

H.E. NO. 2003-11

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. CO-H-2001-240

AMALGAMATED TRANSIT UNION, LOCAL 819, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner denies a Motion for Summary Judgment filed by New Jersey Transit Bus Operations, Inc. The Complaint, based upon an unfair practice charge, alleges that NJT unilaterally implemented an unwritten attendance policy at the Telephone Information Center. The Motion, together with a supporting affidavit, asserted that no change had occurred. The majority representative, ATU, filed responsive papers, including an affidavit.

The Hearing Examiner determined that the Motion could not be granted because material factual issues persist. Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995); N.J.A.C. 19:14-4.8(d).

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Appearances:

For the Respondent
David Samson, Attorney General
(David S. Griffiths, Deputy Attorney General)

For the Charging Party
Craner, Satkin & Scheer, attorneys
(John A. Craner, of counsel)

HEARING EXAMINER'S DECISION
ON MOTION FOR SUMMARY JUDGMENT

On March 6 and March 12, 2001, Amalgamated Transit Union, Local 819, AFL-CIO (ATU), filed an unfair practice charge and amended unfair practice charge against New Jersey Transit Bus Operations (NJTB). The charge, as amended, alleges that on March 1, 2001, New Jersey Transit unilaterally implemented an unwritten attendance policy at the Telephone Information Center (TIC). ATU specifically alleges: "Contrary to its prior practice of considering excused or unexcused absences, lateness and sickness as separate incidents, [NJTB] is combining all three and coming up with a numerical computation, the violation of which results in employees being given written warnings and suspensions." The

exhibits. N.J.A.C. 19:14-4.8. On September 20, 2002, the ATU filed a response, together with an affidavit, pursuant to an extension of time granted by the Chair. On September 25, 2002, NJT filed a reply to ATU's response.

On September 25, 2002, the Motion was referred to me for a decision. N.J.A.C. 19:14-4.8. On September 26, I advised the parties that the October 1 hearing was postponed to enable me to rule on the Motion.

* * * *

Summary Judgment will be granted:

if it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant . . . is entitled to its requested relief as a matter of law.
[N.J.A.C. 19:14-4.8(d)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995) specifies the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The factfinder must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." If that issue can be resolved in only one way, it is not a "genuine issue" of material fact. A motion for summary judgment should be granted cautiously -- the procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J.

Dept. of Human Services, P.E.R.C. No. 89-54, 14 NJPER 695 (¶19297 1988).

Applying these standards and relying upon the pleadings, I make the following:

FINDINGS OF FACT

1. ATU, Local 819 represents employees of New Jersey Transit Bus Operations' TIC.

2. The manager of the TIC, Macary Fils-Aime, compiled a chart listing all ATU unit employees assigned to the TIC from 1997 through September 2001; their status as full-time or part-time employees; the date(s) of all absence and lateness infractions; and the discipline(s) imposed. The chart also shows "date[s] of hearing," purportedly referring to each proceeding for each cited employee which resulted in a "discipline" precipitated by the enumerated "absences" and "lates." Some employees were variously absent and late; others were absent only or late only. Penalties generally ranged from warnings through 12-day suspensions; two terminations were "overturned." The chart also shows that before 2001, several employees were issued "warnings" before they were issued suspensions of one day or more than one day. Other employees were suspended without first receiving a "warning." Fils-Aime filed an affidavit asserting that the records show that NJT did not impose different standards of discipline for attendance infractions before and after March 1, 2001.

3. Michelle Roberts is a TIC employee represented by the ATU. The proffered chart shows that Roberts attended a hearing on June 16, 1997 at which NJT determined that she was absent 7 times for a total of 8 days and late 14 times for which she was assessed a "10-day final" suspension. At a hearing on October 20, 1997 for which she was cited for "overall attendance [deficiency]" Roberts was found to have been absent 4 times for a total of 6 days and late 22 times. The discipline imposed was "termination," which was "overturned." After another hearing on December 3, 1997, Roberts was again cited for "overall attendance." The chart specifies that she was absent 14 times for a total of 40 days and was late 40 times. The discipline imposed was "termination," which was "overturned at arbitration."

4. Etulai Ann Craig is employed by NJT in the TIC. She is also an ATU shop steward. Craig has filed an affidavit asserting in part that the "record" memorializing Roberts' attendance infractions is "totally untrue" and, that she was not absent "14 times totalling 40 days" between October and December 1997.

Craig also certified that beginning in 2001, NJT "implemented an entirely different system of attendance discipline." Specifically, NJT allegedly "began combining attendance occurrences with lateness and leaving-early-without-permission occurrences"; that any "combination of those three totalling to six would result in a warning; and thereafter a form of progressive discipline would be implemented for

each additional violation of the policy." According to Craig, "before 2001, NJT did not combine absences, lateness and leaving-early occurrences but viewed each separately." Nor had progressive discipline been imposed for such infractions before 2001, according to the certification.

5. On August 21, 2001, NJT Deputy Executive Director Stanly Rosenblum sent copies of a letter to ATU President Bernard Moore and Vice-President John Costa, confirming his discussion with them about "issues of concern with TIC staff." In a portion of his "recap" of their remarks, Rosenblum wrote:

You will draft a proposal for an attendance policy for our review and consideration. Until we receive this proposal and a new policy is finally adopted, current practice will continue. TIC staff will continue to be made aware of their status with regard to infractions in the current manner, which means they will receive a letter from management at their fifth infraction advising them that their next infraction could result in discipline. I fully expect, as I indicated to you, that every staff member will meet his obligation to come to work and arrive to work on time.

In line with the above, we will review specific discipline cases to ensure that the staff members were aware of the ramifications of their actions (performance, attendance, etc.) and should the record show that the employee was unaware of the requirements related to their performance or attendance, we will reconsider applied discipline.

[ATU attachment to certification].

ANALYSIS

The record shows that genuine issues of material fact persist. The parties submissions dispute the definition and

charge alleges that NJT did not negotiate over the change, violating 5.4a(5) and (1)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On June 26, 2001, a Complaint and Notice of Hearing issued.

On July 2, 2001, NJT filed an Answer, denying that a new attendance policy was adopted or implemented in March. It denies that a practice existed by which absences or latenesses were separated for disciplinary purposes.

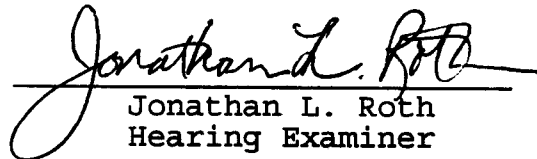
On November 15, 2001, the formal hearing date, the parties informally agreed to seek an alternate disposition of issues raised by the Complaint. The hearing was postponed by consent. On or about February 1, 2002, the ATU requested that the hearing not be rescheduled so that the parties could attempt an informal disposition. On April 29, 2002, the ATU requested that the hearing be rescheduled. On June 10, I issued an Order Rescheduling the hearing.

On August 19, 2002, NJT filed a Motion for Summary Judgment, together with a brief, supporting affidavit and

^{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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

existence of NJT's practice(s) in determining whether a TIC employee will be warned and/or suspended for attendance infractions. Nor is the record clear about any changes to a practice(s), if one existed. (Penalites for violating absenteeism policies are mandatorily negotiable. See, e.g., UMDNJ, P.E.R.C. No. 95-68, 21 NJPER 130 (¶26081 1995)). The moving party's multi-page attendance chart showing absences and lateness infractions does not resolve material and conflicting representations set forth in the affidavits. The affidavits dispute the veracity and significance of the chart. Nor does the Deputy Executive Director's letter prove whether NJT imposed different standards of discipline for attendance infractions before and after March 2001.

Accordingly, NJT has not shown that the facts warrant a judgment in its favor. Brill. The motion is denied.


Jonathan L. Roth
Hearing Examiner

DATED: December 11, 2002
Trenton, New Jersey