P.E.R.C. NO. 2004-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT CORPORATION,

Respondent,

-and- Docket No. CO-H-2002-309

NEW JERSEY TRANSIT PBA LOCAL NO. 304,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by New Jersey Transit PBA Local No. 304 against New Jersey Transit Corporation. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act by failing to permit a probationary officer to have a union representative present during an investigatory interview where the officer had been designated as a witness; re-designating the officer as a subject or principal of the investigation in retaliation for a union representative informing the officer of his rights; implementing a "blanket rule" that employees designated as witnesses are not entitled to union representation during interviews; and for comments made to the union representative by the investigator. The Commission dismisses the Complaint finding that, based on a record consisting only of admissions in the employer's Answer and the testimony of one witness without first-hand knowledge of the incident, the charging party did not prove its allegations.

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.

P.E.R.C. NO. 2004-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT CORPORATION,

Respondent,

-and- Docket No. CO-H-2002-309

NEW JERSEY TRANSIT PBA LOCAL NO. 304,

Charging Party.

Appearances:

For the Respondent, Peter Harvey, Attorney General of New Jersey (Virginia Class-Matthews, Deputy Attorney General, of counsel)

For the Charging Party, Loccke & Correia, P.A., attorneys (Merick H. Limsky, of counsel)

DECISION

On May 14, 2002, New Jersey Transit PBA Local No. 304 filed an unfair practice charge against New Jersey Transit Corporation. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (3), (5) and (7),[1/] by:

1/ 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; (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; 5) Refusing to negotiate in good faith with a majority

(continued...)

> 1. failing to permit Probationary Officer Hudson to have a union representative present during an investigatory interview where Hudson had been designated as a witness;
>
> 2) re-designating Hudson as a subject or principal of the investigation in retaliation for the union representative, State PBA Delegate Noble, informing Hudson of his rights;
>
> 3) implementing a "blanket rule" that employees designated as witnesses are not entitled to union representation during interviews; and
>
> 4) Investigator Goldstein's saying to Noble, "If I find out you are telling these guys what to say, I'll slam-dunk you."

On December 26, 2002, a Complaint and Notice of Hearing issued. On January 17, 2003, the employer filed its Answer.

On April 29, 2003, Senior Hearing Examiner Arnold H. Zudick conducted a hearing. The union presented one witness, PBA President Ed Lahey. Lahey had not spoken with Hudson about this incident; he had spoken with Noble. The employer cross-examined Lahey and the union rested. The Hearing Examiner denied the employer's motion to dismiss at the end of the union's case-in-

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1/ (...continued)
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; (7) Violating any of the rules and regulations established by the commission."

chief. The employer then rested without calling any witnesses. The parties filed post-hearing briefs.

On July 28, 2003, the Hearing Examiner issued his report and recommendations. H.E. No. 2004-5, 30 NJPER 11 (¶4 2003). The Hearing Examiner recommended dismissing the first and third allegations, and recommended finding violations based on the second and fourth. In finding these violations, the Hearing Examiner relied solely on inferences he drew from admissions in the Answer. He recognized that Lahey's testimony was hearsay and could not be the basis for finding a violation.

Exceptions were initially due on August 10, 2003. The employer was granted an extension of time until September 10. On September 11, the Chair notified the parties that the Commission would consider this matter further and that the Hearing Examiner's Recommended Decision would not become a final decision pursuant to N.J.A.C. 19:14-8.1(b).[2/] On September 12, the employer filed exceptions. On November 26, the employer's motion to accept its exceptions and brief as timely filed was granted.

2/ N.J.A.C. 19:14-8.1 provides:

> If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

The charging party has not filed an answering brief or cross-exceptions.

We have reviewed the record. We make these findings of fact based on the admissions in the employer's Answer and the testimony of the sole witness.

Based on the admissions we find:

A civilian complained that New Jersey Transit officers had used excessive force. Two officers were identified as subjects of an investigation and were notified to appear at interviews on April 1 and April 5, 2002. They were allowed union representation at these interviews.

Probationary Officer Hudson was identified as a witness and was notified to appear at the office of Investigator Goldstein on May 2, 2002. Hudson requested but was not permitted union representation.[3/] Goldstein asked PBA Delegate Noble to leave. Goldstein told Noble that if he found out that Noble was coaching officers on what to say during an interview, he would "slam-dunk him."[4/] Goldstein decided to change Hudson's status from witness

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3/ We do not infer, as the Hearing Examiner did, that Hudson's request for representation was refused merely because he was identified as a witness. The Answer specifically denies that the refusal was based solely on the fact that Hudson was identified as a witness. It states that there were other contributing reasons, including the fact that Hudson was not named by the complainant.

4/ We also do not infer that by threatening to "slam-dunk" Noble, Goldstein meant that Noble was not permitted to

(continued...)

to subject upon his refusal to cooperate. Hudson was permitted a union representative at that juncture.

Based on Lahey's testimony, we find:

Prior to the Hudson incident, Lahey had not been informed that officers designated as witnesses in investigatory interviews were ever given the opportunity for a Weingarten representative (T16). Officers had told Lahey that they were denied union representation because they were designated as a witness (T18).

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 applies in the New Jersey public sector as well. 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). If an employee requests and is entitled to a Weingarten representative, the employer must allow representation, discontinue the interview, or offer the employee the choice of continuing the interview unrepresented or having no interview. Dover Municipal Utilities Auth., P.E.R.C.

4/ (...continued)
advise employees of their right to representation in investigatory interviews. The Answer does not justify an inference (H.E. at 5) about what Goldstein meant by what he said and what he said does not touch upon advising employees about their right to representation.

No. 84-132, 10 NJPER 333 (¶15157 1984). If an employee is to be interviewed as a witness, whether the employee has a right to representation will be based upon an application of traditional Weingarten principles to the specific facts of the case. State of New Jersey (Dept. of Public Safety), P.E.R.C. No. 2002-8, 27 NJPER 332, 335 (¶32119 2001). The charging party bears the burden of proving that an employee is entitled to a Weingarten representative.

The first alleged violation is the denial of Hudson's request for union representation. Based on a record that does not include testimony from the employee who requested representation or the representative who was present, we agree with the Hearing Examiner that the charging party did not prove that Hudson's interview triggered a right to Weingarten representation. The record does not show a reasonable basis for believing that the interview could result in his being disciplined. Absent testimony about the circumstances of the interview, we simply cannot determine whether Hudson was entitled to a Weingarten representative. Accordingly, we dismiss this allegation.

The second alleged violation is that Goldstein re-designated Hudson as a subject rather than a witness in retaliation for Noble's informing Hudson of his rights. The charging party proved that Hudson's request for representation was denied and

that he subsequently refused to cooperate, but it did not prove that Hudson was entitled to representation at the interview. Absent proof on that last point, we cannot conclude that he had a right not to participate in an interview without a representative. Contrast Dover MUA. We also note that the Answer specifically denied that the re-designation was done to retaliate against Noble and there is no evidence to the contrary. We dismiss this allegation.

The third alleged violation is that the employer had a blanket rule of denying representation to employees designated as witnesses. The Hearing Examiner recommended dismissing this allegation for lack of competent evidence to support it and the charging party has not excepted to that ruling. We dismiss the allegation.

The final alleged violation is that Goldstein threatened to "slam-dunk" Noble if he found out that Noble was telling employees what to say during the interviews. The Answer admitted that, after Hudson was denied a Weingarten representative and Noble was asked to leave, Goldstein told Noble that "if he found out that Officer Noble was coaching officers on what to say during an interview, he would "slam dunk him." As we have already discussed, that admission does not justify an inference that the remark was meant to interfere with Noble's right to advise employees concerning the right to representation in

investigatory interviews. Absent testimony about the circumstances of the remark, we cannot determine whether it tended to interfere with any employee rights. Accordingly, we reject the recommendation that we find a violation based on the fourth allegation.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Katz, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Mastriani was not present.

DATED: December 18, 2003
Trenton, New Jersey
ISSUED: December 19, 2003

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT CORPORATION,

RESPONDENT,

-and-

Docket No. CO-H-2002-309

NEW JERSEY TRANSIT
PBA LOCAL NO. 304,

CHARGING PARTY.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the New Jersey Transit Corporation violated the New Jersey Employer-Employee Relations Act by designating an employee as a subject of an investigatory interview because he requested a union representative accompany him to the interview, and by threatening a union representative for advising employees of their right to union representation in investigatory interviews. However, the Hearing Examiner did not find that the Corporation unlawfully denied union representation to Officer Hudson or that it had a policy to deny representation to all employees designated a witness in an investigatory interview.

A Hearing Examiner's Recommended Report and Decision 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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2004-005

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT CORPORATION,

RESPONDENT,

-and- Docket No. CO-H-2002-309

NEW JERSEY TRANSIT
PBA LOCAL NO. 304,

CHARGING PARTY.

Appearances:

For the RESPONDENT,
Peter Harvey, Attorney General of New Jersey
(Virginia Class-Matthews, Deputy Attorney General, of counsel)

For the CHARGING PARTY,
Loccke & Correia, P.A.
(Merick H. Limsky, Esq., of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On May 14, 2002, an unfair practice charge was filed by New Jersey Transit PBA Local No. 304 (Charging Party or PBA) with the New Jersey Public Employment Relations Commission (Commission) alleging that the New Jersey Transit Corporation (Respondent or Corporation) violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a(1), (2), (3), (5) and (7).[1/] The charge alleges that the Respondent violated the

1/ These provisions prohibit public employers, their
(continued...)

Act by: 1) failing to permit a Weingarten[2/] representative be present for a probationary officer identified as a witness in an investigatory interview; 2) re-designating the probationary officer as a subject or principal of the investigation rather than just a witness in retaliation for State PBA Delegate Noble informing the probationary officer of his rights; 3) implementing a "blanket rule" or practice that employees designated as witnesses will not be permitted a Weingarten representative under any circumstance; and by: 4) Investigator Goldstein making a threatening/intimidating remark to Delegate Noble after Noble's discussion with the probationary officer.

The Charging Party seeks an order: 1) directing the Respondent to cease and desist from denying employee requests for

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1/ (...continued)
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; (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;(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; (7) Violating any of the rules and regulations established by the commission."

2/ In NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975), the U.S. Supreme Court established the rule that employees were entitled to union representation during certain investigatory interviews.

a union representative at an investigatory interview merely because the employee is designated as a witness; 2) enjoining the Respondent from retaliating against PBA representatives for performing their representation duties; 3) directing the Respondent to re-designate the probationary officer as a witness in the internal investigation; 4) requiring the Respondent to post a notice.

A Complaint and Notice of Hearing was issued on December 26, 2002 (C-1). The Respondent filed an answer relying upon its June 17, 2002 statement of position (C-2B) and on its previously filed answer (C-2A) admitting certain facts and denying others; and arguing that the facts as alleged did not constitute a violation of the Act. A Hearing was held on April 29, 2003.[3/]

Post hearing briefs were received by July 7, 2003, and the Charging Party's reply brief was received by July 21, 2003.

Procedural Background

The Charging Party called one witness at the hearing, PBA President Ed Lahey. It did not call Delegate Noble or the probationary officer identified in the charge. At the conclusion of Lahey's testimony, the PBA rested. The Charging Party waived the right to introduce other witnesses except for rebuttal (T25).

The Respondent promptly moved to dismiss, arguing the Charging Party did not meet its burden of proof. The Charging

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3/ The transcript will be referred to as "T".

Party opposed the motion. I denied the motion, noting my obligation to draw inferences favoring the responsive party when considering such motions. Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969); North Bergen Twp., P.E.R.C. No. 78-28, 4 NJPER 15, 16 (¶4008 1977). The Respondent then rested its case without calling witnesses (T26-T31).

Based upon the entire record, I make the following:

Findings of Fact

The Respondent admitted the following facts in its answer.

1. On or about April 1, 2002, New Jersey Transit began an investigation into a civilian complaint of excessive force. Two officers identified as subjects or principals of the investigation were notified to appear for interviews on April 1 and 5, 2002, regarding the complaint. They were advised of their right to union representation and were allowed such representation at their interviews.

2. Probationary Police Officer Hudson was not identified by the complainant as one of his assailants, but was identified as a witness in the investigation. Officer Hudson was notified to appear for an investigatory interview on May 2, 2002, at the office of Investigator Richard Goldstein. Officer Hudson requested union representation but it was denied.

In its June 17, 2002, statement of position, admitted as part of its answer, the Respondent wrote: "The officer [Hudson]

was identified as a witness in the investigation and therefore was not entitled to PBA representation." I infer from that answer that Hudson was denied a representative merely because he was identified as a witness.

3. After denying Hudson's request for union representation, Investigator Goldstein requested that Officer Noble, a PBA representative, leave the interview area. I infer that Noble was present and available to assist Hudson during the interview before being asked to leave. Investigator Goldstein warned Officer Noble that if he learned that he (Noble) was coaching officers on what to say during an interview, he would "slam-dunk him." I infer that Goldstein meant that Noble was not permitted to advise employees of their right to representation in investigatory interviews, including Hudson's imminent interview.

4. Having been denied a union representative, Officer Hudson refused to cooperate, i.e., answer questions, during the investigation. I infer that Hudson's refusal to "cooperate" meant he would not answer questions without union representation. Since Hudson refused to cooperate, Investigator Goldstein redesignated him a subject of the investigation and then permitted him a Weingarten representative.

* * *

I find these facts:

5. Ed Lahey has been the PBA's president for approximately three and one half years. He was informed of the events regarding Officer Hudson by PBA Delegate Rob Noble either late on May 2 or early on May 3, 2002 (T9-T12).

6. Prior to the Hudson incident, Lahey had not been informed that officers designated as witnesses in investigatory interviews were ever given the opportunity for a Weingarten representative. Officers have told him they were denied union representation because they were designated a witness (T16). But Lahey also knew that in December 2002 Officer Ottomanelli was informed he was a witness and was still advised of his right to representation (T18).

7. Officer Noble never told Lahey that the two officers designated as subjects in the excessive force investigation were cleared of wrongdoing (T22).

8. The PBA has taken the position that employees designated as witnesses in investigatory interviews are entitled to representation at all times (T24).

ANALYSIS

In Weingarten, the U.S. Supreme Court established the rule that an employee is entitled to union representation at an investigatory interview under the following conditions: The employee must request representation; the employee must have a

reasonable basis for believing that the interview may result in discipline; the employee's right may not interfere with legitimate employer prerogatives; and, the employer has no duty to bargain with a representative, nor may the representative obstruct the employer's right to conduct the interview. Id. at 420 U.S. 256-260, 88 LRRM 2691-2692. The Commission 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 later approved by the New Jersey Supreme Court in UMDNJ and CIR, 144 N.J. 511 (1996).

In the first of its four allegations in the charge, the PBA asserts the Respondent violated the Act by failing to comply with Hudson's request for union representation at his interview with Goldstein. The record shows Hudson was summoned to an investigatory interview; that he requested PBA representation and that his request was denied. Hudson did not testify at the hearing in this case and no evidence establishes that he had a reasonable expectation of discipline.

In its post-hearing brief, the PBA argued that the "mere possibility" of future discipline, rather than its probability determines the employee's right to union representation. It also argued that the possibility of discipline is inherent in investigatory interviews and that employers must be enjoined from

denying Weingarten representation to any officer requesting it who is being interviewed in an internal affairs investigation. The PBA in its brief, nevertheless, said that the right to a Weingarten representative is based upon what the employee believes, and in its reply brief argued Hudson would have had a reasonable belief of discipline. Therein lies the problem in this first allegation. The PBA did not demonstrate what Hudson believed. While the right to representation is not based upon the employer's belief of how the employee should perceive the investigation, it is similarly not based upon the union's belief of how the employee may react to the investigation. It is a charging party's responsibility under Weingarten to prove the employee had a reasonable belief of discipline and the PBA simply failed to prove that in this case. The PBA could have presented Hudson's testimony, but it did not. Additionally, the PBA's arguments that employers be automatically enjoined from denying union representation in internal affairs investigations and that the possibility of discipline is inherent in such investigations, are inconsistent with the Weingarten requirements. I, therefore, cannot recommend they become the basis for a new right under the Act.

Finally, even if the Respondent inappropriately rejected Hudson's Weingarten request merely because he was designated a witness, I cannot find Hudson was entitled to representation

absent proof of reasonable expectation of discipline. The PBA did not offer that proof. Consequently, the PBA did not prove this allegation under the Weingarten conditions. That allegation is, therefore, dismissed.

In its second allegation, the PBA contends that the Respondent violated the Act by redesignating Hudson a subject rather than a witness in the investigation in retaliation for Noble informing Hudson of his rights. Compliance with the Weingarten parameters is not relevant to this allegation. The question in this allegation is whether the Respondent, (i.e., Investigator Goldstein) acted against Hudson for the exercise of protected rights, that is, the right to request union representation. In other words, this issue does not concern Hudson's reasonable expectation of discipline; it is about whether he was redesignated because he requested representation.

The record shows that Hudson requested representation, and that according to Investigator Goldstein, Hudson was identified as a witness and was, therefore, not entitled to union representation. Based upon the facts and inferences I have found I conclude that the Respondent violated 5.4a(1) and (3) of the Act by redesignating Hudson.

In its post-hearing brief, the Corporation cited the Residuum Rule, N.J.A.C. 1:1-15.5, Weston v. State, 60 N.J. 36, 50-51 (1972), and argued that the PBA did not prove its case

because there was insufficient corroborative or legally competent evidence to support the hearsay testimony presented by witness Lahey. While I agree with the Corporation that Lahey's testimony was insufficient to prove the case, that does not mean the second allegation was not proved. I did not rely on Lahey's testimony. The Corporation overlooks that its Answer, filed in accordance with N.J.A.C. 19:14-3.1[4/], admitted significant facts alleged in the charge. Those facts prove the second allegation.

The Respondent's Answer concedes that Hudson was denied representation because he had been designated a witness, rather than a subject, and that he was redesignated a subject of the investigation because he would not "cooperate" in the

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4/ N.J.A.C. 19:14-3.1 provides:

> Within 10 days of service on it of the complaint, the respondent shall file an answer. The hearing examiner, upon proper cause shown, may extend the time for filing an answer. The answer shall specifically admit, deny or explain each of the allegations set forth in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a specific denial. All allegations in the complaint, if no answer is filed, or any allegation not specifically denied or explained shall be deemed to be admitted to be true and shall be so found by the Commission, unless good cause to the contrary is shown. The answer shall include a detailed statement of any affirmative defenses. The answer shall be in writing and the party or representative filing the answer shall make this dated and signed certification: "I declare that I have read the above statements and that the statements are true to the best of my knowledge and belief."

investigation, meaning because he exercised his right to refuse to respond to questions without his representative.

In Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984), the Commission held:

> Once the employee makes the request for representation, the employer has three options: (1) granting the employee's request for union representation; (2) discontinuing the interview; or (3) offering the employee a choice of continuing the interview unrepresented or having no interview. Weingarten, 88 LRRM at 2691, Mobil Oil Corp., 196 NLRB 1052, 80 LRRM 1188 (1972). There is no waiver of rights unless the requesting employee voluntarily agrees to remain unrepresented after being presented with these options or is otherwise made aware of the choices. Pacific Te. And Tel. Co. V. NLRB, 711 F.2d 134, 113 LRRM 3529, 3530-3531 (9th Cir. 1983).

In accordance with Dover, Goldstein should have discontinued his interview of Hudson, rather than redesignating him a subject because he would not cooperate with the investigation. Goldstein's action had a chilling effect on Hudson's right to decline to respond to questions without representation. Goldstein's act was retaliation and discrimination for Hudson's request for representation and Noble's attempt to advise Hudson of his rights. A public employee is entitled to request representation even if an employer is not legally obligated to provide it. The employee should not fear being made the subject of an investigation by the exercise of that right. An employer's duty is to assess an employee's representation request by

applying the Weingarten conditions. If it appears that those conditions are met, an employer is obligated to allow a representative even if it (the employer) believes the employee is only a witness, or it may discontinue the interview or make the final offer as provided in Dover.

In its third allegation, the PBA alleged that the Respondent violated the Act by implementing a "blanket rule" or practice of automatically denying union representation to employees designated as witnesses and ordered to submit to an interview. Although the facts show that Goldstein denied Hudson's request for representation merely because he had been designated a witness, the evidence does not establish that the Respondent maintained a policy to deny witnesses union representation in every case. Although PBA President Lahey was unaware of any employee designated as a witness having been allowed a representative upon request prior to the Hudson incident, he knew the Respondent, after the Hudson incident, advised Officer Ottomanelli of his representation right in November 2002.

The burden was on the PBA to prove the allegation and Lahey's testimony failed to sustain that burden. The PBA simply did not prove by a preponderance of the evidence that the Respondent has maintained a blanket policy of denying representatives to employees designated as witnesses. Accordingly, that allegation must be dismissed.

representatives to employees designated as witnesses. Accordingly, that allegation must be dismissed.

In its fourth allegation, the PBA contended Goldstein's "slam-dunk" remark to Noble violated the Act. The Respondent had admitted that Goldstein made the remark to Noble which threatened him for exercising his right to represent employees in the PBA's unit. I find the remark was intended to coerce and intimidate Noble for exercising his rights and therefore violated 5.4a(1) of the Act.

This case provides another opportunity to review the witness/subject or witness/principal dichotomy established by certain public employers regarding the implementation of the Weingarten right. In New Jersey Department of Law and Public Safety, Division of Stat Police, P.E.R.C. No. 2002-8, 27 NJPER 332 (¶32119 2001), adopting H.E. No. 2000-9, 26 NJPER 330 (¶31135 2000), the State employed a witness/principal dichotomy much the same as the Respondent's witness/subject dichotomy here. In Department of Law and Public Safety, I said:

> The State's designation of an employee as a witness or principal is not the deciding factor in determining an employee's Weingarten rights. . . . The determination of a Weingarten violation is fact-intensive and primarily made on a case by case basis. [26 NJPER at 345]

The Commission adopted that analysis holding:

> . . . that the right of a witness to a Weingarten representative must be decided on the facts of each case.
> [27 NJPER 335]

That analysis applies to the Respondent's use of witness/subject as well. Although the State, and in this case, NJT, may designate employees scheduled for interviews in the vernacular of their choice, that designation cannot pre-determine an employee's Weingarten rights. A public employer that automatically, consistently, and arbitrarily denies Weingarten rights to employees designated as witnesses because the employer has determined a "witness" cannot have a reasonable belief of discipline from an investigatory interview violates 5.4a(1) of the Act. An employer, I believe, must apply the Weingarten conditions and make a good faith assessment of an employee's request each time an employee requests union representation.

Although applying the Weingarten conditions to each request may be more time consuming for management, the extra time does not outweigh the representational right. Dover gives an employer sufficient choices to manage Weingarten requests. It can allow a representative and avoid further delay and consideration of the issue, or it can simply discontinue the interview.

Finally, recognizing that an employer cannot maintain a policy of denying Weingarten representatives merely because employees have been designated witnesses, requires, in fairness, that labor organizations also recognize that employees are not

automatically entitled to a representative merely because they are designated as "witnesses" in an internal affairs investigatory interview. Under the current state of the law, an employee must meet all of the Weingarten conditions, including having a reasonable expectation of discipline, in order to be assured a representative. Consequently, I cannot recommend implementation of the PBA's position that employees designated as witnesses are automatically entitled to representation.

Accordingly, based upon the above findings and analysis, I make the following:

Conclusions of Law

The New Jersey Transit Corporation violated 5.4a(1) and (3) of the Act by redesignating Officer Hudson a subject rather than a witness of an investigation because he refused to cooperate in the investigation without a union representative; and violated 5.4a(1) of the Act by threatening Officer Noble for exercising his right to represent employees in the PBA's unit.

Recommended Order

I recommend the Commission **ORDER** New Jersey Transit Corporation to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by redesignating Officer Hudson the subject of

an investigatory interview because he refused to answer questions in an interview without union representation, and by threatening Officer Noble for advising Officer Hudson of his right to union representation.

2. Engaging in conduct which has the tendency to interfere with, restrain or coerce its employees from engaging in conduct protected by the Act, particularly by threatening Officer Noble for advising employees of the right to union representation.

3. Discriminating in regard to the tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by redesignating Officer Hudson the subject of an investigatory interview because he refused to answer questions in an interview without union representation.

B. Take the following action:

1. Correct its records to reflect that Officer Hudson was a witness in the investigatory interview, and expunge any reference to his having been redesignated a subject of the investigation.

2. Acknowledge and rescind in writing the threat to Officer Noble for the exercise of his right as a union representative to advise employees of their right to union representation.

3. Advise employees:

a. that they will not be designated the subject of an investigatory interview merely because they request union representation at the interview;

b. their requests for union representation at investigatory interviews will not be denied merely because they have been designated a witness in an interview;

c. of their right to decline to participate in investigatory interviews if their requests for union representation are denied.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

5. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

C. I recommend all other allegations be dismissed.

Arnold H. Zudick
Senior Hearing Examiner

Dated: July 28, 2003
Trenton, New Jersey

RECOMMENDED

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by redesignating Officer Hudson the subject of an investigatory interview because he refused to answer questions in an interview without union representation, and by threatening Officer Noble for advising Officer Hudson of his right to union representation.

WE WILL cease and desist from engaging in conduct which has the tendency to interfere with, restrain or coerce our employees from engaging in conduct protected by the Act, particularly by threatening Officer Noble for advising employees of their right to union representation.

WE WILL cease and desist from discriminating in regard to the tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by redesignating Officer Hudson the subject of an investigatory interview because he refused to answer questions in an interview without union representation.

WE WILL NOT designate employees the subject of an investigatory interview merely because they request union representation at the interview.

WE WILL NOT deny employee requests for union representation at investigatory interviews merely because they have been designated a witness for the interview.

WE WILL advise employees of their right to decline to participate in investigatory interviews if we decline their specific request for union representation at such interviews.

WE WILL NOT threaten union representatives for advising employees of their Weingarten right to union representation at investigatory interviews.

WE WILL correct our records to reflect that Officer Hudson was a witness in the investigatory interview, and expunge any reference to his having been redesignated a subject of the investigation.

WE WILL acknowledge and rescind in writing the threat to Officer Noble for the exercise of his right as a union representative to advise employees of their right to union representation.

Docket No. CO-H-2002-309 New Jersey Transit Corporation
(Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"