. If, on the other hand, the CCSLB denies the appeal, the matter re-enters the ADR process. Either way, the CCSLB will notify the Postal Service and the Region of its decision, but in cases in which the CCSLB has *denied* the appeal, the Region should, to ensure that the Postal Service's local legal representatives are aware that the case is again active, promptly inform them that the Postal Service must immediately comply with its obligations under the ADR.

### 3. Processing of a Meritorious *Weingarten* violation pursuant to the ADR

If the Region (or the CCSLB after an appeal by the Postal Service) finds a *prima facie Weingarten* violation and the suspect interview resulted in discipline,<sup>2</sup> the Postal Service will notify the labor organization and the affected employee that the labor

---

<sup>2</sup> Discipline refers "to all personnel actions taken in connection with employee misconduct or unsatisfactory job performance, including removals from employment, suspensions from work (with or without pay), and letters of warning, but does not include counseling or instruction." Joint Stipulation at p.3 n.5 and p. 9 n.13.

organization and/or the affected employee have 30 days to request a new interview.<sup>3</sup> If so requested, the Postal Service will conduct such an interview, affording the employee involved full *Weingarten* rights, within 60 days of the receipt of the Region's notification of a *prima facie* case or, if appealed, the CCSLB's determination. Upon request of the affected employee, and with the written consent of the relevant labor organization, the Postal Service shall appoint a supervisor to conduct the second interview who was not involved in, did not attend, and has not been informed of any information obtained at the initial interview.<sup>4</sup> The Postal Service shall not use information obtained from the employee at the suspect interview against the employee at the subsequent, requested interview and shall notify the employee of this in writing.

After the new interview, the Postal Service shall determine whether the discipline issued following the suspect interview was warranted. If it determines that the discipline initially imposed was warranted, the discipline will stand, subject to any challenges to that discipline either in the form of a contractual grievance or a separately filed unfair labor practice allegation. Any discipline imposed, however, may not exceed the original discipline, except if the investigation uncovers misconduct or unsatisfactory job performance by the employee wholly unrelated to the matters upon which the original discipline was based. If, however, the Postal Service determines that no discipline was warranted, or that a mitigation of the penalty is warranted, the Postal Service shall take appropriate action (i.e. rescind and/or reduce the discipline).

If either no discipline resulted from, or issuance of some non-disciplinary measure was taken as a result of, the suspect interview the Postal Service shall notify the affected employee that none of the information obtained from the employee at the suspect interview will be used against the affected employee in any way or in any proceeding, that none of the information will be retained in the employee's personnel files and that, with the exception of attorney files, none of the information will be retained in any other record, unless the Postal Service is able to demonstrate a specific statutory or regulatory requirement to do so. The Postal Service shall also notify the employee that even though no discipline resulted from the suspect interview, or the action taken was non-disciplinary in nature, the Postal Service will conduct another interview if so requested by the labor organization and/or the affected employee within 30 days of the receipt of the required notification. The Postal Service may conclude, after the new interview, whether the non-disciplinary action was appropriate or, if not, shall take appropriate actions, if any, to

---

<sup>3</sup> The Joint Stipulation is silent as to the allowable time in which the Postal Service is to effect these notifications. If the Region does not receive copies of the notification letters within 5 business days of the Postal Service's acceptance of the Region's *prima facie* determination or the Region's notification of the denial of an appeal, the Region should promptly notify the CCSLB and the Postal Service of the delinquency.

<sup>4</sup> The newly appointed supervisor may receive a written summary of the issues involved and the discipline issued after the initial interview. If so provided, copies of the written summary must also be provided to the employee and labor organization prior to the requested meeting.

mitigate the non-disciplinary action, such as by eliminating any mention of the non-disciplinary action from the employee's personnel file and other records, and/or a further reduction of the non-disciplinary action.

#### 4. Board Notices

In all cases where there was a *prima facie* determination, the Postal Service is also required to post, for as long as the ADR program continues in effect, a Notice to Employees, supplied by the Board, informing employees of their rights under the ADR program. The Postal Service shall also post, within 10 days of receipt, a second Notice to Employees supplied by the Board that addresses the specifics of the case at hand. The second, case-specific Notice shall be posted for 60 days. Both the case-specific form (5523) and the permanent *Weingarten* ADR form (5523A) are in the NLRB Forms Library which is accessible from the NLRB Insider.

#### 5. NxGen and Record-Keeping

All submissions to CCSLB pursuant to the USPS ADR program when the Postal Service appeals a merit determination to CCSLB should be sent to "SM-CCSLB" and uploaded into the Investigation Action using the CLC prefix and the Contempt Recommendation document subtype. Once the document has been uploaded, CCSLB added to the Assignment Queue and the document set to Final Version, the Investigation Action should be completed. Step by step instructions for submitting a case to Contempt can be found in the [NxGen Training Materials Library](#).

All cases that have been successfully handled pursuant to the USPS ADR program should be treated in the same fashion as informal settlement agreements. Copies of all correspondence relating to compliance with the ADR agreement should be uploaded in the Compliance Investigation Action with an Informal Settlement Agreement Action Type. The closing reason for these cases should be Informal Settlement.

#### 6. Cases Excluded from the ADR

It should be noted that the ADR Joint Stipulation, Paragraph V, provides that the ADR process "is not applicable to any case in which an employee is disciplined for exercising, or attempting to exercise, his or her *Weingarten* rights. Such cases shall continue to be processed through standard Board procedures." In other words, in cases alleging that the Postal Service disciplined an employee *in retaliation for asserting Weingarten rights* (as opposed to discipline imposed as a result of the conduct that is the subject of the interview), the Region should divert the case from the ADR track and instead handle it as a regular 8(a)(1) charge. This includes submission to the CCSLB where the Region finds the charge to be arguably meritorious and arguably encompassed by the "like or related manner" provision of the D.C. Circuit judgment. Casehandling Manual Part 3 (Compliance Proceedings) §10632. Once again, though, the Region should feel free to - and is encouraged to - consult with CCSLB as to any concerns in this respect as well.

A copy of the Joint Stipulation and a sample letter to be used by the Region upon a *prima facie* determination are attached.

/s/  
A.P.

**ATTACHMENTS**  
**SAMPLE REGIONAL OFFICE LETTER INFORMING THE POSTAL SERVICE OF ITS**  
***PRIMA FACIE* DETERMINATION**

To Whom It May Concern:

Upon careful consideration of all the evidence disclosed by the investigation of the charge in the instant matter, I have determined that there is evidence of a *prima facie* violation by the Postal Service of its obligations under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) during the [date and circumstances of interview]..

Accordingly, pursuant to the requirements of the Amended Joint Settlement Stipulation entered into on January 26, 2009 by the Postal Service and the Agency's Contempt, Compliance, & Special Litigation Branch (CCSLB, formerly the Contempt Litigation & Compliance Branch (CLCB)), the Postal Service shall, within 20 days of receipt of this letter, (a) notify the Region that it accepts the determination of the Region and will abide by the requirements for the Postal Service set forth at Section IIB(4)-(6) of the Amended Joint Settlement Stipulation, or (b) appeal in writing to the CLCB for a *de novo* review of the matter.

Very truly yours,