P.E.R.C. NO. 86-31

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT
BUS OPERATIONS, INC.,

Respondent,

-and- Docket No. CI-83-59-22

CHARLES CANNON,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Charles Cannon against the New Jersey Transit Bus Operations, Inc. The charge had alleged that New Jersey Transit discharged Cannon allegedly in retaliation against his exercise of protected activity. Applying the requisite Bridgewater Tp., 95 N.J. 235 (1984) test, the Hearing Examiner found that Cannon was not discharged because of his exercise of protected activities; rather, he was discharged for insubordination. In the absence of exceptions, the Commission agrees with the Hearing Examiner's conclusions.

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CHARLES CANNON,

Charging Party.

Appearances:

For the Respondent, Hon. Irwin I. Kimmelman, Attorney General (Jeffrey Burstein, Deputy Attorney General)

For the Charging Party, Fiorello, Moraff & Foster, Esqs. (George O. Foster, of Counsel)

DECISION AND ORDER

On April 7, 1983, Charles Cannon ("Cannon") filed an unfair practice charge against New Jersey Transit Bus Operations, Inc. ("NJT") with the Public Employment Relations Commission. The charge alleged that NJT violated subsections 5.4(a)(1),(3),(4) and (7)[1/]

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; and (7) Violating any of the rules and regulations established by the commission."

of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it discharged Cannon allegedly in retaliation against his exercise of the rights guaranteed to him by the Act, specifically his filing of disability claims with a prior employer and discussing seniority rights with his fellow employees.

On July 27, 1983, a Complaint and Notice of Hearing was issued. NJT then filed its Answer. It admitted discharging Cannon, but denied that this discharge was in retaliation against any exercise of protected activities. Rather, it contended that Cannon was discharged for insubordination and abusive language directed at a supervisor.

On October 31 and November 1, 1983, Hearing Examiner Charles A. Tadduni conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On May 8, 1985, Hearing Examiner Tadduni issued his report and recommended decision. H.E. No. 85-41, 11 NJPER 362 (¶16128 1985). Applying the In re Bridgewater Tp., 95 N.J. 235 (1984) test, he concluded that the charging party failed to establish, by a preponderance of the evidence, that the decision to discharge Cannon was motivated by his exercise of protected activities. Rather, he found that he was discharged for insubordination. Accordingly, he recommended that the Complaint be dismissed.

The Hearing Examiner served his report on the parties and advised them that exceptions, if any, were due by May 21, 1985. Neither party filed exceptions.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-10) are accurate. We adopt and incorporate them here. Applying the standards set forth in Bridgewater, we hold that NJT did not violate the Act when it discharged Cannon. He did not prove that the discharge was discriminatorily motivated and NJT proved that it would have discharged him in any event because of his insubordination. Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Johnson, Suskin and Wenzler voted in favor of this decision. None opposed. Commissioner Graves abstained.

DATED: Trenton, New Jersey
August 27, 1985
ISSUED: August 28, 1985

H.E. NO. 85-41

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT BUS
OPERATIONS, INC.,

Respondent,

-and-

DOCKET No. CI-83-59-22

CHARLES CANNON,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent did not violate subsections 5.4(a)(1), (3), (4) or (7) of the New Jersey Employer-Employee Relations Act when it discharged Charles Cannon on March 18, 1983. Cannon's exercise of protected activities under the Act was negligible and thus, he did not meet the first requisite of the test established by the New Jersey Supreme Court in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). Even assuming arguendo that Cannon had established that his exercise of protected activity, i.e., raising a seniority issue on his behalf and that of others, was the motivating factor in the employer's decision to terminate him, the Respondent demonstrated by a preponderance of the evidence that it would have discharged Cannon even in the absence of protected activity due to gross insubordination to a supervisor involving an unwarranted profane outburst.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 85-41

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT BUS
OPERATIONS, INC.,

Respondent,

-and-

DOCKET NO. CI-83-59-22

CHARLES CANNON,

Charging Party.

Appearances:

For the Respondent
Honorable Irwin I. Kimmelman, Attorney General
(Jeffrey Burstein, D. A. G.)

For the Charging Party
Fiorello, Moraff & Foster, Esqs.
(George O. Foster, Esq.)

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on April 7, 1983, by Charles Cannon (hereinafter the "Charging Party" or "Cannon") alleging that New Jersey Transit Bus Operations, Inc. (hereinafter the "Respondent" or "NJT") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee

Relations Act, N.J.S.A. 34:13A-1, et seq. (hereinafter the "Act"), in that Cannon, who was employed by NJT as a bus driver between February 14 and March 18, 1983, was harassed on a daily basis about prior disability claims which had occurred when he worked for Manhattan Transit; was threatened with discharge by NJT if he made a disability claim during his probationary period; and, additionally, that Cannon was placed at the bottom of an NJT seniority list along with 11 or 12 other former Manhattan Transit bus drivers; that Cannon and said former Manhattan Drivers had consulted an attorney, and said information "leaked out" to some of the NJT supervisors, which Cannon alleges affected his employment with NJT, and, after an outburst by a supervisor, Mr. Richard Fernandez, Cannon was singled out and discharged on March 18, 1983; all of which is alleged to be a violation of N.J.S.A. 34:13A:5.4(a)(1), (3), (4) and (7) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition

(Footnote continued on next page)

of the Act, a Complaint and Notice of Hearing was issued on July 27, 1983. Pursuant to the Complaint and Notice of Hearing, hearings were held on October 31 and November 1, 1983, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by March 7, 1984.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. New Jersey Transit Bus Operations, Inc. is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Charles Cannon is public employee within the meaning of the Act, as amended, and is subject to its provisions.

(Footnote continued from previous page)
or complaint or given any information or testimony under this act. (7) Violating any of the rules and regulations established by the commission."

3. Prior to January 28, 1983, Cannon had worked for approximately 18 years as a bus driver with Manhattan Transit. Upon the bankruptcy of Manhattan Transit, Cannon was one of thirty-three (33) bus drivers who were hired by NJT and who became probationary employees for a period of 90 days under the collective negotiations agreement between Transport Workers Union, Local 225 and NJT wherein probationary employees have no recourse to the contractual grievance procedure (2 Tr 18, 19).

4. Cannon commenced employment with NJT as a bus driver on February 14, 1983. He and 11 or 12 other former Manhattan Transit drivers, who were also hired by NJT, went to school in Maplewood for two weeks where an instructor, John Singer, introduced Cannon and the other drivers to Richard Fernandez, who, at that time, was the supervisor of the Fairview Garage (2 Tr 58, 59). Fernandez testified credibly that he gave all of the drivers their work assignments for the next day and told them what time to report. Singer also introduced James Foties, who was to become the supervisor of the Fairview Garage within a "couple of weeks" and the assembled bus drivers were so told (2 Tr 59). Both Fernandez and Foties testified credibly that Cannon was present and that they recalled seeing him there (2 Tr 59, 78).

Cannon claimed that during the two-week period that he was in Maplewood in training, he met Edward Fitzgerald, whose position he erroneously identified as Personnel Director -- Fitzgerald being

an employment recruiter -- and that Fitzgerald told Cannon that "the high echelon upstairs is jumping up and down" about Cannon because of his disability claims and his record (1 Tr 18, 19). Fitzgerald credibly denied making any such statement to Cannon and further denied having any access to or knowledge of disability claims or the disciplinary records of drivers who formerly worked for Manhattan Transit (2 Tr 119). Thomas J. Murphy, the Manager of Labor Relations, also denied that NJT had access to the disability claims or personnel records of former drivers with Manhattan Transit (2 Tr 20-22). Essentially, Cannon resolved the matter by testifying that when he commenced employment with NJT he had no disability claims pending with Manhattan Transit nor had he ever been disciplined during his 18 years of employment there (1 Tr 19, 20).

6. Cannon testified that after Maplewood, he was assigned to the Fairview Garage where Foties was his supervisor. On his first day, he made a run to the Vince Lombardi Park-Ride, where he met James O'Malley, the Northern District Manager of NJT, who, according to Cannon, said to Cannon "You're under severe scrutiny for your disability claims and your record" (1 Tr 22, 24). O'Malley acknowledged speaking with Cannon but flatly denied making the "severe scrutiny" statement (2 Tr 52). The Hearing Examiner credits O'Malley's denial for two reasons: (1) it seems highly unlikely that O'Malley would out of the blue on Cannon's first day of driving for NJT make such a statement, and (2) O'Malley testified credibly

that he was not aware of Cannon's disability claims or disciplinary records and the Charging Party provided no evidence that O'Malley would have had such knowledge, his responsibility being to see that each garage runs effectively (2 Tr 49-53). Note is also taken of Cannon's testimony that he never again spoke to O'Malley (1 Tr 26).

7. Cannon testified that when he was hired, he and the other former Manhattan Transit drivers were told that they would probably be put into appropriate seniority slots and that it was Fitzgerald that told him of this (1 Tr 34). 2/ But, when Cannon arrived at the Fairview Garage, he learned that he did not have any seniority (1 Tr 34). Cannon acknowledged on cross-examination that the alleged harassment of him by NJT was not related to the senority issue but, rather, was related to his disability claims and record at Manhattan Transit (1 Tr 73, 74). Except for Cannon's testimony regarding his conversation with Fitzgerald regarding seniority in Maplewood during his first weeks of employment, there is no proof that any other official of NJT was aware of Cannon's activity in this matter. Foties and Fernandez credibly denied having any knowledge of any activity by Cannon on the seniority issue (2 Tr 65, 66, 84, 85, 90). Finally, Cannon and two other former Manhattan

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2/ The Hearing Examiner credits the testimony of Fitzgerald that he never had any discussion with Cannon regarding activities concerning seniority for the drivers who were formerly employed by Manhattan Transit (2 Tr 119, 120).

Transit bus drivers consulted a labor attorney regarding the seniority issue but no legal action was taken against NJT nor was anyone in NJT informed about the consultation (1 Tr 110, 111, 114, 115).

8. On March 4, 1983, Cannon, in backing a bus out of the garage, damaged the overhead door, for which he was suspended one-half day (1 Tr 26-32; CP-1).

9. Cannon was discharged on March 18, 1983, following a hearing conducted by Foties, which had resulted from an incident between Cannon and Fernandez on the previous day. The charge against Cannon was insubordination (CP-2). The facts regarding the incident of March 17, 1983 are as follows: At about 7 p.m. Percy Milligan was working on the payroll in the Dispatcher's Office at the Fairview Garage. Fernandez was also in the office, notwithstanding that he had ceased to be the supervisor at Fairview about eight days prior thereto (1 Tr 172, 173). Foties, the new supervisor of the garage, was not present. Fernandez had been at the garage every day breaking in Foties; that training process continued to the end of March (1 Tr 179, 180; 2 Tr 60). Cannon and two bus drivers, Louis Reyes and Walter J. Makaus, were outside the Dispatcher's Office (1 Tr 38, 39). Reyes, a Charging Party witness, said to Cannon, referring to Fernandez, "Charlie, he's Puerto Rican," to which Cannon responded, again according to Reyes, "I don't give a shit" in a penetrating voice (1 Tr 163, 165). Both

Makaus and Reyes testified that they knew Fernandez was a supervisor (1 Tr 136, 158). The testimony of Fernandez, Milligan, Makaus and Reyes confirms that the response of Fernandez was to ask "do we have a problem?" (1 Tr 137, 158, 174; 2 Tr 62). Apparently, this inquiry by Fernandez was precipitated by Cannon's utterance to Fernandez in a loud tone that he "should push that fucking work board over" (1 Tr 166, 167, 175; 2 Tr 62). Further, according to Fernandez, whom the Hearing Examiner credits, when Fernandez asked Cannon if he had a problem, Cannon replied "I don't have no f..... problem," to which Fernandez responded that he should not talk that way "around here" (2 Tr 62). Cannon's immediate response to Fernandez was "who the f.... are you to talk to me like that? What am I, a piece a s...?" (2 Tr 62). According to Milligan, the incident lasted five to eight minutes and concluded with Fernandez telling Milligan to write up an incident report (1 Tr 175, 176). Milligan wrote up the incident report immediately thereafter. Exhibit R-4 essentially confirms Milligan's testimony, who was a witness for the Charging Party, as to the repeated use by Cannon of variations of the word "fuck" during his encounter with Fernandez. Fernandez also wrote an incident report, which was dated March 21, 1983 (R-5). Makaus testified as a witness for the Charging Party that he heard no profane language used by Fernandez, and Reyes testified on cross-examination that Cannon had used profanity in connection with the work board (1 Tr 144, 145, 166, 167). This contrasts with the

testimony of Cannon, whom the Hearing Examiner does not credit, that Fernandez used the word "f..." on several occasions during the incident, and denied that he ever used the term (1 Tr 40, 41, 100-102). At the hearing on March 18th before Foties, Cannon denied knowing that Fernandez was a supervisor (1 Tr 106). In view of the testimony of Charging Party witnesses Makhaus and Reyes that they knew that Fernandez was a supervisor, the contrary testimony of the Charging Party is not credited -- particularly given the quite positive testimony of Fernandez and Foties that they were introduced as supervisors by Singer during mid-February 1983 when the former Manhattan Transit drivers, including Cannon, were in training. Further, it seems apparent from some of Cannon's testimony that he was aware that Fernandez was an NJT supervisory person of some sort -- not just another face in the garage (1 Tr 39).

The Hearing Examiner has drawn his conclusions about Cannon's testimony from several bases. First, there is a plausibility problem with Charging Party's overall premise -- that NJT was out to get him, that O'Malley singled out Cannon to pick on, that Cannon did not know Fernandez was a supervisor. The facts in the record either do not support these premises or are squarely against them. As his testimony makes clear, Cannon, while completely fluent in English, speaks in a fairly common street vernacular -- in vocabulary, phrasing, inflection and enuniciation.

The Hearing Examiner notes that Cannon is a man of above average stature and is a fair physical presence (in the opinion of

the Hearing Examiner, who is 5'10" tall and 160 lbs).

In observing Mr. Cannon's testimony -- particularly the cross-examination -- the Hearing Examiner noted that Mr. Cannon was often not direct in his responses: he repeated certain questions, indicated that he did not hear certain questions and contended that he did not understand certain questions, most of which were painfully clear to the Hearing Examiner who was hearing these facts for the first time and most of which, coincidentally, went toward undermining the heart of Charging Party's case.

Next -- concerning the cruicial encounter betwen Fernandez and Cannon -- Cannon has denied the he ever used profanity and stated that Fernandez did use profanity during the incident. At one point, Cannon testified that he did not know Fernandez was a supervisor and that Fernandez verbally abused him (Cannon) with a stream of profanity; he further testified that he responded to Fernandez' alleged tirade with "Who are you?" -- pretty meek under the circumstances, and in this context, simply not believable.

On the other hand, Fernandez testified straightforwardly both on direct and cross-examination. Fernandez stated that while he does occasionally swear, he did not do so in this instance but rather, tried to persuade Cannon to stop swearing -- at him (Fernandez), at his dispatcher and in the workplace generally. This testimony was essentially corroborated by several other witnesses of both the Charging Party and Respondent and is credited by the Hearing Examiner.

DISCUSSION AND ANALYSIS

The Respondent NJT Did Not Violate Subsections (a)(1) And (3) Of The Act When It Discharged Charles Cannon On March 18, 1983 3/

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court adopted the test enunciated by the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980), in "dual motive" cases where the following requisites in assessing employer motivation are utilized: (1) the Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a substantial" or a "motivating" factor in the employer's decision to discipline; and (2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (95 N.J. at 242).

The Court in Bridgewater further refined the above test by adding that the protected activity engaged in by the charging party must have been known to the employer and also, it must be established that the employer was hostile toward the exercise of the protected activity (95 N.J. at 246). The Hearing Examiner also notes that a charging party must establish a nexus between the

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3/ Cannon's allegations that NJT violated subsections (a)(4) and (7) of the Act were dismissed by the Hearing Examiner at the conclusion of the Charging Party's case.

exercise of protected activity and the employer's conduct in response thereto: In re Lodi Bd. of Ed., P.E.R.C. No. 84-40, 9 NJPER 643, 644 (1983).

Applying Bridgewater to the case at hand, it is immediately apparent that the Charging Party has failed in all respects to satisfy the initial requisite set forth above. First, his testimony regarding disability claims and his disciplinary record at Manhattan Transit were never shown to be within the knowledge of NJT officials. Even assuming that there was such knowledge, the Charging Party acknowledged that there were no outstanding disability claims with Manhattan Transit nor had he ever been disciplined there in his 18 years of employment. This raises the question of what possible connection existed between these matters and the termination of the Charging Party on March 18, 1983? None has been established in this record.

Next, there is the matter of dissatisfaction by Cannon and the other 11 or 12 bus drivers at the Fairview Garage with the seniority treatment given to Manhattan Drivers. Admittedly, if Cannon had been open in his advocacy of seniority on behalf of himself and others, this would qualify as "protected activity" under the Act. Although the activity of Cannon in connection with the seniority incident is minimal, to say the least, even if one were to assume that Cannon's activities in connection with the seniority issue were of a greater magnitude, his proofs failed completely on

employer knowledge of such activity. As noted above, Bridgewater, requires that the protected activity engaged in must have been known to the employer. Plainly, such knowledge is lacking on this record. Consider the fact that Cannon testified that while he had spoken with the other drivers about seniority, he had not spoken to anyone from NJT (1 Tr 135). Makaus also testified that he had made no formal request of NJT regarding seniority even though he and the other bus drivers talked about it since their first week of employment in February 1983 (1 Tr 147). Given this testimony by two Charging Party witnesses, there was no proof of employer knowledge of seniority complaints by Cannon and other former Manhattan Transit drivers.

The instant record makes clear that Cannon has failed to make a prima facie showing sufficient to support an inference that any protected activity engaged in by him was a "substantial" or a "motivating" factor in the decision of NJT to discharge him on March 18, 1983. Thus, not having met the first part of the Bridgewater test, the Hearing Examiner need not even consider whether the employer here has shown a legitimate business justification in the termination of Cannon in March 1983. However, assuming arguendo that Cannon was deemed to have engaged in protected activity known to the employer and that this was a "substantial" or a "motivating" factor in NJT's decision to discharge him, it is plain that the employer has established a legitimate business justification for its

action. From the testimony of the Charging Party's own witnesses (excluding Cannon), it is clear that the former Manhattan Transit drivers knew that Fernandez was a supervisor. It was established that Fernandez and Foties were introduced to the Manhattan drivers as supervisors during the training period in mid-February 1983. Only Cannon appears to cling to the view that he did not know that Fernandez was a supervisor on March 17, 1983. His loud and profane outburst to a supervisor in the presence of other employees is a classic basis for discharge on the ground of insubordination. It appears quite clear from this record that the employer was not motivated by any reason other than disciplining an employee -- Cannon -- on proper grounds when it terminated Cannon on March 18, 1983.

In conclusion, the Hearing Examiner would only add that under Bridgewater, it must be established that the employer was hostile toward the exercise of protected activity. There is absolutely no proof whatever of any hostility by NJT toward Cannon because of his exercise of protected activity which, on this record, can only remotely be the matter of seniority.

Accordingly, the Hearing Examiner recommends dismissal of the allegation that NJT violated subsections (a)(1) and (3) of the Act.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent NJT did not violate N.J.S.A. 34:13A-5.4(a)(1), (3), (4) or (7) when it terminated Charles Cannon on March 18, 1983.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the complaint be dismissed in its entirety.

Charles A. Tadduni
Hearing Examiner

DATED: May 8, 1985
Trenton, New Jersey