

P.E.R.C. NO. 2007-22

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

NEW JERSEY TRANSIT CORPORATION,

Respondent,

-and-

Docket No. CO-2006-067

FOP LODGE 37 (SUPERIORS),

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies New Jersey Transit Corporation's motion for summary judgment and FOP Lodge 37's cross-motion for summary judgment. The FOP filed an unfair practice charge alleging that NJT violated the New Jersey Employer-Employee Relations Act when it unilaterally decided to transmit discipline cases expected to warrant more than a five-day suspension to the Office of Administrative Law for hearing. The dispute now centers on the FOP's claim that the employer breached its obligation to negotiate notice provisions. The Commission finds that no statute or regulation preempts negotiations over the pre-disciplinary notice issues raised by the FOP and therefore denies NJT's summary judgment motion. At this juncture, the Commission cannot find that NJT refused to negotiate in good faith over the specific notice issues raised by the FOP and therefore denies the FOP's cross-motion. The Commission dismisses as moot the issue concerning the direction of minor disciplinary matters to a three-member hearing panel since NJT has rescinded that directive.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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In the Matter of

NEW JERSEY TRANSIT CORPORATION,

Respondent,

-and-

Docket No. CO-2006-067

FOP LODGE 37 (SUPERIORS),

Charging Party.

Appearances:

For the Respondent, Stuart Rabner, Attorney General  
(Sharon Price-Cates, Deputy Attorney General, on the  
briefs)

For the Charging Party, C. Elston & Associates, LLC,  
attorneys (Catherine M. Elston, on the briefs)

DECISION

\_\_\_\_\_This case comes to us by way of a motion and cross-motion  
for summary judgment. On September 6, 2005, FOP Lodge 37  
(Superiors) filed an unfair practice charge against New Jersey  
Transit Corporation ("NJT") after NJT unilaterally decided to  
transmit discipline cases expected to warrant more than a five-  
day suspension to the Office of Administrative Law ("OAL") for  
hearing.<sup>1/</sup> On May 26, 2006, NJT moved for summary judgment. On

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<sup>1/</sup> The charge alleges that the public employer violated the New  
Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et  
seq., specifically 5.4a(1) and (5), when it failed to  
respond to a request to negotiate disciplinary procedures  
for minor and major discipline, reduce to writing and sign a  
negotiated agreement over such procedures, and negotiate  
(continued...)

June 22, the FOP filed a response and cross-motion. It now appears that the dispute is limited to the FOP's claim that the employer breached its obligation to negotiate notice procedures with regard to the classification of a disciplinary matter as minor or major and with regard to the factors used in making such classifications.

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. N.J.A.C. 19:14-4.8(d); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). Following are the undisputed material facts.

Before approximately April 2005, superior officers facing discipline were served with notices of charges containing supporting specifications. They did not specify the penalty being sought. The notices included a deadline to enter a guilty plea or request a hearing. If the officer pled not guilty, the matter proceeded to an internal hearing within the department. For many years, the hearing officer was a lawyer retained by NJT. After a hearing, the hearing officer made a recommendation to the chief as to whether NJT had met its burden of proof. The chief then reviewed the recommendation and issued a penalty.

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1/ (...continued)  
written policies setting forth changes to disciplinary review procedures for minor and major discipline.

Around April 2005, the police chief directed the transmittal of "contested cases"<sup>2/</sup> to the OAL for hearings related to allegations expected to warrant more than a five-day suspension.<sup>3/</sup> The chief did not negotiate with the FOP over his decision to transmit those cases.

NJT does not have a disciplinary penalty schedule. Article XLIII, Section 3(b) of the parties' contract provides that "the chief shall prescribe rules and regulations for the conduct of the hearing and the rules and regulations."

Officers are still served with a notice of charges and specifications and given a deadline to enter a plea and request a hearing. The notice still does not mention the penalty being sought. A determination is later made whether a minor or major penalty will be sought. The record does not specify who makes that determination. If a minor disciplinary penalty is sought, the matter stays within NJT for a hearing. If a major penalty is

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<sup>2/</sup> N.J.S.A. 52:14B-2 defines a "contested case" as "a proceeding, including any licensing proceeding, in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing. . . ."

<sup>3/</sup> In merit system jurisdictions, major discipline is defined as removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. N.J.A.C. 4A:2-2.3. NJT is not a merit system jurisdiction.

sought, the matter is forwarded to the OAL for a hearing. Since the new procedures have taken effect, no officer has been advised in advance of receiving hearing dates whether the case will be heard internally or transmitted to the OAL.

On July 5, 2005, the FOP made a formal demand to negotiate over any procedural changes to departmental disciplinary procedures, whether for minor or major discipline. NJT did not negotiate in response to this demand.

The FOP does not dispute that NJT has a right to send disciplinary cases to OAL for hearing. More narrowly, it seeks to negotiate over being notified whether disciplinary charges will be classified as major or minor discipline and consequently heard by OAL or internally and over being notified of the criteria, standards or guidelines used in classifying matters as major or minor.

N.J.S.A. 34:13A-5.3 requires public employers to negotiate over proposed new rules and modifications of existing rules governing mandatorily negotiable employment conditions. Local 195, IFPTE v. State, 88 N.J. 393 (1982), states the test for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental

policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

This Commission and the courts have recognized that an explanation of the reasons behind an employer's personnel action intimately and directly affects employee work and welfare without significantly interfering with the employer's right to take the underlying personnel action. See New Jersey Transit, P.E.R.C. No. 2006-54, 32 NJPER 18 (¶9 2006) (union could arbitrate claim that contract required NJT to explain why police officers were removed as Field Training Officers); Camden Cty. Sheriff, P.E.R.C. No. 2004-46, 30 NJPER 33, 36 (¶10 2004) (holding mandatorily negotiable proposal requiring notice and specification of charges before officer is removed from assignment for disciplinary reasons); Borough of Oakland, P.E.R.C. No. 86-58, 11 NJPER 713, 714 n.4 (¶16248 1985) (statement of reasons for a transfer mandatorily negotiable). Cf. Dept. of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80, 91 (App. Div. 1981) (public employees are entitled to know the basis upon which they will be evaluated in order to conduct themselves accordingly

and know how a personnel decision was made). No statute or regulation is asserted to preempt negotiations over these notification issues. Thus, both of these pre-disciplinary notification issues are mandatorily negotiable.

NJT argues that the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., provides the standards for determining what matters may be transmitted to OAL and that therefore it need not negotiate such standards. We do not read the FOP's charge as seeking to negotiate over the standards. It seeks to negotiate over notice of the standards and notice of the penalty an employee faces.

NJT also argues that Article XLIII of the parties' contract governs internal disciplinary hearings. That article grants the police chief the power to "prescribe rules and regulations for the conduct of the hearing and the rules and regulations." The language is somewhat unclear, but it does not specifically address the notice issues that the FOP now seeks to negotiate.

Under these circumstances, we cannot find that NJT had no obligation to negotiate over the two notice issues. We therefore deny its motion for summary judgment.

As for the FOP's cross-motion, we note that the FOP's charge alleges that it demanded to negotiate over the implementation of separate procedures for contested disciplinary cases, either major or minor, and that NJT did not respond. NJT does not deny these allegations. However, it was not until the FOP filed its

brief in support of its cross-motion and in opposition to NJT's motion that the mandatorily negotiable notice issues were identified. Accordingly, at this juncture, we cannot find that NJT refused to negotiate in good faith over these specific issues and we therefore deny the FOP's cross-motion for summary judgment.

We note that the parties' contract expired on June 30, 2006. Negotiations now over the two mandatorily negotiable notice issues could affect the parties' need for further litigation over past conduct.

Finally, the charge alleged that the employer unilaterally decided to direct minor disciplinary matters to a three-member hearing panel instead of a single hearing officer. However, the employer has rescinded that directive. We therefore dismiss this claim as moot.

ORDER

The issue concerning the direction of minor disciplinary matters to a three-member hearing panel is dismissed as moot. NJT's motion and the FOP's cross-motion are denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners DiNardo, Fuller and Watkins voted in favor of this decision. Commissioners Buchanan and Katz were not present. None opposed.

ISSUED: October 26, 2006

Trenton, New Jersey