

P.E.R.C. NO. 2013-45

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT,

Petitioner,

-and-

Docket No. SN-2012-036

AMALGAMATED TRANSPORTATION UNION,
LOCAL 822,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of New Jersey Transit for a restraint of binding arbitration of a grievance filed by Amalgamated Transportation Union, Local 822. The grievance asserts that evidence obtained during an investigatory interview that led to the termination of a maintenance worker should be suppressed because the employee was denied union representation during the interview. The Commission holds that permitting the employee to have union representation during the interview would not interfere with NJ Transit's statutory mission to provide a coherent public transportation system in the most efficient and effective manner.

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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Appearances:

For the Petitioner, Jeffrey S. Chiesa, Attorney General
(Michael S. Rubin, Deputy Attorney General)

For the Respondent, Cohen, Leder, Montalbano &
Grossman, LLC, attorneys (Paul A. Montalbano, of
counsel)

DECISION

On January 18, 2012, New Jersey Transit (NJT) filed a scope of negotiations petition. NJT seeks a restraint of binding arbitration of a grievance filed by Amalgamated Transport Union, Local 822. The grievance asserts, among other things, that evidence obtained during an investigatory interview which led to the termination of a maintenance worker should be suppressed because the employee was denied union representation during the interview.^{1/} We decline to restrain arbitration.

^{1/} A copy of the grievance was not included in the record, however, copies of the reports from the first, second, and third step grievance hearings were included, and we
(continued...)

The parties have submitted briefs and exhibits. NJ Transit submitted a certification from its Deputy Chief and the ATU filed a certification from the subject employee. The following facts appear.

NJ Transit and ATU are parties to a collective negotiations agreement with a term of July 1, 2008 through June 30, 2010. The grievance procedure ends in binding arbitration.^{2/ 3/}

The employee certified that on June 3, 2008, he was called into his supervisor's office and directed to speak to two New Jersey Transit Police Department (NJTPD) officers. He certified that he asked twice for union representation and was told by the officers that such representation was not necessary. He further certified that he was told by the officers that money was missing from a bus and they saw a video of him going on the bus, and that on the basis of that interview, he was disciplined with termination.

1/ (...continued)
ascertain the nature of the grievance from those documents.

2/ NJT asserts in its brief that the grievance was previously arbitrated, however, the arbitrator did not render a decision and a new arbitrator has been appointed. The parties agreed to stay the arbitration pending this scope determination.

3/ NJT filed an application for interim relief on January 27, 2012, which was later withdrawn due to the parties agreement to stay the arbitration pending this scope determination.

According to NJPTD's initial investigation report, the garage where the alleged theft took place is equipped with surveillance cameras which recorded three employees boarding a bus parked for servicing that had a malfunctioning fare box. The supplemental incident report alleges that the total sum reported to be missing from the fare box was \$206.00 and that several employees were interviewed regarding the theft. The supplemental report also alleges that the employee admitted to stealing approximately thirty to forty dollars. He was then arrested, charged with theft and official misconduct, and read his Miranda rights.^{4/}

The ATU filed a grievance, asserting that the employee was wrongfully discharged and that the evidence obtained during the investigatory interview should be suppressed because the employee was denied union representation. The grievance was denied at all steps of the grievance process, and, on December 11, 2008, the ATU filed a request for binding arbitration. NJT's scope petition followed.

Our jurisdiction is narrow. Ridgefield Park Ed. Assn v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations.

^{4/} The evidence presented to us supports that the criminal charges did not result in anything other than the administrative termination of the employee's job.

Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the merits of the grievance.

This case is governed by the scope of negotiations standard set forth in New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 88-74, 14 NJPER 169 (¶19070 1988), rev'd 233 N.J. Super. 173 (App. Div. 1989), rev'd and rem'd 125 N.J. 41 (1991). In that case, we established the tests for determining mandatorily negotiable topics under the New Jersey Public Transportation Act, N.J.S.A. 27:25-1 et seq. ("NJPTA"), the legislation that established NJT and authorized the conversion of New Jersey's mass transit system from one of private ownership to one owned and operated by the State. 125 N.J. at 43. In deciding what scope of negotiations the NJPTA authorized, we rejected both the employer's argument that public sector negotiability tests exclusively applied and the unions' argument that private sector negotiability tests exclusively applied. Instead, we adopted this approach: an issue that settles an aspect of the employment relationship is mandatorily negotiable unless negotiations over that issue would prevent NJT from fulfilling its statutory

mission to provide a "coherent public transportation system in the most efficient and effective manner."

The Supreme Court approved this test and elaborated on it as follows:

[A]bstract notions of the need for absolute governmental power in labor relations with its employees have no place in the consideration of what is negotiable between government and its employees in mass transit. There must be more than some abstract principle involved; the negotiations must have the realistic possibility of preventing government from carrying out its task, from accomplishing its goals, from implementing its mission. All of the various rulings of PERC . . . have that theme. They look to the actual consequences of allowing negotiations on the ability of NJT to operate and manage mass transit efficiently and effectively in New Jersey. If negotiations might lead to a resolution that would substantially impair that ability, negotiations are not permitted. But, if there is no such likelihood, they are mandatory. It is the effect on the ability to operate mass transit that is the touchstone of the test, rather than someone's notion of what government generally should be allowed to unilaterally determine and what it should not.

[125 N.J. at 61]

NJT argues that the right to union representation is inapplicable for criminal investigations conducted by NJTPD, and that requiring NJTPD to provide union representation during criminal investigations interferes with NJT's statutory mission.

The ATU responds that an employee's right to union representation is not waived or otherwise made non-applicable when a public employer chooses to have its police authority conduct the investigation.

Over the years, we have addressed numerous cases dealing with whether employees are entitled to union representation during investigatory interviews conducted by public employers. Procedurally, those cases were generally initiated with the filing of an unfair practice charge which resulted in an evidentiary hearing where findings of fact, and evidence and credibility determinations were made by a Hearing Examiner. Those cases then came to us on appeal from a Hearing Examiner's report. Indeed, cases addressing whether employees are entitled to union representation during investigatory interviews are extremely fact sensitive and must be considered on a case by case basis. State Police, P.E.R.C. No. 2002-8, 27 NJPER 332 (¶32119 2001). However, here, because this case arose procedurally through the filing of a scope of negotiations petition, the only inquiry we must make is whether allowing the employee to have union representation during the investigatory interview conducted on June 3, 2008 would have prevented NJT from fulfilling its statutory mission to provide a coherent public transportation system and therefore render the grievance not legally arbitrable. We conclude that the answer to that question is no.

NLRB v. Weingarten, Inc., 420 U.S. 251 (1975) is the seminal case in the private sector that found that an employee is entitled to union representation during an investigatory interview that the employee reasonably believes may result in

discipline. We adopted the Weingarten rule in East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398, 399 (¶10206 1979), aff'd in part, rev'd in part, NJPER Supp.2d 78 (¶61 App. Div. 1980), and it was approved by our Supreme Court in University of Medicine and Dentistry of New Jersey and Committee of Interns and Residents, 144 N.J. 511 (1996). There are however the following conditions on the exercise of the Weingarten rule. First, the employee who is to be interviewed must request representation. Second, the interview must be investigatory. Third, the right to representation may not interfere with legitimate employer prerogatives. One such prerogative is to decide not to interview an employee at all if the employee insists upon representation; the employee must then choose between having an interview unaccompanied by a representative or having no interview. Fourth, while the employer cannot compel a representative to remain silent during an interview, it does not have a duty to bargain with the representative. A representative may assist the employee and attempt to clarify the facts, but may not obstruct the employer's right to conduct that interview or turn it into an adversarial contest.

We provide the above information regarding the Weingarten right for background information only. The arbitrator will assess the merits of the grievance and whether the employee's Weingarten right was triggered. Ridgefield Park. Again, the

only inquiry we make in resolving this scope determination is whether allowing the employee to have union representation would have prevented NJT from fulfilling its statutory mission to provide a coherent public transportation system in the most efficient and effective manner. This case involved alleged theft of a total of \$240.00 from a broken fare box. The nature of the investigation did not touch upon or interfere in any appreciable way with NJT's statutory mission. University of Medicine and Dentistry of New Jersey, 144 N.J. at 534 (finding that while a Weingarten right was triggered when an intern requested union representation at an investigatory interview that concerned alleged academic and medical misjudgments, that right did not and could not frustrate the University's purpose to make appropriate academic and medical decisions).

We reject NJT's argument that Weingarten rights never apply to interviews conducted by NJTPD because to allow such representation would frustrate the effectiveness of criminal interviews.^{5/} While NJT asserts that NJTPD is akin to a municipal or State police force, NJTPD's jurisdiction is limited to "police and security responsibilities over all locations and services owned, operated, or managed by the [NJT] corporation and its subsidiaries." N.J.S.A. 27:25-15.1(a). The nature of the

^{5/} The facts of Weingarten itself involved an employee who was accused of theft.

investigatory interview may have been criminal, but it resulted in an administrative termination of the employee's job. An investigatory interview conducted by the police arm of a public employer, as opposed to the public employer itself, is not, standing alone, a ground to render Weingarten protections inapplicable. In Re Carroll, 339 N.J. Super. 429 (App. Div. 2001) (even though sheriff's officer was granted use immunity during an internal criminal investigation interview, he should have been allowed to consult with attorney and union representative); see also Dept. of Human Services, P.E.R.C. No. 89-16, 14 NJPER 563 (§19236 1988) (finding a violation of the New Jersey Employer-Employee Relations Act when an employee interviewed by Human Services police was denied union representation where the employee had a reasonable basis to believe the information gathered at the interview was available for purposes of administrative discipline); see also U.S. Postal Service, 241 N.L.R.B. 141, 100 LRRM 1520 (1979) (finding that an employee interviewed by Postal Service inspectors and ultimately disciplined based on evidence obtained as a result of the criminal investigation was entitled to union representation).

ORDER

The request of New Jersey Transit for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed. Commissioner Bonanni was not present.

ISSUED: December 13, 2012

Trenton, New Jersey