P.E.R.C. NO. 94-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT BUS OPERATIONS, INC.,

Respondent,

-and-

Docket No. CO-H-93-51

AMALGAMATED TRANSIT UNION, DIVISION 824,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Amalgamated Transit Union, Division 824 against New Jersey Transit Bus Operations, Inc. The charge alleged that NJT violated the New Jersey Employer-Employee Relations Act by designating Division 824's president as an employee's representative at a first step grievance hearing and refusing to permit a Division 824 shop steward to represent the employee and testify on his behalf. The Commission finds that this single allegation does not represent anything more than an alleged breach of contract. This dispute was over a single incident, based on operational needs and presumably curable through the subsequent steps of the grievance procedure.

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AMALGAMATED TRANSIT UNION, DIVISION 824,

Charging Party.

Appearances:

For the Respondent, Fred De Vesa, Acting Attorney General (Laurie S. Szubin, Deputy Attorney General)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen, attorneys (Arnold S. Cohen, of counsel)

DECISION AND ORDER

On August 5, 1992, Amalgamated Transit Union, Division 824 filed an unfair practice charge against New Jersey Transit Bus Operations, Inc. The charge alleges that NJT violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2) and (5),[1/] by designating Division 824's president as an employee's representative at a first step grievance hearing and refusing to permit a Division 824 shop

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1/ These subsections 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. (2) Dominating or interfering with the formation, existence or administration ofany employee organization. (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.

steward to represent the employee and testify on his behalf. NJT's representative claimed at the time that the shop steward had a bus run and there was not sufficient time to find an employee to take his run.

On November 13, 1992, a Complaint and Notice of Hearing issued. NJT filed its Answer on December 17, reserving the right to raise defenses by motion.

On February 3, NJT filed a motion for summary judgment with supporting exhibits. The Chairman referred the motion to Hearing Examiner Alan R. Howe. Division 824 opposed the motion.

On May 20, 1993, the Hearing Examiner recommended that the motion be granted and the Complaint dismissed. H.E. No. 93-25, 19 NJPER 362 (¶24163 1993). He found that because the parties' contract contained a self-executing grievance procedure with binding arbitration, the grievance procedure itself offered an opportunity to cure any defect in a prior step.

On June 3, 1993, Division 824 filed exceptions.[2/] It claims that the Hearing Examiner erred by disregarding a longstanding past practice of having Division 824 designate the grievant's representative, and by relying on precedent concerning self-executing grievance procedures which is allegedly not relevant to the past practice. It further claims that if we deem that

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2/ Division 824 claims that the motion should not have been considered because NJT did not provide a supporting affidavit. NJT relies on the facts as alleged in the charge and therefore no further affidavit is required.

precedent to be relevant, we should reconsider it because it encourages an intransigent employer to bypass the grievance procedure. On June 9, Division 824 supplemented its exceptions.

On June 10, 1993, NJT filed a reply incorporating its reply brief on the motion.[3/] It urges us to sustain our holdings that, when a grievance procedure is self-executing and culminates in binding arbitration, an employer's refusal to respond to a grievance or its improper treatment of a grievance at an intermediate step of the grievance procedure, in and of itself, is not an unfair practice.

We have reviewed the record. We incorporate the Hearing Examiner's interim findings of fact (H.E. at 3-5) which are undisputed for purposes of deciding this motion.

Summary judgment may 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); see also Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).

The first step of the parties' negotiated grievance procedure provides:

3/ Although NJT has stipulated to the facts in the charge, it reserves its right to maintain that at some point in the grievance hearing, the shop steward was assigned to represent the employee.

> Such dispute or grievance is to be taken up between the employee and the Union representative and the supervisor, foreman, or department head.

Division 824 alleges that there was an unbroken past practice of having the Division's president designate the grievant's representative. It further alleges that at the hearings, the union representative, the grievant, and any witnesses are permitted to testify and the representative can also make contractual arguments. It claims that in this case, NJT repudiated that practice by refusing to allow the shop steward to represent the grievant.

In State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), we held that a mere breach of contract is not an unfair practice, but a specific claim that an employer has repudiated an established term and condition of employment may be litigated in an unfair practice proceeding pursuant to subsection 5.4(a)(5). A claim of repudiation may be supported by a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it or by factual allegations indicating that the employer has changed the parties' past and consistent practice in administering a disputed clause.

Here the contract clause does not specify that the union has a right to choose a representative at a grievance hearing or to present testimony at a hearing. Instead those rights are defined by the parties' practice.

In this case there is a single allegation of a supervisor refusing to permit a shop steward to represent a grievant because the supervisor did not have sufficient time to find another employee to

take the steward's bus run. The supervisor stated that Division 824's president could handle the grievance instead. He did so.

We do not believe that this incident represents anything more than an alleged breach of contract. Human Services. NJT has not announced that it will ignore Division 824's right to choose its own grievance representatives, nor has it refused to honor a clear contract provision. This dispute is over a single incident, based on operational needs and presumably curable through the subsequent steps of the grievance procedure. Accordingly, we find that NJT's conduct in this case did not violate subsection 5.4(a)(1) or (5).

Division 824 also alleged a violation of subsection 5.4(a)(2). There is no evidence of a refusal to accommodate any reasonable attempt by Division 824 to protect its right to select its own representative for adjusting grievances. The hearing could have been postponed until the steward was available, but there is no evidence that Division 824 requested that it be postponed. Accordingly, we dismiss the subsection 5.4(a)(2) allegation as well.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: September 24, 1993
Trenton, New Jersey
ISSUED: September 24, 1993

H.E. NO. 93-25

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-93-51

AMALGAMATED TRANSIT UNION, DIVISION 824,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission grant the Respondent's Motion for Summary Judgment since the undisputed facts raised by the affidavits and other papers satisfy the Commission's standard for the grant of such a motion. The Charging party sought to establish that the conduct of the Respondent's representatives at a First Step grievance hearing was violative of the grievant's rights. However, given the fact that the contract contained a self-executing grievance procedure with binding arbitration, a legion of Commission decisions have held that each subsequent step in the grievance procedure offers an opportunity to cure any defect in the prior step.

A Hearing Examiner's Decision on a Motion for Summary Judgment is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 93-25

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AMALGAMATED TRANSIT UNION, DIVISION 824,

Charging Party.

Appearances:

For the Respondent,
Robert J. Del Tufo, Attorney General
(Laurie S. Szubin, Deputy Attorney General)

For the Charging Party,
Balk, Oxfeld, Mandell & Cohen, attorneys
(Arnold S. Cohen, of counsel)

HEARING EXAMINER'S DECISION
ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on August 5, 1992, by Amalgamated Transit Union, Division 824 ("Charging Party" or "824") alleging that the New Jersey Transit Bus Operations, Inc. ("Respondent" or "NJT") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that NJT and 824 are parties to a collective agreement, effective July 1, 1990 to June 30, 1993, which provides for a First Step in the grievance procedure between the employee and an 824 representative; 824 represents

employees at the Howell Garage; a First Step grievance hearing was scheduled for July 23, 1992 at 2:05 p.m., regarding an unreported accident by one James B. Lynch; an 824 shop steward, Stephen J. Dorsey, was designated to represent Lynch and present testimony but an NJT representative, Carl Pulaski, refused to permit Dorsey to do so, claiming that he, Pulaski, did not have sufficient time to fill Dorsey's bus run; NJT representative Pulaski next stated that 824's President, Paul Smisek, could handle the grievance on behalf of Lynch, which Smisek did but, as a result, Lynch was disciplined; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (2) and (5) of the Act.[1/]

A Complaint and Notice of Hearing was issued on November 13, 1992. A hearing was scheduled for February 9, 1993 in Trenton, New Jersey. The Respondent filed its Answer on December 17, 1992, in which it reserved the right to raise defenses by motion at the time of the hearing or before the hearing in this matter. On February 3, 1993, counsel for NJT filed a Motion for Summary Judgment with the Chairman, which was referred to me on February 4th. On February 8th, I held a telephone conference call with

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1/ These subsections 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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."

counsel for the parties, in which I advised them that the hearing for February 9th would be adjourned, pending my disposition of the Respondent's Motion for Summary Judgment. On the same date, counsel for 824 submitted a letter Memorandum in Opposition to the Respondent's Motion for Summary Judgment, which, by agreement, was supplemented on March 1, 1993. Thereafter, the Respondent filed its opposition to the submissions of the Charging Party under date of March 26, 1993 and there the matter stands for disposition.

* * * *

The Respondent, in its initial Motion for Summary Judgment, attached two letters but no affidavits. However, whether or not the Respondent, as the moving party on a Motion for Summary Judgment, has attached affidavits is irrelevant since our rule [N.J.A.C. 19:14-4.8(b)] provides that a motion for summary judgment may proceed with or without affidavits.

Based upon the moving and opposing papers, I make the following:

INTERIM FINDINGS OF FACT

1. New Jersey Transit Bus Operations, Inc. is a public employer within the meaning of the Act, as amended, and the Amalgamated Transit Union, Division 824 is a public employee representative within the meaning of the same Act.

2. Section 1, Article A, of the parties' collective negotiations agreement, effective July 1, 1990 through June 30, 1993, provides that:

> First: Such dispute or grievance is to be taken up between the employee and the Union representative and the supervisor, foreman, or department head...(p. 2).

The parties' agreement then provides for a "self-executing" grievance procedure, beginning with the Second Step, which provides for a waiver of that Step and on to the Third Step, based upon the availability of NJT representatives. Following a like waiver of the Third Step, either party is permitted to refer the dispute to final and binding arbitration upon request.

3. 824 represents employees at the Howell Garage where the Garage supervisor is Carl Pulaski. At 2:05 p.m., on July 23, 1992, a First Step grievance hearing was scheduled regarding the allegation that unit member, James B. Lynch, had failed to report an accident. Specifically, he had been charged with four violations in connection with an unreported accident on the morning of July 8, 1992. These four violations were subsequently been reduced to a single offense, that of a "chargeable accident."

4. Lynch had previously been directed to complete a written "Occurrence Report" in connection with the above incident and, both orally and in writing, he denied having been involved in an accident.

5. In support of Lynch, Stephen J. Dorsey, the 824 shop steward, claimed that he had been present on the bus with Lynch on July 8, 1992 and that he had not witnessed any accident. Dorsey completed an "Employee's Witness and Information Report" confirming his oral statements that he had no knowledge of any alleged accident.

6. Dorsey had been designated to represent Lynch at the First Step hearing. Dorsey also intended to present testimony on behalf of Lynch at the hearing, in accordance with past practice, but he was refused to do so by Pulaski. This refusal was based upon Pulaski's decision, after seeking a replacement for Dorsey, that he lacked sufficient time to fill Dorsey's run, which was scheduled to depart at 2:27 p.m.

7. Pulaski stated that Paul Smisek, 824's President, could handle the grievance on behalf of Lynch. Smisek did so. 824 failed to raise the denial of representation by Dorsey or his testimony as an issue at the subsequent 2nd or 3rd Step hearings. Lynch received an eight-day suspension as a result of the grievance hearing.[2/]

8. Lynch's grievance was pursued through the grievance procedure with 824 seeking arbitration of Lynch's grievance as of August 4, 1992 and January 29, 1993.

* * * *

ANALYSIS

Standard Applicable to a
Motion For Summary Judgment

The standard which the Commission utilizes in deciding whether or not to grant a motion for summary judgment is governed by N.J.A.C. 19:14-4.8(d), namely, "...If it appears from the pleadings, together with the briefs...and other documents filed, that there

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2/ NJT, in its initial submission of February 2, 1993, and in its final submission of March 26, 1993, appears to concur with the facts as found above.

exists no genuine issue of material fact and the movant ... is entitled to its requested relief as a matter of law..." (emphasis supplied), then summary judgment may be granted and the requested relief ordered.

The Commission has, in many cases, followed the applicable New Jersey Civil Practice Rule (R.4:46-2) and a leading decision of the New Jersey Supreme Court, Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954), in deciding motions for summary judgment under N.J.A.C. 19:14-4.8. Both the Civil Practice Rule and Judson apply the same standard.

"Material facts" are those which tend to establish the existence or non-existence of an element of the charge or of a defense that is derived from controlling substantive law. See Lilly, Introduction to the Law of Evidence [West Publishing Co., 2d ed. (1978) at p. 18] and McCormick on Evidence [West Publishing Co., 2d. ed. (1978) at p. 434].

But summary judgment is to be granted with extreme caution. The moving papers must be considered in the light most favorable to the opposing party, all doubts must be resolved against the movant, and the summary judgment procedure may not to be used as a substitute for a plenary hearing: State of N.J. (Human Services), P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988), citing Baer v. Sorbello, 177 N.J. Super. 182, 185 (App Div. 1981); and Essex Cty. Ed. Services Comm'n., 9 NJPER 19 (¶14009 1982).

Given The Fact Of A Self-Executing Grievance Procedure In The Parties' Collective Negotiations Agreement, The Motion Of NJT For Summary Judgment Must Be Granted

I am left with no alternative but to grant NJT's Motion for Summary Judgment. This is based upon the critical fact that the contract between the parties clearly provides for a self-executing grievance procedure, culminating in binding arbitration. The proof that the grievance procedure is self-executing lies first in the Second Step which provides for a waiver of that Step if it is not consummated in a timely fashion. Likewise, a waiver provision appears in the Third Step, following which either party may proceed to final binding arbitration upon request. Plainly, this contractual grievance procedure contains all of the elements of the self-executing grievance procedures found in many decisions of the Commission.

For example, in New Jersey Transit Bus Operations, Inc., D.U.P. No. 87-14, 13 NJPER 383 (¶18154 1987), the same employer involved herein, the Director found that a nearly identical grievance procedure was self-executing and ended in binding arbitration. He restated the rule that: "...it is not an unfair practice for the employer to fail to act at an intermediate step of the grievance procedure. City of Trenton, D.U.P. No. 87-7, 13 NJPER 99 (¶18044 1986), Township of Rockaway, D.U.P. No. 83-5, 8 NJPER 644 (¶13309 1982); Rutgers University, D.U.P. No. 82-28, 8 NJPER 237 (¶13101 1982); Essex County Voc. School Board of Education, D.U.P.

No. 77-2, 2 NJPER 372 (1976); Englewood Board of Education, E.D. No. 76-34, 2 NJPER 175 (1975)..." [13 NJPER at 384].

The most recent decision on the subject is that of Wayne Board of Education, D.U.P. No. 92-9, 18 NJPER 105 (¶23050 1992) where the Director repeated that an employer's refusal to respond to a grievance, "...or its improper treatment of a grievance at an intermediate step... in and of itself, is not an unfair practice, when the contract provides for a self-executing grievance procedure which culminates in binding arbitration..." [citing the various prior decisions above]. In Wayne, the contractual grievance procedure permitted the Association, if not satisfied with the results at any step of the grievance procedure, to simply proceed to the next step, which the Association did when it filed for binding arbitration [18 NJPER at 105, 106].

I do not see the relevance of Kearny PBA v. Town of Kearny, 81 N.J. 208 (1979) to the case at bar. We are not concerned here with the various "interpretative devices" that have been used to discover the intent of parties in interpreting their contracts. This case involves the question of whether or not a self-executing grievance procedure exists, i.e., whether a claimed violation at one step can be remedied by moving to the next step as matter of right and so on to final binding arbitration.

Similarly, the Commission's decision in Human Services has no application here since we are not concerned with when and where a breach of contract claim might have resulted in a finding of a

violation of Section 5.4(a)(5) of the Act by NJT [P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984)].

Finally, the remaining cases cited by 824, namely, City of Newark, P.E.R.C. No. 90-83, 16 NJPER 182 (¶21078 1990) and New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 89-29, 14 NJPER 638 (¶19267 1988) are not pertinent to the matter before me. Neither case is relevant since each case arose from employer conduct which constituted a "blanket refusal" to process grievances under the grievance procedure. Thus, the conduct in these cases warranted a finding that the employer violated its obligation of "good faith" under Section 5.4(a)(5) of the Act.

The instant case concerns solely what occurred at the First Step of the parties' grievance procedure on July 23, 1992. Any complaints by 824, regarding the conduct of NJT could have been raised and possibly cured at succeeding steps, culminating in binding arbitration. Therefore, NJT did not violate the Act.

* * * *

Based upon the interim Findings of Fact previously found, and the entire record in this case, I make the following:

CONCLUSION OF LAW

The Respondent NJT did not violate N.J.S.A. 34:13A-5.4(a)(1), (2) or (5) by its conduct at the First Step of the parties' grievance procedure on July 23, 1992 since the grievance procedure was self-executing.

RECOMMENDED ORDER

I recommend that the Commission ORDER that Respondent NJT's Motion for Summary Judgment be granted and that the Complaint be dismissed.

Alan R. Howe
Hearing Examiner

Dated: May 20, 1993
Trenton, New Jersey