

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT CORPORATION  
(MERCER),

Respondent,

-and-

Docket No. CI-2019-035

PAMELA L. WILLIAMS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission partially grants a motion of New Jersey Transit (NJT) for summary judgment on an unfair practice charge which alleges NJT, in connection with its disciplinary termination of the Charging Party's employment as a bus operator, denied the Charging Party due process and union representation and fired her unjustly; and which links the termination decision to an alleged argument (unrelated to discipline) between an NJT supervisor and the union president in a meeting prior to the termination decision, in violation of subsection 5.4a(3) of the Act. The Commission finds no basis in the record to conclude the Charging Party, a probationary employee, was denied due process or union representation. However, the Commission finds a hearing is required to determine whether the termination decision was substantially motivated by protected conduct during the meeting, specifically as to the Charging Party's allegations about what occurred between the NJT supervisor and the union president in that meeting.

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 Respondent, Matthew J. Platkin, Acting Attorney  
General of New Jersey (Diane L. Scott, Deputy Attorney  
General, on the briefs)

For the Charging Party, Pamela L. Williams, pro se

DECISION

On April 1, 2019, P.W. (Charging Party) filed an unfair  
practice charge (UPC or Charge) and an amended Charge against New  
Jersey Transit Corporation (Mercer) (NJT or Respondent), alleging  
NJT violated the New Jersey Employer-Employee Relations Act  
(Act), N.J.S.A. 34:13A-1 et seq., specifically subsections  
5.4a(2), (3), (4) and (5)<sup>1/</sup>, when, on December 26, 2018, it

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<sup>1/</sup> These provisions prohibit public employers, their  
representatives or agents from: "(2) Dominating or  
interfering with the formation, existence or administration  
of any employee organization"; "(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"; "(4)  
Discharging or otherwise discriminating against any employee  
(continued...)"

terminated her employment as a bus operator. As amended, the UPC alleges, among other things, that in connection with the termination decision the Charging Party: was denied due process; was not allowed to be represented by her union<sup>2/</sup>; was fired unjustly according to NJT's policies; and that while in a meeting immediately prior to the termination decision, an NJT supervisor and her union president had "a strong disagreement over other cases," and that "at the end of the disagreement" the supervisor looked at the Charging Party and said, "I've decided to terminate your employment," which the Charging Party believes "was done to prove" to the union president that the supervisor "was in control after they had argued so intently." As a remedy, the Charging Party seeks reinstatement and "everything they owe" her, including a \$6,000.00 sign-on bonus which, the Charge alleges, she never received. On February 9, 2021, the Director of Unfair

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1/ (...continued)  
because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act"; and "(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."

2/ In the section of the UPC form that asks whether a grievance was filed based upon the same facts alleged in or otherwise related to the Charge, the Charging Party wrote, "The union tried to represent me based on the Janis [sic] law as well as the union book," but the supervisor "wouldn't allow it."

Practices issued a Complaint and Notice of Pre-Hearing only on the UPC's alleged violations of subsection 5.4a(3) of the Act.<sup>3/</sup>

On February 22, 2022, NJT filed a motion for summary judgment, supported by a brief, a Statement of Material Facts Not in Dispute, exhibits and the certifications of: Charles Hellyer, Garage Manager at NJT's Hamilton Township Garage; Antoinette Williams, Inspector A-Vacation Relief; and Diane L. Scott, Deputy Attorney General. On March 14 the Charging Party filed a response in opposition to NJT's motion for summary judgment. On March 23 NJT filed a reply brief and exhibits, and on March 24 the Charging Party filed a sur-reply. The Charging Party's submissions were unaccompanied by certification(s) or exhibit(s).

We have reviewed the record, and we summarize the undisputed material facts as follows.

#### SUMMARY OF FACTS

1. NJT hired the Charging Party as a full-time bus operator commencing on October 11, 2018.
2. Under the terms of a collective negotiations agreement (CNA) between NJT and Amalgamated Transit Union, New Jersey State Council, Division nos. 540, 819, 820, 821, 822, 823, 824, 825, and 880 (Union)<sup>4/</sup>, the Charging Party became eligible for Union membership within 30 days after entering service with NJT, however the CNA also provides: "the 90-day

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<sup>3/</sup> We note that subsection 5.4a(1) will be violated derivatively when an employer violates another unfair practice provision, including subsection 5.4a(3).

<sup>4/</sup> The record includes a copy of a CNA in effect from July 1, 2010 through June 30, 2017, the terms of which continued in effect pending negotiations for a successor agreement.

probationary period agreed to by the employee on applying for a position with the Company will be recognized."

3. NJT's offer of employment, which the Charging Party executed on September 9, 2018, included, among other things, the following conditions: "After successfully completing the training period, you will become a probationary employee as defined by the contract"; "The first ninety (90) days of employment with NJ TRANSIT are considered to be a probationary period".
4. NJT's Standard Operating Procedures (SOP) Manual provides, among other things: "probationary employees are not covered by the [CNA's] grievance procedure and cannot appeal or challenge any disciplinary action"; "[t]he probationary period commences when the initial training period is complete"; and "[u]nder the Weingarten Rule, probationary employees may be represented by the union at any time . . . if the employee desires such representation". The SOP Manual also details limited disciplinary procedures afforded to probationary employees, in pertinent part as follows:
  - 1) Probationary employees are to be issued "see me slips" and have incidents recorded on incident reports as the normal custom for all employees.
  - 2) The union is to be notified that a "probationary employee meeting" is being scheduled for that employee and shall be allowed to represent the employee. Such representation cannot interfere with management's rights to investigate and conduct the hearing.
  - 3) The meeting and all paperwork generated shall be referred to as a "probationary employee meeting" not a first step hearing.
  - 4) Upon conclusion of the probationary employee meeting, unless the matter is held in abeyance, the probationary employee is to be notified of a decision and this determination must be written on the bottom of the incident report. . . . There is no appeal of a discipline rendered at a probationary employee meeting.

5. NJT's Transportation Employees Service Guide includes the following provisions:

110 - Reporting Off Sick

Employees shall personally report illness by telephone or in person to their Supervisor or Depot Master at the earliest time possible so that their work may be reassigned. Employees who fail to report their illness to the Supervisor or Depot Master at least 1 hour prior to their assignment may be charged with a miss.

311 - Conduct Unbecoming an Employee

Employees who are careless of the safety of themselves or others, indifferent in the performance of their duties or who commit acts of discourtesy, dishonesty, intemperance, insubordination, incivility, immoral conduct, fighting, gross carelessness, gross misconduct or harassment will be subject to discipline.

6. The Charging Party completed bus operator training on November 8, 2018, and was thereafter assigned to NJT's Hamilton Township Garage.
7. On December 24, 2018, the Charging Party, while still a probationary employee, was assigned to "roll call"<sup>5/</sup> at the Hamilton Garage from 12:30 pm to 5:30 pm. At some point during that shift, the Hamilton Garage Depot Master on duty, Antoinette Williams<sup>6/</sup>, assigned to the Charging Party a bus route that was scheduled to depart at 4:14 pm and return to the garage at 12:25 am. A discussion ensued between the

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5/ The record indicates that bus operators on "roll call" usually report to the garage, where they wait during their assigned hours to fill in as a bus operator should the need arise.

6/ As an Inspector A - Vacation Relief, Antoinette Williams fills in for Depot Masters and other titles when individuals holding such positions are on vacation or otherwise unavailable.

Charging Party and the Depot Master concerning the assigned route.

8. The parties differ as to whether and when the Charging Party "refused" the route assigned by the Depot Master and/or whether she had legitimate reasons not to take it. However, the following is not disputed: (a) the Charging Party told the Depot Master that she did not feel well; (b) the Depot Master told the Charging Party that if so, she should go home and take care of herself (or words to that effect) when the Charging Party asked if she should remain at the garage for the remainder of her "roll call" shift; (c) the Charging Party then left the garage; and (d) the assigned route was ultimately performed by bus operators other than the Charging Party.
9. The Depot Master certifies that she reported to garage management that the Charging Party had refused work and left early because she felt sick. The Depot Master subsequently spoke with the Hamilton Garage Manager, Charles Hellyer, relaying the same information.
10. The Depot Master certifies that after informing Hellyer about the incident, she had no further involvement with it, or with the decision to terminate the Charging Party's employment as a bus operator.
11. Hellyer certifies that after speaking with the Depot Master, he scheduled a probationary employee meeting with the Charging Party, to discuss her refusal of work as a possible violation of Rule 311 of the Transportation Service Guide, "conduct unbecoming."
12. On December 26, 2018, when the Charging Party reported for work, she was presented with a "See Me Slip" for her probationary employee meeting. The record contains a copy of an Employee Notice dated December 26, 2018, directing the Charging Party to "[r]eport to the office with Union representation in regards to the following matter: CONDUCT UNBECOMING - Refused Work."
13. Hellyer presided over the employee probationary meeting, which was attended by the Charging Party and Union President Kenneth Rice. Depot Master Antoinette Williams did not attend the meeting.
14. The record contains a copy of an "Employee's Incident Report" dated December 26, 2018. It bears Hellyer's stamped

signature and Rice's handwritten signature, the latter beside a handwritten notation, "Probationary Employee Meeting Discharge." The Incident Report also contains the following typed "Description and Remarks":

Inspector A, Antoinette Williams, gave [the Charging Party] assignment 47/603-613 due out at 4:14pm. [The Charging Party] asked for her check and was asked to come in to the depot office to get the assignment. [The Charging Party] was handed the paddle.<sup>7/</sup> While looking at the paddle Ms. A. Williams told her she could get something to eat before going out. At that time, [the Charging Party] stated she was going to have to take a "L." She was asked if she was refusing the work and she stated yes.

15. The December 26, 2018 probationary employee meeting is also detailed in the record in a document entitled "New Jersey Transit, Employee Performance System, First Step Hearing," dated April 2, 2019. This document describes the "offense" for which the Charging Party was discharged as "Refusing Work," and repeats the Incident Report's Description and Remarks as the "Facts for This Charge." It also contains the following information:

Grievant or Union's Response to the Facts  
Argument:

The operator stated she was sitting next to a cleaning cart and the chemicals must have affected her asthma and her throat was scratchy and she had tightness in her chest. She stated she was going to come in and see Antoinette and tell her such. She stated she was sick before receiving the assignment. I have always done what I was asked to do. I have come in early before to help out.

Antoinette told me not to worry about it and take care of myself. I went off the advice of another.

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<sup>7/</sup> The record indicates that a "paddle" is a physical copy of the schedule and major arrival points for a particular route.



ATU Local 540 President Ken Rice was present during the Probationary Employee Meeting. At the meeting he stated Company Policy term of action was Next Day Removal of Work. Mr. Rice is asking that the Company look at her record and have leniency.

Your Conclusion of Facts/Rule Violation:

Per Inspector A, Antoinette Williams, she asked [the Charging Party] to come into the Depot Office. A. Williams stated that there was no apparent issues at the time [the Charging Party] came into the office. A. Williams stated she gave [the Charging Party] the paddle and told her she could go get something to eat before the trip went out. A. Williams stated [the Charging Party's] entire demeanor changed at that point and that [the Charging Party] stated she couldn't do it and would have to take an "L." A. Williams also stated [the Charging Party] did not state she was sick until after she had given her the assignment.

During the Probation Employee Meeting, [the Charging Party] was asked if she went to the doctor. [The Charging Party] stated she went to an urgent care facility but it was crowded and she went home.. [The Charging Party] also stated she then went home and used her inhaler and took an allergy pill and went to bed. She stated she woke up he next morning and felt fine so she called the depot office and spoke to Steve Campbell, DM-C, and was instructed to she Chuck Hellyer on Wednesday at 9:00 am.

No Doctor's note was provided to back-up any claimed illness. The operator was assigned work and refused the work by the Depot Master.

The operator is in her 90-day probationary period,

Discipline: Consider Severity of Offense or Prior Records:

Discharge.

This employee is probationary and as such the discipline is final and cannot be appealed.

16. The Charging Party filed her amended UPC on April 1, 2019, alleging as follows:

I, [the Charging Party] was separated from employment with NJ Transit on 12/26/2018. The reason for termination is as follows: on 12/24/2018 I presented myself to work with a report time of 12:30 pm. At or around 1:40/2:00 pm I went to my Depot Master Antoinette Williams to let her know I wasn't feeling well. I explained to her that my chest felt tight and I was wheezing and I asked her what should I do, at that time she stated, "I was just about to give you a work assignment[,] " and I said[,] "I can't safely operate a bus with the way I'm feeling[,] " she said "go home and take care of yourself[.]" I asked ["are you sure I should leave[,] " and she responded[,] "go take care of yourself[,] " and I left.

However, after leaving I took a Benadryl [and] as I got closer to home stop[ped] at the urgent care but they were crowded so I went home and laid down. When I woke up the next day 12/25/2018 I was feeling better so I called to let them know I would be returning to work for my work assignment[,] and I was told not to come in and that I was taken off the schedule[,] and that I should report on 12/26/2018 at 9:00 am and I needed to see the supervisor.

I reported on 12/26/18 as I was told only to find out I was fired. I was never given due process[.] Nor was I allowed to be represented by the union[.] I was an exceptional employee. I'd never been late[.] Never been coached and I was fired unjustly according to their policies.

While sitting in the conference room Mr. Charles Hellyer[,] NJ Transit supervisor[,]

and Union President Kenn[e]th Rice had a strong disagreement over other cases[,] and at the end of the disagreement Mr. Charles Hellyer looked at me and said[,] "I've decided to terminate your employment.["] I believe this was done to prove to Mr. Rice that he was in control after they had argued so intently.

We find that the record contains no certified facts, documents or other evidence from which we may derive undisputed facts material to the Charging Party's allegation, in her amended Charge, that during the probationary employee meeting, Hellyer and Rice had "a strong disagreement over other cases," and that "at the end of the disagreement" Hellyer looked at the Charging Party and said, "I've decided to terminate your employment," which the Charging Party alleges "was done to prove" to Rice that Hellyer "was in control after they had argued so intently." Nor does the record contain any legal argument regarding these allegations.

#### STANDARD OF REVIEW

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. 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). N.J.A.C. 19:14-4.8(e) provides:

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 that the movant or cross-movant is entitled to its requested

relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

In determining whether there exists a "genuine issue" of material fact that precludes summary judgment, we 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 fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540. We "must grant all the favorable inferences to the non-movant." Id. at 536. No credibility determinations may be made and the motion must be denied if material factual issues exist. N.J.A.C. 19:14-4.8(e); Brill, Judson, supra. The summary judgment procedure is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 183 (App. Div. 1981), certif. denied, 87 N.J. 388 (1981); UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

#### ARGUMENTS OF THE PARTIES

NJT argues, in sum, that we should grant it summary judgment because the Charging Party cannot demonstrate that she was not a probationary employee when she refused work. NJT argues that, as a probationary employee, the Charging Party had no contractual right to the formal grievance structure, which concludes in final and binding arbitration. Nevertheless, NJT asserts that the

Charging Party was afforded Weingarten<sup>8/</sup> rights, that is, the opportunity to be heard and the evidence evaluated. NJT further contends that its decision to terminate the Charging Party's employment was lawful and should be upheld.

In opposition to NJT's summary judgment motion, the Charging Party asserts that in compliance with the NJT Employees Service Guide's rule 110 - Reporting Off Sick, she informed the Depot Master of her medical issue between 1:30 and 2:00 pm, when she complained of chest pains and shortness of breath and stated that she could not safely drive a bus. The Charging Party asserts that the Depot Master responded, "go home and take care of yourself," and when the Charging Party asked, "are you sure," the Depot Master responded, "Yes." The Charging Party further asserts that when she was just about to be given a paddle for the route, she responded, "I'm not feeling well and I cannot safely drive the bus." The Charging Party also maintains that she was not offered medical attention despite her complaint of chest

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<sup>8/</sup> An employee has a right to request a union representative's assistance during an investigatory interview that the employee reasonably believes may lead to discipline. This principle was established in the private sector by NLRB v. Weingarten, 420 U.S. 251 (1975), and is known as a Weingarten right. It also applies in the New Jersey public sector. UMDNJ and CIR, 144 N.J. 511 (1996); State of New Jersey (Dept. of Treasury), P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001).

pains,<sup>9/</sup> and in an effort to make it home she took a Benadryl to stop her shortness of breath as she did not have her rescue inhaler. The Charging Party further contends: she did not refuse any work assigned to her; her work record speaks for itself; she never called out; has never been late; and has never been insubordinate.

In reply, NJT argues, in essence, that the Charging Party's opposition is not credible. NJT asserts there is a discrepancy between what, it contends, the Charging Party alleges regarding the "hours she was on the job" on December 24, 2018, and NJT's payroll records. NJT asserts that its payroll records, as contemporaneous business records, are accurate and reliable, and they state that she was paid for 2.45 hours of work, as she worked from 12:30 pm to 3:15 pm, not from 12:30 pm to 1:40/2:00 pm, which NJT contends is what the Charging Party stated. NJT asserts its payroll records are consistent with the Depot Master's certification that at "approximately 3:10 pm," she needed a bus operator to fill a route, and assigned it to the Charging Party. NJT argues that, assuming the Charging Party "left work" between 1:40 pm and 2:00 pm, she would have been paid for approximately 1.5 - 2.00 hours that she did not work. NJT

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9/ The Charging Party cites the NJT Employees Service Guide's rule 112 - Injury On Duty, which addresses treatment for on-the-job injuries by a physician approved by NJT's Medical Services Department. A copy of this rule is not in the record.

argues the Charging Party was required to report this error (overpayment) and arrange to repay it, which she has not done. Lastly, NJT contends that the Charging Party speciously maintains that she suffered an "on the job incident," and that this must be rejected as an embellishment of the facts.

In her sur-reply, the Charging Party reiterates the assertions in her opposition to NJT's summary judgment motion. The Charging Party also states that, according to her memory, her interaction with the Depot Master took place between 1:30 - 2:45 pm on December 24, 2018. The Charging Party argues that if her timing was slightly off (presumably referring to her memory of the event), it was justified considering she was sick, and due to how long it has been. The Charging Party reiterates that she should have been given medical attention like any other employee in times past, present and future. The Charging Party contends that she was terminated because she got sick on the job and was not given medical attention.

#### ANALYSIS

Viewing the undisputed material facts in a light most favorable to the non-moving party, we find that NJT is entitled to relief as a matter of law with respect to the Charging Party's claims relating to the events of December 24, 2018 (the job-

performance-related events)<sup>10/</sup>. However, we find that NJT is not entitled to summary judgment on the Charging Party's allegations about what occurred in the probationary employee meeting on December 26, 2018; specifically, her claim that Hellyer's decision to terminate her employment had to do with the fact that Hellyer and Rice, during the probationary employee meeting, allegedly got into a "strong disagreement over other cases," and that the termination "was done to prove" to Rice that Hellyer "was in control after they had argued so intently." In support of its summary judgment motion, NJT did not address these allegations at all. Accordingly, we are permitting a hearing to allow the Charging Party an opportunity to meet her burden of proving, by a preponderance of the evidence, her allegations as to the December 26, 2018 meeting.<sup>11/</sup> Those allegations present material issues of fact not susceptible to summary disposition. We add the following.

In a case relied upon by NJT, Amalgamated Transit Union, Local 880 v. New Jersey Transit Bus Operations, Inc., 200 N.J.

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<sup>10/</sup> While we make no determination as to the factual accuracy of these allegations, we find they do not independently support the 5.4a(3) charge alleged by this probationary employee.

<sup>11/</sup> N.J.A.C. 19:14-6.8 provides: "The charging party shall prosecute the case and shall have the burden of proving the allegations of the complaint by a preponderance of the evidence. The respondent shall have the burden of establishing any affirmative defenses in accordance with law."



105 (2009), the New Jersey Supreme Court reversed the appellate court's vacation of a grievance arbitration award that had been upheld by a trial court as being reasonable, and reinstated an arbitration panel's decision that a probationary employee of NJT could not access the grievance procedure in a CNA to dispute his disciplinary termination as a bus operator.

The CNA in Amalgamated Transit Union, as here, stated that the "90-day probationary period agreed to by the employee on applying for a position with the Company will be recognized." Id., at 109. The arbitration panel granted the employer's motion to dismiss a union grievance challenging the termination decision, reasoning that the CNA's language afforded the grievant access to the CNA's grievance procedure "only if he successfully completes the probationary period," and the employer terminated the grievant's employment before he had completed the probationary period. Id., at 111-112. The arbitration panel, among other things, interpreted the CNA as incorporating the 90-day probationary period outlined in the individual employment applications which are signed by employees when accepting employment, as occurred here. Id., at 122, n.5. The Supreme Court found the panel's conclusion "that probationary employees do not have the right to grieve," based upon its interpretation of the CNA and the documents found to be incorporated therein, was a "reasonable determination [that] must stand." Id. at 122.

Here, in opposing NJT's summary judgment motion, the Charging Party, consistent with her charge, contends that NJT's decision to terminate her employment was unjustified under the circumstances. However, in support of its motion, NJT presented evidence which shows that the Charging Party was, at all relevant times, a probationary employee within the meaning of: the relevant CNA; NJT's offer of employment which the Charging Party signed; and associated NJT rules.

NJT's evidence also shows that the Charging Party was afforded the limited disciplinary procedures for probationary employees under that contract, offer of employment and rules. This included being issued a "see me slip" directing her to "[r]eport to the office with Union representation," which was followed by her "probationary employee meeting" with Hellyer on December 26, 2018. The record also shows that Rice, the Union's President, attended the meeting, at which both he and the Charging Party were allowed to speak, consistent with her Weingarten rights.

In her opposition to summary judgment, the Charging Party neither disputes this record nor presents evidence or argument to the contrary. The Union here did not seek to grieve the Charging Party's termination, consistent with the New Jersey Supreme Court's decision in Amalgamated Transit Union, 200 N.J. 105 (2009). On this record, we have no basis to conclude that the

Charging Party was due any process other than that which NJT undisputedly provided to her, or was denied Union representation, in connection with the termination decision at issue. However, the Charging Party has also alleged facts about what occurred between Hellyer and Rice during the probationary employee meeting. Whether those allegations, if true, support the Charging Party's 5.4a(3) claim is a question that is distinct from the Charging Party's unsupported claims that she was denied due process and Union representation.

N.J.A.C. 19:14-2.1(a) requires that after a charge has been processed, "if it appears to the Director of Unfair Practices that the allegations of the charge, if true, may constitute unfair practices on the part of the respondent," the Director shall issue a complaint. Id. (emphasis added). Here, the Director found the Charging Party met the complaint-issuance standard only as to the question of whether the respondent, by any or all of the conduct alleged in the charge, violated subsection 5.4a(3) of the Act.

That subsection, as noted supra, prohibits public employers, their representatives or agents from "[d]iscriminating 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." In other words, the Director issued a complaint because he found that the

allegations, if true, may constitute discrimination in regard to the Charging Party's exercise of rights guaranteed by the Act.

In re Bridgewater Tp., 95 N.J. 235, 244 (1984), sets forth the elements that a charging party must prove to establish a violation of 5.4a(3). Under Bridgewater, no violation will be found unless the charging party has proved, 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. See also, N.J. State Judiciary, P.E.R.C. No. 2014-84, 41 NJPER 43 (¶11 2014) (denying summary judgment on 5.4a(3) and derivative a(1) charge, finding material facts were in dispute regarding union's allegations of retaliation for protected conduct).

Here, during the probationary employee meeting at issue, the Charging Party was exercising rights guaranteed by the Act, specifically her Weingarten rights, while being represented by Rice during the meeting. See n.7, supra. However, whether a substantial or motivating factor in the termination decision was Hellyer's desire "to prove" to Rice that Hellyer "was in control" after their allegedly "strong disagreement about other cases" (i.e., that Hellyer's decision was motivated by hostility towards

protected conduct), or whether such a disagreement even occurred, as the Charging Party alleges, simply cannot be established from the facts on record at this juncture in this case.

Therefore, a hearing is required to determine whether the termination decision was substantially motivated by protected conduct during the probationary employee meeting. N.J. State Judiciary, supra, citing, generally, Pressler and Verniero, Current N.J. Court Rules, comment to R. 4:46-2, p. 1828 (2014) (summary judgment should not ordinarily be granted where an action or defense requires determination of a state of mind or intent such as bad faith). Accordingly, we deny NJT's motion for summary judgment of the Charging Party's 5.4a(3) charge with respect to the alleged conduct of Hellyer during the probationary employee meeting, and his alleged motive for same.

#### ORDER

New Jersey Transit's motion for summary judgment is granted on the Charging Party's claims related to the events of December 24, 2018. NJT's motion for summary judgment is denied as to the Charging Party's allegations that Hellyer's alleged conduct during the probationary employee meeting on December 26, 2018 violated N.J.S.A. 34:13A-5.4a(3) and (1) derivatively.

We transfer this matter to the Director of Unfair Practices for further processing consistent with this decision.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Jones, Papero and Voos voted in favor of this decision. None opposed. Commissioner Ford was not present.

ISSUED: May 26, 2022

Trenton, New Jersey