

REVIEWING THE PORT AUTHORITY OF NEW YORK & NEW JERSEY'S WHISTLEBLOWER PROTECTION PLAN: ADDED PROTECTIONS FOR WHISTLEBLOWERS?

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Whistleblower litigation has become increasingly more popular in recent years,¹ but increased litigation has made it clear that whistleblower protection is not universally shared by all members of the American working-class; legislative bodies throughout the United States have molded laws that differ widely in scope, goal, and protection offered. This creates gaps in the protections, because states often disagree on the purpose and scope of these protections. Moreover, applying whistleblower protection to Compact Clause entities—also known as bi-state entities—such as the Port Authority of New York & New Jersey (the “Port Authority”), to which individual state laws do not apply, presents quite the problem, potentially leaving Port Authority employees without sufficient protection. However, that gap in protection may be narrowing with the enactment of the Port Authority Whistleblower Protection Plan.

I. A CONGLOMERATE OF SOVEREIGNTY

A brief introduction to the concept of bi-state entities is warranted. Bi-state entities are unique sovereigns that derive their life-source from the contributions of three main actors: two individual states and the

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1. See, e.g., Karen Aho, *Whistleblower Cases Hit New Records*, BLOOMBERGBUSINESSWEEK (July 29, 2014, 5:00 PM), <https://www.bloomberg.com/news/articles/2014-07-29/a-record-753-people-filed-whistleblower-cases-in-2013>.

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federal government.² Because these entities derive their existence from contributions of multiple sovereigns, governing and controlling them is often a complex task, requiring active compromise between the originating entities:

Compact Clause entities owe their existence to state and federal sovereigns acting cooperatively, and not to any “one of the United States,” their political accountability is diffuse; they lack the tight tie to the people of one State that an instrument of a single State has: “An interstate compact, by its very nature, shifts a part of a state’s authority to another state or states, or to the agency the several states jointly create to run the compact.” . . . In sum, within any single State in our representative democracy, voters may exercise their political will to direct state policy; *bistate entities created by compact, however, are not subject to the unilateral control of any one of the States that compose the federal system.*³

The Port Authority is a bi-state entity, which was created in 1921 by a bi-state compact entered into between New York and New Jersey and approved by Congress.⁴ As such, “[t]he Port Authority is not the agency of a single state but rather a public corporate instrumentality of New Jersey and New York.”⁵ Because of this, neither state may unilaterally impose duties, powers, or responsibilities on the Port Authority.⁶ Therefore, where the member-states have not explicitly provided for specific rules in the compact, such as whistleblower protections, imposing single-state legislation on the bi-state entity offends the entity’s sovereignty, which prohibits “unilateral imposition of additional duties” on the entity “absent express authorization in the

2. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40–42 (1996).

3. *Id.* at 42. (emphasis added) (quoting *West Virginia ex rel. Dryer v. Sims*, 341 U.S. 22, 33 n. 2 (1951)).

4. *Santiago v. N.Y. & N.J. Port Auth.*, 57 A.3d 54, 57 (N.J. Super. Ct. App. Div. 2012), *cert. denied*, 68 A.3d 890 (N.J. 2013) (quoting *Brown v. Port Auth. Police Superior Officers Ass’n*, 661 A.2d 312, 315 (N.J. Super. Ct. App. Div. 1995)).

5. *Bunk v. Port Auth.*, 676 A.2d 118, 121–22 (N.J. 1995).

6. *HIP, Inc. v. Port Auth.*, 693 F.3d 345, 358 (3d Cir. 2012); *see also Hess*, 513 U.S. at 42; *Ballinger v. Del. River Port. Auth.*, 800 A.2d 97, 101 (N.J. 2002) (“[T]he unilateral imposition of additional duties on the authority . . . is impermissible absent express authorization in the compact or joint legislation by the two creator states.”) (quoting *Del. River Port Auth. v. Commonwealth, State Ethics Comm’n*, 585 A.2d 587, 589 (Pa. Commw. Ct. 1991); *E. Paralyzed Veterans Ass’n. v. Camden*, 545 A.2d 127, 131 (N.J. 1988)).

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compact.”⁷ That rule was codified by the legislatures of New York and New Jersey in drafting the bi-state compact, inasmuch as the compact expressly prohibits unilateral action by one state without the concurrence of the legislature of the other state.⁸ New Jersey courts, however, have carved out a narrow exception to this rule, finding that if the member-states have complimentary or parallel legislation, the laws of one state may be applied to the bi-state entity if they are “substantially similar” to an enactment of the other state.⁹ New York has not espoused a similar position, leaving open the question of whether the “substantially similar” test could be validly applied against the Port Authority. For the purposes of this article, it is simply helpful to know this possible exception exists.

New York and New Jersey did not explicitly provide for whistleblower protections in either the original 1921 compact or the 1951 amendments thereto, and New Jersey courts have found that New York and New Jersey do not have substantially similar whistleblower legislation. Therefore, employees of the Port Authority have been without non-federal whistleblower protections.

II. THE PORT AUTHORITY WHISTLEBLOWER PROTECTION POLICY

On March 19, 2015, the Board of the Port Authority of New York and New Jersey (the “Board”) passed a resolution enacting the Whistleblower Protection Policy (the “Policy”).¹⁰ The stated purpose behind the Policy is to “encourage Port Authority employees to disclose wrongdoing by the Port Authority and its employees acting in connection with their employment, without fear of employer retaliation.”¹¹ More specifically, the Policy

permit[s] Port Authority employees to step forward without fear of retaliation and report conduct which they know or reasonably believe involves corruption, criminal activity, other violation of applicable federal, state or local laws, rules or regulations,

7. *Hess*, 513 U.S. at 42; *HIP*, 693 F.3d at 358; *Ballinger*, 800 A.2d at 101.

8. N.J. STAT. ANN. § 32:1-8 (West 2017); N.Y. UNCONSOL. LAW § 6408 (McKinney 2017).

9. *Ballinger*, 800 A.2d at 102 (quoting *E. Paralyzed Veterans Ass’n*, 545 A.2d at 127).

10. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, MINUTES (March 19, 2015), <https://www.panynj.gov/corporate-information/pdf/PA-Minutes-3-19-15.pdf> (hereinafter Board Minutes).

11. *Id.* at 27.

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conflict of interest, gross mismanagement, gross waste of funds or abuse of authority within the Port Authority.¹²

In order to effectuate that purpose, the Board granted broad coverage under the Policy, including not only employees of the Port Authority but also “all entities participating in Port Authority business transactions.”¹³ The Policy provides that:

[n]o Commissioner, officer or employee of the Port Authority shall take or participate in an adverse personnel action with respect to an officer or employee of the Port Authority solely as a result of, or in retaliation for, his or her: (i) making a truthful report (regardless of motivation) of information concerning conduct which he or she knows or reasonably believes to involve corruption, criminal activity, conflict of interest, gross mismanagement, gross waste of funds or abuse of authority by another Port Authority officer or employee, which concerns his or her office or employment, or by persons dealing with the Port Authority (collectively, “misconduct”) to the Inspector General; (ii) objection to, and/or refusal to participate in misconduct; or (iii) cooperation with an investigation by a public body, including provision of truthful information or testimony with respect to misconduct.¹⁴

In keeping with the theme of broad coverage, “adverse personnel action” is also broadly defined to include:

any material alteration to existing terms, conditions and privileges of employment including, without limitation, dismissal, demotion, suspension, compulsory leave, disciplinary action, negative performance evaluation, any action resulting in loss of staff, office space or equipment or other benefit, failure to appoint, failure to promote, or any transfer or assignment or failure to transfer or assign against the wishes of the affected employee.¹⁵

12. *Id.*

13. *Id.*

14. *Id.* at 28–29.

15. *Id.* at 27.

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The Office of the Inspector General of the Port Authority administers the Policy in its entirety. The Policy's enforcement mechanism appears to be completely internal, requiring reporting of any adverse action "in accordance with the procedures established by the Office of the Inspector General."¹⁶ The only specific reporting procedure contained within the resolution requires the Inspector General to "establish and maintain a 'hotline' to facilitate reporting on either an anonymous or confidential basis."¹⁷ In addition to the hotline, and for ease of access, the Inspector General also created an online form to field complaints.¹⁸

Reporting parties may, but need not, report their identity in order to be protected under the Policy.¹⁹ The Policy seeks to protect anonymity to the greatest extent possible, but also recognizes that anonymity may be sacrificed in the interest of conducting a full investigation of the matter.²⁰

Once a report is received, the Policy requires the Inspector General to conduct an inquiry to determine whether the adverse personnel action is in violation of the Whistleblower Protection Policy.²¹ Procedural defects in the reporting of a violation are not fatal, so long as the reporting party acted in good faith:

To the extent that the Inspector General determines that the officer or employee making the report of the prohibited adverse personnel action, while acting in good faith (regardless of motivation, and based on actual knowledge or reasonable belief of the existence of misconduct), failed to follow one of the procedural elements set forth in this Whistleblower Protection Policy, but as an equitable matter should otherwise qualify for protection under this Whistleblower Protection Policy, the

16. *Id.* at 29.

17. *Id.*

18. THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, REPORT FRAUD, <http://www.panynj.gov/inspector-general/fraud-complaint-form.cfm> (last visited April 12, 2017).

19. Board Minutes, *supra* note 10 at 29 ("If a reporting officer or employee does not wish to disclose his or her identity, the officer or employee may report on an anonymous basis, and such anonymous reporting shall not adversely impact on such officer's or employee's eligibility for coverage under this Whistleblower Protection Policy, to the extent that such officer's or employee's identity is subsequently disclosed.").

20. *Id.* ("The confidentiality of the identity of the officer or employee submitting the report or complaint will be maintained to the fullest extent possible, consistent with the need to conduct an adequate investigation.").

21. *Id.*

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Inspector General shall not take into account such procedural failure in making a determination under this Whistleblower Protection Policy.²²

The Policy also requires the Inspector General's Office to provide written notice of receipt of a report to the reporting party within fifteen days of the report,²³ which must include the name of the person in the Office who will serve as the contact to the reporting party.²⁴

Once the investigation has concluded, “the Inspector General shall provide a written summary of the final determination to the officer or employee who reported the prohibited adverse personnel action.”²⁵ “The summary shall include the Inspector General’s recommendations, if any, for remedial action, or shall state that the Inspector General has determined to dismiss the complaint and terminate the investigation.”²⁶ If the Inspector General decides to dismiss the complaint and terminate the investigation, in addition to notice to the reporting party, notice must be given to the Port Authority’s Governance and Ethics Committee (the “Ethics Committee”).²⁷ In contrast, if a determination is made that a prohibited adverse personnel action has been taken, the Inspector General must, “without undue delay,” give notice to both the Ethics Committee and the Executive Director of the Port Authority—unless the Inspector General finds that the Executive Director was involved in the action.²⁸

If a prohibited action is found, the Executive Director must then “(i) determine the remedial action to be taken and (ii) report such determination on remedial action to the Governance and Ethics Committee in writing, with a copy sent to the Inspector General.”²⁹ Such remedial action may include:

1. reinstatement or redeployment of the employee to a position the same as or comparable to the position the employee held

22. *Id.*

23. *Id.* at 29–30.

24. *Id.* at 30.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

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or would have held if not for the adverse personnel action; or, as appropriate, to an equivalent position;

2. reinstatement of full seniority rights;
3. payment of lost compensation which includes both wages and benefits; and
4. other remedial measures necessary to effectuate a “make whole” remedy that addresses the effects of the adverse personnel action.³⁰

The Ethics Committee will then recommend any necessary actions to the Board.³¹ Within these necessary actions, the Board is permitted to discipline any officer or employee found to have violated the principles set forth in the Policy, “in the manner provided in the rules and regulations of the Port Authority.”³²

Finally, and potentially most interestingly, the Policy provides that it is not the exclusive remedy for whistleblower protection.³³ Specifically, the Policy states that:

[n]othing in this Whistleblower Protection Policy shall be construed to limit the rights of any officer or employee of the Port Authority with regard to any administrative procedure or judicial review; provided, that an officer or employee who is the subject of a report of misconduct shall not participate in any adverse personnel action pertaining to the officer or employee reporting such misconduct, other than to provide factual information in the proceedings pertaining to such adverse personnel action.³⁴

III. PEERING INTO THE CRYSTAL BALL

It is unclear whether the Policy will fill the entire void created by the absence of state whistleblower protections. As noted above, the Policy itself does not purport to preempt other remedies available to employees. Nonetheless, the Policy is unclear as to what other remedies may be available. Absent the patchwork of federal whistleblower protections

30. *Id.* at 27–28.

31. *Id.* at 30.

32. *Id.*

33. *Id.* at 30–31.

34. *Id.*

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available, employees of the Port Authority are left trusting the internal operations of the Office of Inspector General in prosecuting any instances of retaliation. Perhaps the Policy itself will give employees alternative means of judicial review, sounding in contractual or equitable principles. The only thing that is clear, as proven by recent events, is the need for fulsome protection of Port Authority employees who choose to step forward and report acts that affect public confidence and raid the public coffers.³⁵ Only time will tell if the protections that the Port Authority has crafted will be sufficient to accomplish that goal.

35. *See, e.g.*, Press Release United States Attorney's Office, District of New Jersey, Former Deputy Executive Director of Port Authority and Former Deputy Chief of Staff in N.J. Governor's Office, Guilty on All Counts (Nov. 4, 2016) (<https://www.justice.gov/usao-nj/pr/former-deputy-executive-director-port-authority-and-former-deputy-chief-staff-nj-govern-0>) (discussing the conviction of former Deputy Executive Director of Port Authority's misuse of Port Authority resources for political retaliation).