

I.R. No. 2006-7

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT CORPORATION  
(NEW JERSEY TRANSIT POLICE DEPARTMENT),

Respondent,

-and-

Docket No. CO-2006-067

NEW JERSEY TRANSIT SUPERIORS,  
FOP LODGE 37-FOP/NJ LABOR COUNCIL,

Charging Party.

SYNOPSIS

A Commission Designee restrains New Jersey Transit from changing the disciplinary review procedure regarding the minor discipline of New Jersey Transit Police. However, the Designee declines to restrain NJT from referring hearings on major discipline to the OAL for hearing.

The Commission Designee concluded that the FOP did not demonstrate a substantial likelihood of success on the merits of the case regarding major discipline. The decision in Division of State Police v. Maguire, 368 N.J. Super. 564 (App. Div), certif den., 181 N.J. 545 (2004), may obviate negotiations over who can conduct major disciplinary hearings.

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Appearances:

For the Respondent, Peter C. Harvey, Attorney General  
(Sharon Price-Cates, Deputy Attorney General)

For the Charging Party, C. Elston & Associates, LLC,  
(Catherine Elston, of counsel)

INTERLOCUTORY DECISION

On September 6, 2005, the New Jersey Transit Superiors, FOP Lodge 37-FOP/NJ Labor Council (FOP) filed an unfair practice charge with the Public Employment Relations Commission alleging that New Jersey Transit Corporation (NJT) violated 5.4a(1), (3), (5) and (6) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act),<sup>1/</sup> when on or about June 28, 2005

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<sup>1/</sup> 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 (continued...)

it unilaterally changed the disciplinary review procedures for major and minor disciplinary actions for NJT employees represented by the FOP in the New Jersey Transit Police Department.

The unfair practice charge was accompanied by an application for interim relief. An Order to Show Cause was executed on September 7, 2005, scheduling a return date for September 23, 2005. The parties submitted briefs and affidavits in support of their respective positions and argued orally on the return date. The FOP seeks a stay of certain hearings regarding major discipline scheduled before the Office of Administrative Law (OAL), and seeks to restrain NJT from sending additional cases to OAL and from sending minor disciplinary matters to a panel of hearing officers rather than one hearing officer. The FOP argues it demanded negotiations regarding the disciplinary review procedures but that NJT failed to respond. NJT argued that it changed the procedures to comply with Division of State Police v. Maguire, 368 N.J. Super. 564 (App. Div), certif den., 181 N.J. 545 (2004).

The following pertinent facts appear:

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1/ (...continued)  
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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

The NJT Police Department Chief is the agency head regarding police officer discipline, but NJT is not a civil service employer. Prior to April 2005, the disciplinary procedure for Department officers included serving an officer with charges. The officer was not given notice of the level of discipline at that time. The Department has not had disciplinary penalty guidelines. If the officer pled not guilty, the case (whether for major or minor discipline) was sent to a hearing officer, usually an attorney selected by the Chief. The hearing officer made a recommendation to the Chief which was either accepted or rejected. Officers learned of the level of discipline after the hearing. If the Chief's decision did not resolve the case and it involved minor discipline (defined by the parties as 5 days or less), the employee could grieve the discipline. (NJT is now challenging such grievances in the Chancery Division.) If the discipline was major, an employee could appeal the Chief's decision to the Appellate Division.

Prior to January 2005, the same attorney served as hearing officer for several years. From January through March 2005, however, a different attorney served as hearing officer, presumably assigned by the Chief. That hearing officer dismissed several disciplinary charges proffered against department members.

Subsequently, in April 2005, the Attorney General's office, without explanation, advised the FOP's attorney that all scheduled disciplinary hearings were stayed, and that some disciplinary matters would be transferred to the OAL for hearing. On or about June 28, 2005, Department Chief Bober told FOP President Lt. Leonard Lenahan that major disciplinary actions were being referred to OAL for hearing, and that minor disciplinary actions were to be heard by a three-member panel of captains. Lenahan notified Bober that such procedures should have been negotiated, and Bober expressed his willingness to negotiate the procedural changes, but never did.

On July 5, 2005, the FOP served Bober with a written demand to negotiate. Bober did not respond.

The Chief changed the disciplinary review procedures upon the Attorney General's advice to comply with its interpretation of Maguire. At least three disciplinary matters have been referred to the Office of Administrative Law (OAL). Two matters involving Officer Alan Garrison are scheduled for trial before an Administrative Law Judge (ALJ) on October 21, 2005. No trial is currently scheduled for a case involving Officer Thomas Springs.

#### ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations

and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

The FOP argues it met the interim relief standards because disciplinary procedures are negotiable, NJT did not dispute it unilaterally changed procedures, and because such changes have a chilling effect that cannot be fully remedied later. NJT argued that it is subject to the Administrative Procedures Act (APA), particularly N.J.S.A. 52:14b-2(b) and, therefore, Maquire preempted negotiations on disciplinary procedures for both major and minor discipline of NJT police.

N.J.S.A. 34:13A-5.3 requires an employer to negotiate with the majority representative before changing employees' working conditions, and specifically provides that disciplinary review procedures are mandatorily negotiable so long as they do not replace or are inconsistent with any alternate statutory appeal procedure. See City of Newark, I.R. No. 99-5, 24 NJPER 490 (¶29228 1998); Borough of Hopatcong, P.E.R.C. No. 95-73, 21 NJPER 157, 158 (¶26096 1995) recon. den. P.E.R.C. No. 96-1, 21 NJPER

269 (¶26173 1995) aff'd sub nom., Monmouth County, 300 N.J. Super. 272 (App. Div.1997); see also Borough of Mt. Arlington, P.E.R.C. No. 95-46, 21 NJPER 69 (¶26049 1995).

Here, NJT essentially argues that Maguire preempts negotiations over major discipline for its police because the Administrative Procedures Act provides the appeal procedure for such discipline. In Maguire, the State Police Superintendent suspended a trooper after accepting a hearing officer's recommendation. The hearing was conducted by an officer employed by the Division of State Police who is ultimately supervised by the Superintendent. The Court explained that an internal hearing officer could be influenced by Division policies not part of the record which could contribute to a feeling that the hearing officer was less than impartial. In contrast, the Court noted that ALJ's employed by the OAL are independent from the Division and their impartiality not likely to be questioned.

The Court concluded that the Division is subject to the APA, N.J.S.A. 52:14B-1 et seq., and that while the Superintendent as agency head had the right to hear the disciplinary matter, the use of a hearing officer in a contested case involving more than five days of discipline would violate N.J.S.A. 52:14F-8(b). Consequently, the Court reversed and remanded the case for a hearing to be conducted by an ALJ.

Maguire, however, did not rule that minor disciplinary hearings - which subject police only to written reprimands or suspensions not exceeding five days - was similarly subject to the APA. In fact, our Act at N.J.S.A. 34:13A-5.3 makes disciplinary review procedures for minor discipline negotiable.<sup>2/</sup>

Relying upon Academy Bus Tours v. N.J. Transit Corp., 263 N.J. Super. 353 (App. Div. 1993), NJT argues in its brief that it is subject to the APA, and therefore, relying upon Maguire, argued internal hearing officers cannot hear cases of major discipline, those cases involving suspensions over five days. NJT, however, does not provide any legal basis, or significant business justification, for changing the procedure for minor discipline.

Since the Commission has not had the opportunity to review Academy Bus Tours and Maguire, and since those cases can be read to support NJT's contention regarding hearings involving major discipline, the FOP has not demonstrated a substantial likelihood of success regarding whether the sending of major discipline to the OAL for hearing violates the Act. Accordingly, the FOP's application for interim relief to restrain NJT's referral of major disciplinary proceedings to the OAL is denied.

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<sup>2/</sup> Our Act literally defines minor discipline as less than five days, but the Court in Monmouth County et al. v. Communications Workers of America, et al., 300 N.J. Super. 272, 295 (App. Div. 1997), held that statute was meant to be "five days or less."



However, since Maquire does not apply to minor disciplinary actions, and since our Act makes minor disciplinary procedures mandatorily negotiable, the FOP has a substantial likelihood of success in proving their argument on minor discipline. Furthermore, employees in minor disciplinary actions required to proceed with their hearings before the three-member tribunal may suffer consequences which cannot be retroactively remedied by a Commission order at the conclusion of the processing of the unfair practice charge. See City of Newark. Therefore, irreparable harm may occur if interim relief is not granted.

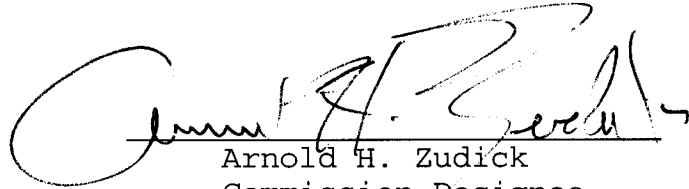
Based upon the above, I find that the FOP has demonstrated a substantial likelihood of success in prevailing on the merits of its charge regarding minor discipline. Accordingly, interim relief to cease NJT's referral of minor disciplinary proceedings to a three-member tribunal rather than a single hearing officer is granted.<sup>3/</sup> It's request for relief regarding major disciplinary procedures is denied.

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<sup>3/</sup> While NJT is restrained from changing the procedure for minor disciplinary hearings, the Chief (on behalf of NJT) has the managerial prerogative to select the individual to preside over the hearing. Borough of Mt. Arlington, P.E.R.C. No. 95-46, 21 NJPER 69 (¶26049 1995), and the Chief as agency head, also has the ultimate right to make the disciplinary determination. Borough of Hopatcong, P.E.R.C. No. 95-73, 21 NJPER 157 (¶2609 1995).

ORDER

New Jersey Transit is restrained from changing the disciplinary review procedure for the minor discipline of New Jersey Transit Police. The remainder of the FOP's application is denied.



Arnold H. Zudick  
Commission Designee

Dated: October 11, 2005  
Trenton, New Jersey