

D.U.P. NO. 96-26

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

BOROUGH OF AVALON and
AFSCME COUNCIL 71,

Respondents,

-and-

Docket No. CI-96-51

WAYNE FRITZ,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint on Wayne Fritz' allegation that the Borough of Avalon and AFSCME Council 71 committed an unfair practice by failing to notify him in a timely manner that the Borough leased its water and sewer operations to a private contractor.

The Director finds that AFSCME ceased representation of Fritz' unit before the Borough privatized its water and sewer department and that there is no allegation that AFSCME treated Fritz differently than it did other unit members. The Director also finds that although Fritz alleges that the Borough treated him differently than other unit members by failing to notify him of how to transfer his employment to the private contractor, that there is no allegation that the disparate treatment was motivated by activity protected by the Act.

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Appearances:

For the Respondent - Borough of Avalon,
Gruccio, Pepper, Giovinazzi, DeSanto & Farnoly, attorneys
(Lawrence Pepper, Jr., of counsel)

For the Respondent - AFSCME,
Tracy A. Smith, Staff Representative

For the Charging Party,
Press & Long, attorneys
(Richard L. Press, of counsel)

REFUSAL TO ISSUE COMPLAINT

On February 20, 1996, Wayne Fritz filed an unfair practice charge with the Public Employment Relations Commission against the Borough of Avalon and the American Federation of State, County and Municipal Employees Council 71^{1/}. Fritz also alleges that the

^{1/} The charge incorrectly refers to Council 71 as "Local 71".

Borough violated subsections 5.4(a)(3), (6) and (7) ^{2/} of the New Jersey Employer-Employee Relations Act N.J.S.A. 34:13A-1 et seq. by failing to notify him in a timely manner that the Borough leased its water and sewer operations to a private contractor. Fritz alleges that AFSCME violated subsections 5.4(b)(4) and (5) ^{3/} of the Act by failing to notify him in a timely manner that the Borough leased its water and sewer operations to a private contractor.

Fritz was a foreman in the Borough's Department of Public Works and Utilities. He was out of work due to a physical disability from October 1994 to October 1995. During this period, the Borough leased its water and sewer operations to the New Jersey American Water Company. All of the Borough's water and sewer employees except Fritz were transferred to the employment of the New Jersey American Water Company.

Fritz alleges that neither the Borough nor AFSCME notified him of the transfer or the need to contact the New Jersey American Water Company. Fritz first became aware that the Borough had leased

^{2/} These subsections prohibit public employers, their representatives or agents from: "(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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

^{3/} These subsections prohibit employee organizations, their representatives or agents from: "(4) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (5) Violating any of the rules and regulations established by the commission."

its water and sewer operations when he received a letter dated September 14, 1995 from the Borough's Director of Public Works, Henry deButts. The letter stated that the Borough had entered into an agreement with the New Jersey American Water Company to take over management and operation of the water and sewer utility, effective September 16, 1995; it advised Fritz that his eligibility for disability expired on October 3, 1995 and if he did not return to work before then, he would be terminated on that date. However, if he intended to return to work after September 16, 1995 but before October 3, 1995, his position would no longer exist and he would also be considered terminated. It concludes "I regret the delay in advising you of these plans, but the Supervisor's Union (AFSCME) never responded to the Borough's request for a meeting concerning these plans, who should have then informed you as a member subject to these negotiations."

Fritz alleges that he independently attempted to contact AFSCME at "the Pennsauken office" but that nobody returned his calls^{4/}.

AFSCME District Council 71/Supervisors was certified as the majority representative of a unit of all regularly employed blue-collar supervisory employees employed by the Borough of Avalon on February 27, 1995.

^{4/} AFSCME states that it has never maintained an office in Pennsauken.

On May 17, 1995, AFSCME Staff Representative Tracy Smith sent a letter to Local President Dennis Horvat stating that she would be scheduling negotiations dates with the Borough and requesting that he select two people in addition to himself to meet and review contractual language.

On June 13, 1995, seven of the nine unit supervisors wrote to AFSCME Council 71 expressing their dissatisfaction and requesting to withdraw their membership.

On June 15, 1995, the Borough attorney sent a letter to Council 71 stating that the Borough planned to privatize the unit work and layoff the supervisory employees. The union was invited to discuss the matter. On June 29, 1995, Smith responded by letter, stating that she and Local President Dennis Horvat would like to meet to discuss the pending layoffs after July 11th. The Borough responded with proposed meeting dates.

By letter of June 29, 1995, Smith asked Horvat to contact her to discuss the Local's request to withdraw from Council 71. On July 6, 1995, six of the supervisors wrote to Smith stating that they were dissatisfied and didn't want to discuss the matter. They only wanted to have our membership withdrawn as soon as possible.

Smith replied to Horvat on July 25, 1995. She asked Horvat to notify her if, in light of the decision to cease AFSCME representation, the unit wanted AFSCME to represent them in discussing the possibility of privatization and layoffs with the Borough. There is no record of Horvat replying to this letter. On

August 30, 1995, Smith sent a letter to Borough Administrator Andrew Bednarek informing him that "...AFSCME Council 71 is relinquishing our rights as the majority representative for AFSCME Local 3779G, which includes the blue collar supervisors at the Borough of Avalon.". No collective negotiations agreement was ever executed between AFSCME and the Borough.

AFSCME states that it had no knowledge of Fritz' situation until it was served with this unfair practice charge.

It contends that the Borough had the responsibility to notify all employees of the pending layoffs, subcontracting and possible terminations, and the Borough, together with the New Jersey American Water Company, had the responsibility of informing Borough employees of what needed to be done to transfer employment to the subcontractor.

AFSCME argues that it was not obligated to represent the unit employees concerning possible subcontracting of their jobs. The majority of employees withdrew their membership and told AFSCME they did not want representation over this very issue. Thereupon, AFSCME withdrew its status as majority representative.

Fritz alleges that AFSCME committed an unfair practice by failing to notify him in a timely manner that the Borough subcontracted its water and sewer operations. He bases this assertion on deButts' September 14, 1995 letter.

Decisions to subcontract are not mandatorily negotiable. Local 195, IEPTE v. State, 88 N.J. 393 (1982). Local 195 requires

negotiations over proposals to discuss subcontracting decisions based on fiscal considerations, but not over the decisions themselves. The Borough offered to discuss the impending subcontracting with AFSCME, and the parties exchanged potential meeting dates in June and July of 1995. However, after AFSCME received the unit members letters disavowing interest in representation, AFSCME had a good faith doubt as to its status as majority representative by early July, 1995. It was not improper for AFSCME to cease representation of this unit. It did so well before the privatization. There is no allegation that AFSCME treated Fritz differently than it did other unit members.^{5/}

The Borough states that negotiations with the New Jersey American Water Company concerning possible privatization of its water and sewer utility operation started in late 1994, before AFSCME was certified as the blue-collar supervisors' majority representative.^{6/} The Borough states that it had an undisputed right to subcontract for water and sewer utility services. The Borough informed AFSCME of the possibility of subcontracting and layoffs, offered to discuss its plans with the union and provided dates its representatives were available to meet and discuss the

^{5/} Fritz also alleges that AFSCME violated subsections 5.4(b)(4) and (5) of the Act. However, AFSCME and the Borough never reached an agreement with AFSCME and Fritz has not alleged that AFSCME violated any specific Commission rules and regulations.

^{6/} AFSCME was certified on February 27, 1995.

issue. However, as discussed above, AFSCME did not respond to the Borough's offer. The Borough states that it notified Fritz by letter of September 14, 1995 that his position was eliminated because he was out on disability and "unavailable to talk to directly".

Fritz alleges that the Borough committed an unfair practice by failing to notify him in a timely manner that the Borough leased its water and sewer operations to a private contractor.

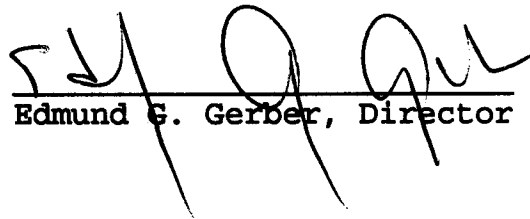
N.J.S.A. 34:13A-5.4(3) prohibits public employers from "Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act." However, I find that the Act did not require the Borough to notify Fritz of how to transfer his employment to the private contractor. Although Fritz alleges that the Borough treated him differently than other employees, there is no allegation that he was treated differently because of activity protected by the Act.^{7/}

Based upon the above, I find that the Commission's complaint issuance standard has not been met by Fritz' allegations

^{7/} Fritz also alleges that the Borough violated subsections 5.4(a)(6) and (7) of the Act. Subsection 5.4(a)(6) states that employers are prohibited from refusing to reduce a negotiated agreement to writing and to sign such agreement. However, AFSCME and the Borough never reached an agreement. Fritz also alleges that the Borough violated subsection (a)(7) of the Act, but has not alleged any facts indicating that the Borough violated any of the Commission's rules and regulations.

against the Borough or AFSCME. Therefore, I decline to issue a complaint on the allegations of this charge^{8/}. Accordingly, the charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Edmund G. Gerber, Director

DATED: May 29, 1996
Trenton, New Jersey