H.E. No. 2007-4

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-2002-010

WILLIAM QUICK,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that an employee of NJ Transit was disciplined for poor work performance rather than because he complained about his supervisor performing unit work. The Hearing Examiner recommended the complaint be dismissed.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommended 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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent, Stuart Rabner, Attorney General of New Jersey (Richard W. Schleifer, Deputy Attorney General, of counsel)

For the Charging Party, William Quick, pro se

Summary

William Quick (Quick) filed an unfair practice charge alleging New Jersey Transit Bus Operations Inc. (NJ Transit) violated the New Jersey Employer-Employee Relations Act (Act). Quick claims he was disciplined for engaging in conduct protected by the Act. NJ Transit claims he was disciplined for poor work performance.

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

Procedural Background

On August 13, 2001, Quick filed unfair practice charges against the Amalgamated Transit Union, Local 823 (Docket No. CI-2002-009) (ATU) and against NJ Transit (CI-2002-010) with the New Jersey Public Employment Relations Commission (Commission) alleging they engaged in certain actions in violation of the

Act, N.J.S.A. 34:13A-1 et seq. The charge against NJ Transit alleged it violated 5.4a(1), (3) and (7) of the Act by harassing and issuing Quick a notice of discipline for complaining that his supervisor was performing ATU unit work.[1/] Quick alleged the ATU violated 5.4b(1) and (5) of the Act[2/]. Quick was represented by counsel when the hearing began, but he dismissed his attorney on or about August 4, 2005, prior to the completion of the hearing.

A Consolidated Complaint and Notice of Hearing was issued on February 26, 2002. Quick withdrew his charge against the ATU on March 26, 2004, prior to the hearing. In his charge against NJ Transit, Quick seeks the removal of any discipline he received in April 2001 and to be made whole for any salary loss caused by NJ Transit's acts. NJ Transit filed an Answer on April 23, 2002 denying it violated the Act. Hearings were held on August 24 and September 8, 2004, and November 2, 2005.[3/] Both parties filed

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1/ These provisions 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. (7) Violating any of the rules and regulations established by the commission."

2/ These provisions prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Violating any of the rules and regulations established by the commission."

3/ The transcripts will be referred to at 1T, 2T and 3T respectively.

post-hearing briefs/statements, the last of which was received on August 18, 2006. The procedural delay associated with this case occurred in part due to the requests and/or unavailability/illnesses of the attorneys and/or Quick, and due to settlement efforts which were unsuccessful.

In his post-hearing statement, Quick made reference to not being able to present a rebuttal case. As evidenced by numerous letters in the case file, Quick was offered dates to call a rebuttal witness, but, ultimately, due to his failure to produce the witness and respond to new dates, the hearing was closed.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. NJ Transit and the ATU were parties to a collective negotiations agreement covering bus repairmen and other titles, but excluding Foreman and other supervisors. Section 13G of the agreement provided in pertinent part as follows:

> **G. Foreman**- (a) The Company agrees that it will not allow Foreman or Management personnel to participate in any physical labor that will take any work away from the regular employees.

2. William Quick was employed by NJ Transit in May 1992. Albert Kabbash was employed by NJ Transit as a Foreman Two in January 2000. Bob Scoular, a Foreman One, was Kabbash's Supervisor (2T5, 2T22). Beginning in April 2000, Kabbash became one of Quick's supervisors on the evening shift in the Iron Bound Garage (1T34). Sometime in October 2000, Quick was moved to the

day shift, in part to avoid Kabbash, but also to accommodate his daughter's school schedule (1T72-1T73, 1T76). By January 2001, Kabbash was involuntarily moved to Quick's day shift (2T20-2T21).

3. In April 2000, Quick observed Kabbash sweeping out buses. Quick, apparently believing Kabbash had violated Section 13G of the ATU contract, told Kabbash he wasn't supposed to do that work. Kabbash did not say anything in response or take any action against Quick (1T15, 2T93). I credit Quick's testimony on that point. Quick complained to his shop steward, Charlie Laing, about Kabbash working on the bus (1T50-1T51), but there was no evidence Kabbash was aware of Quick's complaint to Laing, and there was no evidence Laing took any action.

4. The employees Kabbash supervised, including Quick, had been receiving two 15 minute courtesy breaks not required by contract and at the Foreman's discretion, and a contractual half hour for lunch (2T77-2T78). When Kabbash began supervising the repairmen he noticed that employees were taking longer breaks and longer lunches than provided by contract. After observing that conduct for a few months, Kabbash, in mid 2000, determined that the middle of the evening 11:00 p.m. - 7:30 a.m. shift was about 3:00 a.m. He informed the employees he supervised that lunch would be from 3:00 a.m. to 3:30 a.m., and break time would be from 1:00 a.m. to 1:15 a.m., and that there would not be a 5:00 a.m. to 5:15 a.m. break because that time frame would interfere with the need to pull buses out of the garage (2T78-2T81).

Subsequent to that directive, Quick complained to Kabbash about enforcing lunch and break time. Quick asked him why he was changing the times and Kabbash responded because it was getting out of control; employees were taking too long (2T83). Quick then told Kabbash:

> I told you not to fuck with us. If you fuck with us we're going to fuck you back (2T84).

Kabbash did not respond to the remark (2T84). Quick told Laing about the break time changes but there is no evidence Laing took any action or that Kabbash knew that Laing had been told about the break time (1T51).

5. In July 2000, Quick observed Kabbash adjusting brakes on a bus, and he (Quick) told Kabbash he wasn't supposed to be working on buses. Kabbash didn't say anything to Quick (1T16). I credit Quick's testimony to that point. The following week Quick was several minutes late for work and was docked pay. Quick thought Kabbash was responsible for the docking because of his (Quick's) remarks about Kabbash working on buses, but Quick said Kabbash never said anything to employees about the docking (1T20). While I find Quick was docked, I do not credit his testimony that it resulted from Quick's remarks to Kabbash or that Kabbash was at all responsible for the docking. There was no reliable evidence tying Kabbash to the docking. Rather, I can only find Quick was docked for being late.

Kabbash testified he repaired the brakes on a bus in April 2000 because all the mechanics were out on road calls, and that

he cleaned out a bus on another occasion. I credit that testimony. He acknowledged that Quick had complained to him about his (Kabbash) working on buses (2T91, 2T93-2T95). I also credit Kabbash's testimony that Foreman are allowed to inspect the vehicles and review work performed by mechanics (2T13). No evidence was presented showing that any of the work Kabbash performed on buses took work away from regular employees represented by the ATU.

On or about July 28, 2000, a Foreman One (not Kabbash) assigned Quick to perform a major "F" inspection on a particular bus. Kabbash determined Quick took too long to complete that work and Quick was given a one day suspension on August 5, 2000 for poor work performance. Two weeks later, Quick was given another "F" inspection assignment, he took too long again, and beginning on August 20, 2000 was given a two day suspension for poor work performance (1T23-1T24, 1T97, 1T104).

6. By September of 2000, a number of 3000 series buses and 1800 series buses in the Iron Bound Garage needed to be prepped for winter. On or about October 9, 2000, Kabbash prepared a list of buses that needed work (CP-3), including a number of 1800 series buses that needed winter-prep, and he wrote on that list next to the buses needing the prep "do not go back out under penalty of DEATH" (2T38-2T42, 2T53-2T68, 3T8; CP-3; R-3). The date of April 6, 2001 is written across the top of CP-3, the sheet containing the photocopy of the list Kabbash prepared for

the bus prep. But based upon Kabbash's testimony which I credit, I find he prepared and delivered that list on or about October 9, 2000 (2T38-2T42, 2T53-2T57; R-3).

Kabbash wrote the "penalty of DEATH" words on CP-3 mostly as a joke, but he was trying to convey how important it was that those buses could not go back out until the work was completed (2T39, 2T42-2T43). On October 9th Kabbash gave CP-3 to repairman Michael Venizio who was working in the back house of the garage where that work would be done. Kabbash had no conflicts or disagreements with Venizio (2T44-2T45), and there is no evidence that Quick was aware of CP-3 in October 2000. Venizio showed CP-3 to Quick on April 7, 2001 (1T106, 1T119, 1T128). Quick testified that Venizio told him in April 2001, that Kabbash had threatened Venizio - presumably when Kabbash gave Venizio CP-3 on or about October 9, 2000 - by telling him to get back to work or he (Kabbash) would "kick Mike's ass" (1T120-1T121). But on cross-examination Quick explained Kabbash was speaking to three employees in October 2000 and he may have made a remark in jest (1T126-1T127). Kabbash didn't recall making any remarks but didn't deny he may have made one. He denied that he would have made a threat, and said if he made such remarks it would have been in a joking manner (2T87-2T88). I credit Kabbash's testimony. Quick's testimony on this point was very uncertain and, together with Kabbash's testimony, I find Kabbash's remarks

and "penalty of death" note were made in October 2000 and were made in jest.

7. On April 5, 2001, Quick was assigned to do work required by the State Department of Transportation (DOT) on bus no. 1853. Quick worked on that bus on-and-off between April 5 and April 7. During some of that time he also assisted repairman Jeff Fayton who was working on the register of another bus (1T27, 1T31, 2T25, 3T18-3T19).

At some point on April 7, 2001 while assisting Fayton, Quick observed Kabbash move a bus and he (Quick) told Kabbash he was not supposed to perform such work (1T27, 1T32). Quick testified that after he made the remark to Kabbash, Kabbash called his (Kabbash's) Foreman, Bob Scoular, and later that day Kabbash issued him (Quick) an employee notice for poor work (CP-1; 1T32-1T34).

Kabbash prepared an Employee Incident Report (CP-2 & R-2) detailing the basis for issuing CP-1. The Incident Report contained the following explanation:

> Employee was assigned D.O.T. work on bus # 1853 since 04/05/01. During the course of an 8 hour shift on 04/07/01 employee was repeatedly seen away from assigned job. After 8 hour shift on 04/07/01, the only work accomplished on bus was (left drive brake chamber installed, left drive shoes hung. Right drive brake chamber installed, right drive shoes hung) Installation old parts had been removed the previous day.
>
> At 2:45 p.m., employee approached me and said that he could not find the wheel bearings that belong to his wheels. After searching

> the rack where the wheel bearings are kept, the bearings were not found and I instructed employee to install new bearings and races [sic] which he had already received from stock clerk. He started to remove the races [sic] from one wheel when his shift ended. (4/7/01)

Kabbash admitted that in April 2001 Quick told him he was not allowed to move buses (2T93-2T95), and he also admitted that by April 2001 he knew he and Quick had conflicting personalities (2T29). Generally, Kabbash felt Quick tried to do as little work as possible, and they had had conversations about what Quick felt like doing as compared to what he was required to do (2T30). But Kabbash explained their personality conflict was not related to the issuance of the April 2001 employee notice (2T29). There is also no evidence that Quick ever filed a grievance over Kabbash doing unit work. Kabbash denied that he issued the employee notice (CP-1) and incident report (CP-2 & R-2) against Quick because of Quick's complaints about Kabbash. Kabbash said he issued the employee notice because of Quick's poor work performance (2T97). I credit Kabbash's testimony. I found him honest, and a more knowledgeable and reliable witness than Quick. I find Kabbash was unaffected and not threatened or intimated by Quick's complaints, and gave no indication of an intent or disposition to retaliate.

Kabbash explained the basis for the incident report was that normally an employee should complete a rear realignment, including disassembly and reassembly, within an eight hour

period, but that Quick would not have completed the job within that time frame (2T27-2T28, 3T42). He testified that Quick "took way more time than is required for the job" and that was why he issued the employee notice (3T30). I credit his testimony.

Since Kabbash had only been with NJ Transit for less than a year he asked his foreman, Bob Scoular how to write up the employee notice. Scoular told him to write it up as poor work performance (3T32-3T33). Scoular explained that a brake realignment should take four to six hours (3T50-3T51). He recalled Kabbash called him about a problem he was having with Quick, but could not recall the substance of the conversation or what Quick failed to do (3T50, 3T51, 3T59). On cross-examination by Quick, Scoular testified that to his knowledge Quick normally did any work assigned to him, but he also testified that he knew Quick gave Kabbash and other foremen a hard time about doing work (3T53-3T54). I credit Scoular's testimony.

ANALYSIS

The issue in this case is whether Quick was disciplined in April 2001 in retaliation for his complaints about Kabbash performing union work, or because of poor work performance. I find it was because of poor work performance.

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates 5.4a(3) of the Act. Under Bridgewater, no violation will be

found unless the charging party has proven, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

The decision on whether a charging party has proved hostility in such cases is based upon consideration of all the evidence, including that offered by the employer, as well as the

credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987).

Assuming that complaining to one's supervisor that his performance of union work is conduct protected by the Act, Quick met the first Bridgewater standard. The second Bridgewater standard was also met because Kabbash was aware that Quick complained about his (Kabbash) performing such work. Quick, however, did not prove the third Bridgewater standard, that Kabbash was hostile to him (Quick) because of the exercise of the protected conduct. Rather, the evidence supports a finding that Quick was disciplined because he did not finish certain work by April 7, 2001.

Kabbash admitted that Quick complained to him on several occasions that he (Kabbash) was performing union work and that he should cease such conduct. But there was no evidence that Kabbash ever responded to Quick's remarks, no evidence that Quick or the union filed a grievance over Kabbash's alleged conduct or that Kabbash's conduct resulted in less work for any regular employee, and no evidence that anyone other than Quick spoke to Kabbash about doing union work.

Quick's case is based upon his own testimony and inferences he expects me to draw that Kabbash's issuance of the employee notice in April 2001 was in retaliation for his (Quick's)

complaints about Kabbash. But that is not the inference I draw from the facts presented.

The evidence shows that Quick did not complete a brake realignment by April 7, 2001 after working on the same bus since April 5. Both Kabbash and Scoular testified that a brake realignment should be completed in four to eight hours and Quick was not going to finish that work by the end of his shift on April 7. Quick did not dispute that he did not or could not complete the work by that time. Rather, he pointed out he was helping another employee, but the evidence shows that was only for a short time period.

Having found that Quick's testimony was often confusing and unreliable, I credited Kabbash. His testimony denying that the employee notice was related to Quick's complaints was even more compelling because Kabbash did not deny Quick made several complaints about him, and he admitted he and Quick had conflicting personalities. Despite Quick's complaints to Kabbash going back to mid-2000, there is no evidence that Kabbash ever responded to them or took any action because of them. I found he was unaffected by them. Consequently, I find that based upon the record here, there is insufficient basis to conclude that Quick was disciplined in April 2001 because of the exercise of protected conduct.

Accordingly, the 5.4a(1) and (3) allegations should be dismissed. Since there were no facts supporting the 5.4a(7) allegation, that, too, should be dismissed.

Based upon the above facts and analysis I make the following:

RECOMMENDATION

The charge should be dismissed.

Arnold H. Zudick
Hearing Examiner

DATED: January 26, 2007
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by February 8, 2007.