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Respondent, United States Postal Service (“Postal Service”), pursuant to Section 102.46 of the Board’s Rules and Regulations, hereby timely submits its exceptions to the Administrative Law Judge’s (ALJ’s) decision, issued on December 23, 2019. Respondent incorporates its supporting brief, including the citation of authorities, with its exceptions herein. As set forth in more detail, below, the ALJ erred when she concluded that (1) the union’s request for information relating to a future pre-disciplinary interview was presumptively relevant, (2) management did not proffer a confidentiality concern and, if it did, management failed to determine if the investigation would be impeded by disclosing the requested information, (3) an employee’s Weingarten rights should be extended to include a union’s request for pre-interview information and (4) under the circumstances of this case, Respondent unlawfully delayed providing the requested information to the Union.

I. FACTUAL BACKGROUND

The facts are not in dispute and not complicated. Management notified the Union on November 28, 2018, that it had scheduled a pre-disciplinary interview for December 4, 2018, with Eaton Rapids, MI, employee, Charlotte Barker, regarding allegations that Ms. Barker had been absent without leave (AWOL). Tr. (pp. 43-44). Via email, dated November 29, 2018, Union representative, John Greathouse, submitted a request for information to Eaton Rapids Postmaster, Tim Schuchaskie, stating “[p]rior to the investigative interview on Tuesday morning, the APWU is requesting copies of all records and documents including questions to get used in the interview.” JT Ex. 2 (pp. 1-2). Mr. Schuchaskie, after consulting with Greater Michigan District Labor Relations, responded on December 3, 2018, as follows:

Cart before the horse. This is an investigatory interview and if we take action then you can have copies.

The logic is this. Information is just that until it is used for a basis or support of a decision. Investigatory interview is just part of the process to make a decision.

JT Ex. 2 (p. 1).

On December 4, 2018, Eaton Rapids Supervisor, Kathy Strahan, conducted the pre-disciplinary interview of Ms. Barker, who was represented by Mr. Greathouse. Tr. (p. 65). By letter, dated December 11, 2018, Respondent issued to Ms. Barker via mail a Notice of Removal for "failure to report to duty as assigned, resulting in AWOL." Tr. (pp. 107-108); JT Ex. (pp. 18-21). As is the typical practice, management did not send a copy of the Notice of removal to the union. Tr. (pp. 67, 108). Ms. Barker never notified the Union of the Notice of Removal. Tr. (p. 67). Mr. Greathouse became aware of Ms. Barker's Notice of Removal on January 4, 2019. Tr. (pp. 59, 63).

Mr. Greathouse never followed up with Mr. Schuchaskie regarding the November 29, 2018, request for information. Tr. (pp. 86, 91). Via email, dated January 11, 2019, Mr. Schuchaskie provided to Mr. Greathouse all information relating to Ms. Barker's removal for AWOL and stated as follows:

This was sent to her by mail. I was waiting for an info request after this was issued. To my knowledge no grievance has been filed on this removal.

JT Ex. 3.

Mr. Schuchaskie explained what he meant by this as follows:

Q. What does that mean? Why did you write that?

A. At this point in time when I sent this to him, I had had a conversation with – it wasn't Pattie at the time. It was Susan. And Susan had told me to send this, instructed me to send this to him. When I did, I just sent this to him, and this was kind of I was waiting for an info request for this. Then I also added that to my understanding there was no grievance filed. But

that's why I added that in there because there was no information request or request for information, excuse me, an RFI. There was no RFI on this.

Q. The November 29, 2018, RFI, did you think that was still in existence?

A. No. I answered that.

Tr. (pp. 93-94).

II. ANALYSIS

1. The ALJ erred when she determined that the Union's request for information relating to a future pre-disciplinary interview was presumptively relevant

Respondent does not dispute the case law cited by the ALJ at pages 7 [lines 22-39] and 8 [lines 2-8] but excepts the ALJ's rulings at page 8 [lines 10-21] of the decision.

Specifically, the ALJ initially stated:

I find that the record supports a finding that the information requested by the Union as the exclusive representative of the unit and pertaining to discipline and a potential grievance concerning Barker's time and attendance and other terms and conditions of her employment was presumptively relevant

ALJ Decision, page 8 [lines 10-13].

The ALJ cites no cases, however, which stand for the proposition that a union is entitled to submit requests for information in advance of a pre-disciplinary interview. Moreover, the cases she does cite merely permit unions to seek information about "terms and conditions of employment," "for grievance adjustment and contract administration" and "the filing, possible filing or processing of grievances." Until Ms. Barker was issued the Notice of Removal on December 11, 2018, however, her terms and conditions of employment had not been affected. In other words, until the discipline was issued, no grievance could be filed, adjusted or processed. The ALJ next stated:

The Union in representing its member employee needed information prior to the investigative interview to effectively understand the charges levied against her, counsel her and prepare to represent her.

ALJ Decision, page 8 [lines 13-15].

This statement effectively relates to an employee's right to union representation during a pre-disciplinary interview, under NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

This will be addressed in detail, below, in connection with the ALJ's finding that

Respondent's Weingarten defense fails. Finally, the ALJ stated:

There is no evidence to doubt the Union's reasonable and good faith belief that an investigative interview would result in further discipline of Barker.

ALJ Decision, page 8 [lines 15-16].

By this statement, the ALJ effectively turns the concept of relevancy on its head and creates a presumption that every investigation or investigative interview will result in discipline, so information can be requested by the union before an employee is actually disciplined or before an employee actually has any grievance rights. This is plainly not the standard of relevance historically used by the Board. Indeed, should the Board adopt the ALJ's rationale here, employers will henceforth be flooded with requests for information every time they start to conduct an investigation into possible employee misconduct, thereby creating a new procedural burden before the employee has suffered an adverse employment action.

2. The ALJ erred when she determined that management did not proffer a confidentiality concern and, if it did, management failed to determine if the investigation would be impeded by disclosing the requested information

Respondent excepts the ALJ's ruling at pages 8 [lines 23-47], 9 [lines 1-47] and 10 [lines 2-14].

The ALJ initially suggests that management untimely asserted a confidentiality interest and that confidentiality “was first proffered at trial.” That is incorrect. As stated in the factual background, above, Mr. Schuchaskie advised the Union by email on December 3, 2019, among other things, that the “investigatory interview is just part of the process to make a decision.” In other words, there are numerous components to an investigation besides the pre-disciplinary interview – e.g., the review of documents, interviewing witnesses, conducting a follow-up interview with the employee – all of which are part of that investigative “process” and which could be undermined if the employer is required to respond to union requests for information before the employer has even spoken with the employee under investigation. Moreover, as discussed in more detail below, Mr. Schuchaskie may not have been in a position to know precisely what confidentiality interests existed until after Ms. Strahan conducted the preliminary interview with Ms. Barker on December 4, 2018.

Regardless, the ALJ analyzed the legitimacy of management’s confidentiality claim, relying primarily on American Baptist Homes of the West d/b/a Piedmont Gardens, 362 NLRB 1135 (2015). In that case, the Board overruled Anheuser-Busch, Inc., 237 NLRB 982 (1978), a case that created a blanket rule exempting witness statements from the general obligation to honor union requests for information, and ruled that the Board will instead apply the balancing test set forth in Detroit Edison v. NLRB, 440 U.S. 301 (1979). Specifically, the ALJ relied upon Piedmont Gardens for the proposition that “an employer must determine in each case whether any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover up.” ALJ Decision, page 9 [lines 3-5]. The ALJ then concluded that management here made no such determination. ALJ Decision, page 8 [lines 15-26].

First and foremost, the ALJ's reliance on Piedmont Gardens is questionable in light of the Board's recent decision in Apogee Retail LLC, 368 NLRB No. 144 (Dec. 16, 2019). In that case, the Board overturned Banner Estrella Medical Center, 362 NLRB 1108 (2015), enf. denied on other grounds, 851 F.3d 35 (D.C. Cir. 2017), which demanded a case-by-case determination of whether employers can require confidentiality during an investigation. More specifically, the Board in Banner Estrella found that an employer must supply evidence that "in any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up" – precisely the same requirement the ALJ imposed in this case. Id., at 1109. The Board in Banner Estrella further held that an employer could lawfully require employee confidentiality only after an employer presented a particularized showing that corruption of the investigation was likely to occur. Id.

In overturning Banner Estrella, the Board in Apogee held that investigative confidentiality rules are lawful, and fall within Boeing Category I, where the rules apply only for the duration of the investigation. Apogee, supra, at p. 2. The Apogee Board further held that Banner-Estrella failed to consider the importance of confidentiality to both employers and employees during an on-going investigation. Id., at pp. 4-5. In particular, the Apogee Board stated as follows:

By requiring an employer to engage in a case-by-case assessment of whether the integrity of the investigation will be compromised without confidentiality, the Board in Banner Estrella ignored the obvious need to protect employee witnesses and the integrity of sensitive workplace investigations. Indeed, the Board disregarded the reality that a preliminary investigation is necessary in order to determine whether 'witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up.' Since the employer would not, at the outset, have the information it needs to make that determination, under Banner Estrella it is unable to provide the very assurances of confidentiality necessary to obtain the information it needs to make the determination Banner Estrella demands. As the Board found in

IBM, the absence of an employer confidentiality policy ‘greatly reduces the chance that the employer will get the whole truth about a workplace event’ and ‘increases the likelihood that employees with information about sensitive subjects will not come forward.’

Id. at p. 5.

In addressing the dissent in Apogee, the majority also specifically addressed the parallel requirement set forth in Piedmont Gardens, relied upon by the ALJ in the instant case. Referencing Anheuser-Busch, the majority stated:

A Board majority, including our colleague, overruled that precedent in Piedmont Gardens, 362 NLRB 1135 (2015), and substituted a case-by-case balancing test comparable to the one announced the same day in Banner Estella, under which employers rarely will meet the substantial burden of proving a confidentiality interest that outweighs the union’s interest in obtaining witness statements. The issue presented in Piedmont Gardens is not presented here. We would consider revisiting that decision if the issue is raised in a future case.

Apogee, *supra* at fn. 20.

Accordingly, the ALJ’s reliance on Piedmont Gardens is highly questionable after Apogee Retail. However, even under the case-by-case analysis espoused in the ALJ’s Decision, Respondent still would not be required to furnish the Union with the information requested here. This is because the confidentiality interest must be balanced against the relevancy of the information and, as set forth above, there was minimal, if any, relevance given the information was requested before Ms. Barker’s working conditions were impacted and before the union could file a grievance.¹ Accordingly, the employer’s confidentiality

¹ Respondent does not disagree with the ALJ’s statement, at footnote 7 of her Decision, that “[a] pending grievance is not a prerequisite for requested information to be considered relevant to a union’s statutory responsibilities.” However, to be relevant, there should at least be some employment action that constitutes a potentially grievable matter. Here, there was none until December 11, 2018.

interests outweighed any relevance of the information, at least until the investigation was complete and the Notice of Removal was issued on December 11, 2018.

3. The ALJ erred when she determined that an employee's Weingarten rights should be extended to include a union's request for pre-interview information

Respondent excepts the ALJ's ruling at pages 10 [lines 16-43], 11 [lines 1-47], 12 [lines 1-43] and 13 [lines 1-19].

The ALJ found that Respondent's reliance on Weingarten was "misplaced." ALJ Decision, p. 10 [lines 28-29]. To the contrary, it is the ALJ who misinterprets Weingarten and then attempts to "extend" Weingarten beyond any Board or court precedent. Specifically, in Weingarten, the Supreme Court upheld the NLRB's position that an employer cannot deny an employee's request for union representation at an investigatory interview which the employee reasonably believes might result in disciplinary action. Weingarten, supra, 420 U.S. at 268. The Supreme Court, however, cautioned that "exercise of the right may not interfere with legitimate employer prerogatives" and "the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview." Id. at 258-59. As explained in more detail by the Supreme Court:

The employer has no duty to bargain with the union representative at an investigative interview. The representative is present to assist the employee and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's account of the matter under investigation.

Id. at 260.

Significantly, the "duty to furnish ... information stems from the underlying statutory duty imposed on employers and unions to bargain in good faith with respect to mandatory

subjects of bargaining.” Cowles Communications, 172 NLRB 1909 (1968). As such, if an employer has no duty to bargain with the union representative at an investigative interview, it cannot be obligated to furnish the union representative with requested information. The analysis, therefore, should end here.

The ALJ, however, cited Climax Molybdenum Co., 227 NLRB 1189, 1190 (1977), enf. denied, 584 F.2d 360 (10th Cir. 1978), for the proposition that to effectively represent an employee “too fearful or inarticulate to relate accurately the incident being investigated” a union representative must be “knowledgeable” to “assist the employer by eliciting favorable facts, and ... getting to the bottom of the incident.” But, as the ALJ herself stated in the next sentence of her Decision, “these objectives can more readily be achieved when the union representative has had an opportunity to consult beforehand with the employee to learn his version of events and to gain a familiarity with the facts.” Id. (emphasis added). Indeed, the Board specifically held that “[t]he only question here is whether the employee’s right to representation at an investigatory-disciplinary interview which was sustained in Weingarten includes the right of the employee to confer with the union representative before the interview.” Id. (emphasis added).

Climax does not, however, stand for the proposition, or hold, that the union representative has the right to request information from the employer, or get a list of the questions to be asked, prior to the investigative interview. It simply holds that the employee has the right to confer with his union representative prior to the investigatory interview. Indeed, the NLRB has held in other cases that the union representative’s role at the investigatory interview is limited. Indeed, in a decision issued five years later, the Board specifically limited Climax as follows:

Nor does a requirement of prior consultation and information regarding the matter being investigated present any greater possibility of transforming the

interview into an adversary proceeding. The employer, under Weingarten, has no obligation to bargain with the representative and 'is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation.'

We emphasize that our construction of Section 7 does not, as our dissenting colleague suggests, require that an employer's investigatory or disciplinary process take on attributes even remotely akin to "full-scale criminal proceedings." All Climax requires is that, as a function of an employee's right to engage in concerted activity for mutual aid or protection, a pre-interview consultation with his Weingarten representative be permitted. This consultation need be nothing more than that which provides the representative an opportunity to become familiar with the employee's circumstances. To require that the employer inform the employee as to the subject matter of the interview does not dictate anything resembling 'discovery.' The employer does not have to reveal its case, the information it has obtained, or even the specifics of the misconduct to be discussed. A general statement as to the subject matter of the interview, which identifies to the employee and his representative the misconduct for which discipline may be imposed, will suffice.

Pacific Telephone and Telegraph Co., 262 NLRB 1048, 1049 (1982)(emphasis added), aff'd, 711 F.2d 134 (9th Cir. 1983).²

See also, New Jersey Bell Telephone Co., 308 NLRB 277, 279-80 (1992)

("permissible extent of participation ... is seen to lie somewhere between mandatory silence and adversarial confrontation"); IBM Corp., 341 NLRB 1288, 1293 (2004)(declining to extend Weingarten rights to non-unionized employees, expressed concern about interfering with "an employer's ability to conduct an effective internal investigation"). Furthermore, while IBM involved non-unionized employees, the concerns raised are nevertheless valid. As explained in more detail:

² The ALJ also cited from the Circuit Court's opinion in Pacific Telephone, but only for the proposition that "securing of information as to the subject matter of the interview and a pre-interview conference with the union representative are no less within the scope of that [Weingarten] right." Id. at 136-137. The Circuit Court, however, did not overturn the Board's admonition that Climax does not permit the union to engage in pre-interview "discovery" or that "[t]he employer does not have to reveal its case, the information it has obtained, or even the specifics of the misconduct to be discussed."

The possibility that information will not be kept confidential greatly reduces the chance that the employer will get the whole truth about a workplace event. It also increases the likelihood that employees with information about sensitive subjects will not come forward.

Id.

Not to be deterred, the ALJ then stated in her decision “I find that it is reasonable ... to extend Weingarten to employees and/or their union representatives seeking pre-interview information concerning the charges leveled against the employee as long as such extension does not impede the investigation.” ALJ Decision, p. 11 [lines 39-44]. In doing so, the ALJ is attempting to create new law that is not supported by existing precedent. She is effectively trying to attach the Piedmont Gardens principles, cited earlier in her Decision and rejected by the Board in Apogee, to an employee’s Weingarten rights. For the same reasons as were cited in Apogee, this should not be permitted.

Finally, the NLRB’s Division of Advice has addressed both confidentiality and the applicability of Weingarten where, prior to an investigatory interview, the union asked the Postal Service to provide a Postal Inspector’s investigative memorandum and the attached exhibits and management maintained it had no obligation to give them to the union until after it had completed its independent investigation. United States Postal Service, 12-CA-24496, 2005 WL 4076673 (NLRBGC Dec. 6, 2005). While this advice is not binding, it remains instructive. Citing to some of the same cases identified above, the NLRB’s Division of Advice held as follows:

However, there is a legitimate confidentiality concern regarding the timing of the disclosure of these documents. Requiring disclosure of a Postal Inspector’s report prior to Weingarten interviews may impede the Postal Service’s ongoing investigation. Once the Postal Service’s investigative file is made available to the Union and the affected employee, it would become more difficult for management to assess credibility and reach the truth during the investigative interview. Further, the disclosure during an investigation could also compromise other investigative avenues available to the Postal Service.

Since the information would be confidential at least while the investigation is ongoing, a balance must be struck between that interest and the Union's interest in obtaining information, and an accommodation must be made. We conclude that the Postal Service's interest in maintaining confidentiality throughout the investigation outweighs the Union's need for the information in preparing for Weingarten interviews.

...

Here, in light of the Postal Service's interest in insuring fiscal integrity, the effectiveness of its ongoing disciplinary investigations is critically important. Finally, the Postal Service's offer to provide the information after management completes its disciplinary investigation was a reasonable accommodation of the Union's need for the data. The Weingarten interview is not a trial and the Union representative's role at the interview is relatively limited. Thus, participating in the interview without reviewing the Postal Service's investigatory file imposes only a minimal burden on the Union. Under these circumstances, the Postal Service did not violate the Act by refusing to provide the information until its internal investigation was completed.

Accordingly, the Region should dismiss the charge, absent withdrawal.

Id. at *2-3.

Similarly, here, Mr. Schuchaskie was not obligated to furnish Mr. Greathouse with information relating to an on-going investigation, including the questions to be asked at the pre-disciplinary interview, where no disciplinary action had yet been issued.

4. The ALJ erred when she determined that management unlawfully delayed providing the requested information to the Union

Respondent excepts the ALJ's ruling at pages 13 [lines 21-47], 14 [lines 1-45] and 15 [lines 1-16].

For the reasons set forth above, Mr. Schuchaskie had no obligation to provide Mr. Greathouse with the requested information until the investigation had concluded and an adverse employment action was taken against Ms. Barker on December 11, 2018. There is also no evidence that Mr. Schuchaskie acted in bad faith after December 11, 2018. NLRB v. Truitt Mfg. Co., 251 U.S. 149, 153 (1956)("[t]he inquiry must also be whether or not under

the circumstances ... the statutory obligation to bargain in good faith has been met”); West Penn Power Co. d/b/a Allegheny Power, 339 NLRB 585, 587 (2003)(“Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow”).

In order to determine if Mr. Schuchaskie was acting in good faith or bad faith after December 11, 2018, one must look at all the facts and circumstances.

First, the ALJ read Mr. Schuchaskie’s December 3, 2018, response to the request for information – i.e., “if we take action then you can have copies” – as a promise to furnish the information if disciplinary action was taken against Ms. Barker. ALJ Decision, p. 14. Therefore, by not furnishing the requested information on or shortly after December 11, 2018, he broke his promise and unlawfully delayed providing the union with the requested information.

However, looking at Mr. Schuchaskie’s statement in proper context, in light of all the testimony and evidence, that is not what Mr. Schuchaskie meant. To begin with, Mr. Schuchaskie did not say “if we take action I will give you copies” or “if we take action you will get copies.” Either of these statements would suggest that furnishing the copies would automatically follow after the discipline is issued. Rather, Mr. Schuchaskie said “if we take action you can have copies.” In other words, if we issue discipline you have the right to ask for and receive copies under the applicable grievance process. This interpretation, in turn, is supported by both the typical process followed by the parties under the grievance procedure and Mr. Schuchaskie’s later statements and testimony.

Looking initially at the typical process followed by the parties, the union cannot file a grievance until management has taken some adverse employment action against an

employee.³ Once an adverse action is taken, the employee will normally consult with the union to determine if a grievance should be filed or, if necessary, additional information is needed to make that decision. The union may also choose not to file a grievance after consulting with the employee. Unknown to Mr. Schuchaskie, Ms. Barker never shared her Notice of Removal with Mr. Greathouse. Regardless, the union did not file a grievance. Mr. Schuchaskie, therefore, assumed the union chose not to file a grievance. Finally, Mr. Greathouse never followed-up with Mr. Schuchaskie regarding the November 29, 2018, request for information or a new request for information, therefore leading Mr. Schuchaskie to believe that the union no longer wanted any information.

This interpretation is likewise supported by Mr. Schuchaskie's later statements and his testimony during hearing. Specifically, when Mr. Schuchaskie provided Mr. Greathouse with all the information relating to Ms. Barker's removal on January 10, 2019, he stated: "This was sent to her by mail. I was waiting for an info request after this was issued. To my knowledge no grievance has been filed on this removal." This is consistent with Mr. Schuchaskie's understanding that Mr. Greathouse no longer wanted the information. Moreover, as set forth above, Mr. Schuchaskie testified at hearing that "there was no grievance," "there was no request for information" and "I already answered that."

Second, it makes no sense for Mr. Greathouse to want the same information he requested on November 29, 2018, after the pre-disciplinary investigation and after the Notice of Removal was issued. Specifically, the November 29, 2018, request asked for "copies of all records and documents including questions to get used in the interview." Mr. Greathouse attended the pre-disciplinary interview. He knew what questions were asked and saw any documents that were "used in the interview." Why would he now want copies

³ See JT Ex. 1 (p. 76) ("a grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment")

of all records or documents used in the pre-disciplinary interview? Why would he now want copies of the questions to be asked in the pre-disciplinary interview? That defies logic.

What makes more sense would be for Mr. Greathouse to ask for copies of the Notice of Removal and any documents relied upon by management to issue the Notice of Removal. This would include both documents that existed at the time of the pre-disciplinary interview and documents that were found or created after the pre-disciplinary interview. And that is precisely what Mr. Schuchaskie furnished to Mr. Greathouse on January 10, 2019 – a packet of documents, some of which post-dated and did not exist at the time of the pre-disciplinary interview. Mr. Schuchaskie did not respond to the November 29, 2018, request for information, but rather he responded to the request for information that Mr. Greathouse should have submitted after the Notice of Removal was issued.

All this establishes that Mr. Schuchaskie was not refusing to provide the union with information and was not bargaining with the union in bad faith. Instead, based on his understanding of the facts and circumstances, he thought he had responded to the November 29, 2018, request for information and was waiting for Mr. Greathouse to file a grievance or contact him about a new request for relevant information. Even if his assumptions or understanding were wrong, that is not evidence of bad faith. Therefore, any alleged delay from December 11, 2018, to January 10, 2019, a period of less than one month, was not unlawful.

III. CONCLUSION

Based on the foregoing, Respondent respectfully submits that the instant complaint be dismissed in its entirety.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this this 17th day of January, 2020, I served Respondent's foregoing Exceptions as follows:

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