P.E.R.C. NO. 88-39

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-87-99-52

AMALGAMATED TRANSIT
UNION, LOCAL 824,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Amalgamated Transit Union, Local 824 against New Jersey Transit Bus Operations, Inc. The charge alleged that New Jersey Transit violated the New Jersey Employer-Employee Relations Act when it suspended James Lynch, Local 824's president. The Commission deferred to an arbitrator's award that New Jersey Transit did not have cause to suspend Lynch for insubordination because he was engaged in protected activity and ordered that he be made whole.

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Charging Party.

Appearances:

For the Respondent, W. Cary Edwards, Attorney General
(Jeffrey Burstein, Deputy Attorney General)

For the Charging Party, Robert A. Molofsky, Esq.

DECISION AND ORDER

On October 14, 1986, the Amalgamated Transit Union, Local 824 ("Local 824") filed an unfair practice charge against New Jersey Transit Bus Operations, Inc. The charge alleges that New Jersey Transit violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (3),[1/] when it suspended James Lynch, Local 824's president allegedly in retaliation for his union activity.

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; and (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."

On October 24, 1986, a Complaint and Notice of Hearing issued. The parties then agreed to defer the unfair practice proceeding to arbitration. On July 14, 1987, the arbitrator found that New Jersey Transit did not have cause to suspend Lynch for insubordination because he was engaged in protected activity. The arbitrator ordered that he be made whole.

Neither party requested that the unfair practice proceedings resume. On September 15, 1987, Hearing Examiner Alan R. Howe recommended that we defer to the arbitrator's award and dismiss the Complaint. H.E. No. 88-13, 13 NJPER ___ (¶_____ 1987).

Neither party excepted to this recommendation. In the absence of exceptions and under all the circumstances of this case, we agree.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Reid was not present.

DATED: Trenton, New Jersey
October 22, 1987
ISSUED: October 23, 1987

H.E. NO. 88-13

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-87-99-52

AMALGAMATED TRANSIT UNION, LOCAL 824,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission defer to the arbitration award of Jeffrey B. Tener, dated July 14, 1987, in which the subject matter of the Unfair Practice Charge, namely, the discipline of James Lynch, was adjudicated by the arbitrator under the standards of Spielberg Mfg. Co., 112 NLRB 1080, 36 LRRM 1152 (1955) and related Commission decisions such as City of Englewood, P.E.R.C. No. 82-124, 8 NJPER 375 (¶13172 1982). The Hearing Examiner concluded that the arbitrator was given the authority to consider the issues underlying the Unfair Practice Charge and that these issues were presented to him and that he considered them in his decision and, further, that the proceedings were fair and regular and were not repugnant to the Act.

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.

H.E. NO. 88-13

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT BUS OPERATIONS, INC.

Respondent,

-and- Docket No. CO-87-99-52

AMALGAMATED TRANSIT UNION, LOCAL 824,

Charging Party.

Appearances:

For the Respondent
W. Cary Edwards, Attorney General
(Jeffrey Burstein, D.A.G.)

For the Charging Party
Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, Esqs.
(Arnold S. Cohen, Esq.)
Robert A. Molofsky, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on October 14, 1986, by the Amalgamated Transit Union, Local 824 (hereinafter the "Charging Party" or the "ATU") alleging that New Jersey Transit Bus Operations, Inc. (hereinafter the "Respondent") 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. (hereinafter the "Act"), in that on August 26, 1986, the Respondent discharged the ATU President and Business

Agent, James Lynch, based on conduct engaged in by him on August 15, 1986, while he was investigating grievances on behalf of two employees during a period of several hours at the Port Authority Garage in New York City; at a Step Three grievance hearing under the parties' contractual grievance procedure, the discharge of Lynch was reduced to a 15-day suspension, which is the subject of the instant Unfair Practice Charge; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 24, 1986. Pursuant to the Complaint and Notice of Hearing, hearings were initially scheduled for November 25 and 26 and December 1, 1986 in Newark, New Jersey. However, prior to the initial hearing date, counsel for the parties voluntarily agreed to defer the hearing and decision on the instant Unfair Practice Charge to the then pending arbitration proceeding under the parties' collective negotiations agreement. Confirmation of this fact was made by the undersigned Hearing Examiner in a letter to

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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; (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."

the parties dated November 18, 1986, which cancelled the three hearing dates, supra, and recited, additionally, that after the arbitration award was rendered a copy was to be submitted to the undersigned so that it might be reviewed in the light of the standards set forth in Spielberg Mfg. Co., 112 NLRB 1080, 36 LRRM 1152 (1955) and related cases. The Hearing Examiner invited counsel for the parties to address the issue as to whether or not the Opinion and Award of the Arbitrator satisfied the Spielberg standards.

THE ARBITRATOR'S OPINION AND AWARD

On March 11 and March 25, 1987, Jeffrey B. Tener, the arbitrator selected by the parties, conducted hearings in Newark, New Jersey, where the parties were represented by their respective counsel and a transcript of the proceeding was made. Post-hearing briefs and reply briefs were received by May 30, 1987. On July 14, 1987, Arbitrator Tener rendered his Opinion and Award.

An examination of the ten-page Arbitration Opinion and Award indicates that each party had an ample opportunity to call the witnesses it deemed necessary and each testified fully on the issue submitted to the Arbitrator, namely, whether or not there was "proper cause for the 15-day suspension of James Lynch." Thus, the arbitrator was presented with a complete factual record upon which to base a decision.

Further, the parties fully briefed the Arbitrator on their respective positions, it being noted by the Arbitrator, that the

ATU alleged that Lynch was engaged in protected activity and, since there was no independent evidence of insubordination or disruption of the Respondent's operation, the Commission's decision in Black Horse Pike Regional Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502-504 (¶12223 1981) was dispositive of the issue.

The arbitrator in his decision cited with approval Black Horse Pike, supra, particularly, the portion which held that when an employee is engaged in protected activity he and the employer are equals in advocating their respective positions and one is not a subordinate of the other. Continuing, the Arbitrator concurred in the conclusion of Black Horse that the employer cannot express its dissatisfaction with an employee engaged in protected activity "...by exercising its power over the individual's employment..." (7 NJPER at 503).

Finally, although the Arbitrator made reference to the ATU's contention that anti-union animus was involved in the disciplining of Lynch, he did not resolve the disciplinary issue on the basis of the presence or absence of anti-union animus. He did observe that the mere fact that Lynch was an officer of ATU did not mean that there had been anti-union animus because of his having been disciplined. In this connection he noted the correctness of the Respondent's position that an employee engaged in protected activity is not immune from discipline. However, the Arbitrator ultimately based his decision on the fact that Lynch had been disciplined for alleged insubordination while acting as a union

representative in the adjustment of grievances. It was in this context that the Arbitrator ultimately cited and relied upon Black Horse Pike, supra, in particular, the Commission's holding that an employer may not express its dissatisfaction with an employee engaged in protected activity by "...exercising its power over the individual's employment..." The Arbitrator stated that this was precisely what the Respondent attempted to do in the case of the disciplining of Lynch.

* * * *

Although the arbitrator's award was rendered on July 14, 1987, neither counsel for the parties complied with the request of the undersigned, supra, that a copy of the arbitration award be sent to him for determination as to whether or not compliance with the Spielberg standards had been met. Thus, the undersigned Hearing Examiner was required to request of counsel that a copy of Arbitrator Tener's Opinion and Award be sent to him, which was received on September 8th. Further, neither party requested that the instant Complaint be heard on the merits on and after July 14, 1987.

DISCUSSION AND ANALYSIS

The Commission cases are legion on the issue of deferral or non-deferral to arbitration awards. First, there is a distinction to be made between a case involving contractual interpretation under §5.4(a)(5) of the Act and discriminatory discipline under §5.4(a)(3) of the Act.

As an example of a case involving §5.4(a)(5) of the Act, although this subsection of the Act is not involved herein, it is instructive to examine the evolution under our Act of the deferral doctrine as first enunciated in Spielberg, supra, by the National Labor Relations Board. Thus, in Medford Bd. of Ed., P.E.R.C. No. 80-144, 6 NJPER 298 (¶11141 1980), the Commission affirmed the decision of the Director of Unfair Practices in his refusal to issue a complaint where the unfair practice charge alleged that the President of the Board stated that the Association should remove its chief negotiator because he had misled the Association and its members in negotiations. The Director of Unfair Practices, after ascertaining that the Board was willing to submit the matter to arbitration under the parties' agreement, deferred processing the charge, retaining jurisdiction to consider timely application of a showing that the arbitration procedure reached a result not repugnant to the Act. The arbitrator found that the conduct of the President of the Board did not violate the agreement. The charging party moved to have the Commission process the charge on the ground that the arbitrator's award was repugnant to the Act. The Director reviewed the opinion and award of the arbitrator and refused to issue a complaint, finding that the arbitrator had reached the dispute underlying the association's charge and that the result was

not repugnant to the Act.[2/] The Commission, after an independent review of the arbitrator's award, concluded "...that the arbitrator reached or considered the underlying unfair practice charge and that the result was not repugnant to the Act...." (6 NJPER at 299). Certain language differences between the agreement of the parties and the language of our Act was considered irrelevant. Thus, the refusal of the Director to issue a complaint was sustained.

In Jersey City Bd. of Ed., D.U.P. No. 80-9, 5 NJPER 478 (¶10242 1979) the Director of Unfair Practices was confronted with a charge involving, inter alia, §5.4(a)(3) of the Act wherein the charging party alleged that he was improperly suspended and discharged. There was a pre-Complaint agreement of the parties to defer the charge to arbitration. Thereafter an arbitrator issued a decision sustaining the discharge. The charging party requested that a complaint issue. The Director:

> ...In determining whether or not to resume the processing of a charge that has been deferred to arbitration...is guided by the standards first set forth by the National Labor Relations Board in Spielberg Mfg. Co., 112 NLRB 1080, 36 LRRM 1152 (1955). See In re State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977). As set forth in Spielberg, and as previously noted, unless there is a proper showing that the arbitration proceeding was not fair and regular, or that a result

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2/ See State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977) for a discussion of the standards to be utilized when the Commission is considering whether or not to reassert jurisdiction over a case previously deferred to arbitration.

> was reached repugnant to the Act, or that the dispute was not submitted properly to arbitration, the Commission will defer to the arbitrator's findings... (5 NJPER at 478, 479).

The Director, in refusing to issue a complaint, cited as additional authority his earlier decision involving the same employer, Jersey City Bd. of Ed., D.U.P. No. 80-5, 5 NJPER 405 (¶10211 1979).

We now come to the Commission's significant decision in City of Englewood, P.E.R.C. No. 82-124, 8 NJPER 375 (¶13172 1982) where it held that it would not defer a §5.4(a)(3) unfair practice allegation to an arbitration award, relying on NLRB precedent, unless (1) the arbitrator had authority to consider the issues of contractual interpretation underlying the unfair practice charge; (2) the proceedings were fair and regular; (3) the award was not repugnant to the Act; and (4) the unfair practice charge was presented to and considered by the arbitrator. See 8 NJPER at 376 and Suburban Motor Freight, Inc., 247 NLRB No. 2, 103 LRRM 1113 (1980). The Commission at one point said:

> Following the Board's lead in Suburban Motor Freight, we hold that deferral to an arbitration award is inappropriate to the extent a Complaint contains allegations of anti-union motivation and discrimination which have not been presented or considered in arbitration...(emphasis supplied)(8 NJPER at 377).

The Commission concluded in Englewood that the arbitrator had not considered the allegations of anti-union animus and, thus, the arbitrator's award did not warrant deferral. The clear implication to the undersigned is that if all of the four requisites, supra, had been met then it would be appropriate to

defer an arbitrator's award involving §5.4(a)(3) allegations of anti-union animus.[3/]

Given the above standards, as articulated by the NLRB in Spielberg, supra, and the various Commission decisions discussed and cited, supra, the Hearing Examiner concludes that deferral to the Tener Arbitration Award in the instant case is warranted.[4/] First, and not necessarily in any stated order, the instant proceeding before Arbitrator Tener was clearly fair and regular. As the opinion and award indicates, hearings were held with counsel present and a stenographic transcript. It is obvious to the undersigned that the parties had an adequate opportunity to adduce all of the evidence necessary to support their positions by testimony or documentary evidence. Counsel for the parties filed post-hearing briefs with the arbitrator, who considered all of the contentions advanced and rendered his opinion and award thereon.

Second, the parties agreed upon the statement of the issue to be decided by the arbitrator, namely, was there "proper cause"

3/ This conclusion of the Hearing Examiner is not affected in any way by the decision of the Commission in County of Hudson, P.E.R.C. NO. 86-127, 12 NJPER 439 (¶17162 1986) where the Commission, although citing City of Englewood, supra, was able to dispose of a §5.4(a)(3) allegation without reaching the merits as to the alleged anti-union animus.

4/ The Commission in Englewood also stated that the party urging deferral has the burden of proving the requirement that the UPC was presented to and considered by the arbitrator. Given the Opinion of Arbitrator Tener, supra, this would not appear to be an issue in the instant case since the ATU clearly carried this burden.

for the 15-day suspension of Lynch, and, if not, what should the remedy be. This submission of the issue, concededly broad, enabled the Arbitrator to consider the contractual provisions regarding a basis for discipline as well as the provisions of §5.4(a)(3) of our Act as alleged in the Complaint. As set forth previously, in discussing the content of the Arbitrator's Opinion and Award, it is evident that the Arbitrator considered the contentions of protected activity engaged in by Lynch and reached a result which was not repugnant to the Act.[5/]

Finally, the Arbitrator, having concluded that the Respondent lacked "proper cause" for imposing the 15-day suspension upon Lynch, and, having ordered that he be made whole, it is clear beyond doubt that such a remedy is no more or no less than what Lynch would have gained if the instant Complaint had gone to hearing with a favorable result rendered by the Hearing Examiner and affirmance by the Commission.

* * * *

5/ While not explicating on the presence or absence of animus on the part of the Respondent as the direct basis for his decision, the Arbitrator did respond to the citation by the ATU of the Commission's decision in Black Horse, supra, which clearly indicates to the Hearing Examiner that the substance of the underlying Unfair Practice Charge herein was before the Arbitrator and was considered by him in his Award. Thus, it appears clear that the Arbitrator was given the authority not only to decide the contractual issue of discharge for "proper cause" but also the allegations in the unfair practice charge as set forth in the Complaint.

For all of the foregoing reasons, the Hearing Examiner finds and concludes that deferral to Arbitrator Tener's Opinion and Award of July 14, 1987, is appropriate under Englewood, supra, notwithstanding that the allegations in the Complaint aver a violation by the Respondent of §§5.4(a)(1) and (3) of the Act. Thus, dismissal of the Complaint in this case is warranted.6/

* * * *

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint in this case be dismissed in its entirety for all of the reasons hereinbefore set forth.

Alan R. Howe
Hearing Examiner

Dated: September 15, 1987
Trenton, New Jersey

6/ It is noted again that neither party requested that the instant Complaint be heard on the merits on and after July 14, 1987, when Arbitrator Tener issued his Award.