

D.U.P. NO. 95-39

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

In the Matter of

NEWARK FIREMENS UNION, INC., LOCAL 1846  
and FIREFIGHTER ASSOCIATION OF N.J.,

Respondents,

-and-

Docket Nos. CI-95-49, CI-95-50,  
CI-95-51, CI-95-64

DARIUS BISHOP, CURTIS JOHNSON,  
EDWIN BISHOP & CHARLES BISHOP,

Charging Parties.

SYNOPSIS

The Director of Unfair Practices dismisses four unfair practice charges alleging that a majority representative violated the duty of fair representation by failing to seek enforcement of a 1980 consent decree entered by the charging parties and the public employer; that it also violated the duty by denigrating the agreement before State officials and members of the majority representative.

The Director determined that the facts, as alleged, did not warrant the issuance of a Complaint.

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Appearances:

For the Respondent, Firemens Union  
Fox and Fox, attorneys  
(Stacey Rosenberg, of counsel)

For the Respondent, Firefighter Association  
Zazzali, Zazzali, Fagella & Nowak, attorneys  
(Paul L. Kleinbaum, of counsel)

For the Charging Parties,  
Darius Bishop, pro se  
Curtis Johnson, pro se  
Edwin Bishop, pro se  
Charles Bishop, pro se

REFUSAL TO ISSUE COMPLAINT

On February 10 and March 10, 1995, Darius Bishop, Curtis Johnson and Edwin Bishop filed separate unfair practice charges and amended charges, all alleging that the Newark Firemen's Union, Inc.,

Local 1846 violated subsections 5.4(b)(1), (2), (3), (4) and (5)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. On March 24, 1995, Charles Bishop filed an unfair practice charge against Local 1846, alleging the same facts appearing in the amended charges.

The charges allege that the Union is "intentionally engaging in unconstitutional discrimination" by creating a "capricious, arbitrary and unnecessary employer-created barrier to [their] professional development and advancement on the basis of race". Actions alleged to be violating the Act are: not holding the Newark Fire Department accountable for ending "disparity", which it is "compelled by law to do"; not negotiating all terms and conditions of employment "concerning the consent decree"; interfering with federal court consent decree of 1980; in November 1994, it "misled" the Department of Community Affairs and the N.J. Fire Safety Commission on the percentage of minority employees in the Department; in December 1994, it spoke against minority

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<sup>1/</sup> These subsections prohibit employee organizations, 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) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (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."

firefighters at a N.J. Fire Safety Commission meeting; specifically, union vice-president Ray Frost said that minority firefighters will "jeopardize the safety of the citizen [sic] and their property"; in March 1994, it spoke against the consent decree, stating that the "D.O.P. should stand up to the U.S Justice Department when it concerns the lowering of test scores" and that the agency was "very negligent and insensitive to many senior firefighters"; that the Union is "coercing" the Department of Personnel to score the promotional exam in a manner that will have an adverse impact on minority candidates; and that in August 1994, vice president Frost wrote a letter to a newspaper alleging that the consent decree cost tax-payers "countless millions of dollars" and remedies like the decree were "unconscionable".

On April 5 and May 2, 1995, Newark Firemen's Union, IAFF Local 1846 filed a letter responding to the charges. The Union asserts that a bulk of the allegations pertains to a consent decree entered by the New Jersey Department of Personnel and the U.S. Department of Justice. The decree concerns civil service testing procedures for entry-level firefighters. The Union asserts that it was not a party to the negotiations resulting in the decree and cannot be held accountable for its terms, or for determining the City's compliance with any agreement.

The Union also asserts that the consent decree is "beyond the four corners of the collective agreement" and cannot fall within the Commission's jurisdiction. Moreover, it asserts, the monitoring of the agreement falls to the signatories of the consent decree.

The Union also asserts that it has fairly represented all of its firefighters, that various terms of the decree, including procedures for civil service entry-level examinations, are not mandatorily negotiable.

The Union also asserts that the vice president's remarks to the Board of Fire Commissioners "raised legitimate issues concerning safety and the testing process for all firefighters". While calling the goals of the decree "noble", the Union sought to protect "the safety of all firefighters."

The Union denies it has any collective negotiations relationship with the N.J. Fire Safety Commission, the Department of Community Affairs and the Department of Personnel. It argues that in its collective negotiations relationship with the City of Newark, "promotional advancement" is not a mandatorily negotiable subject and that promotional advancement issues must be addressed by the parties to the consent decree. To the extent such terms are negotiable, the Union argues that they are preempted by the decree.

On June 1, 1995, I issued a letter tentatively dismissing all charges filed against Local 1846. On June 6, 1995, I issued a supplemental letter, tentatively dismissing all charges filed against the Firefighters Association of N.J. because it is not the majority representative of the charging parties.

On June 12, 1995, charging parties filed an amended charge against Local 1846 and proof of service was filed on June 21, 1995, pursuant to N.J.A.C. 19:14-1.5.

Unions must represent the interests of all unit members without discrimination. N.J.S.A. 34:13A-5.3. A breach of the duty of fair representation occurs only when a union's conduct toward a unit member is "arbitrary, discriminatory or in bad faith". Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976), citing Vaca v. Sipes, 386 U.S. 171 (1967). The Commission and New Jersey Courts consistently apply the Vaca standard in evaluating fair representation cases. See Saginario v. Attorney General, 87 N.J. 480 (1981); D'Arrigo v. State Bd. of Mediation, 119 N.J. 74 (1990).

In the private sector, a union's duty of fair representation does not extend beyond the context of negotiating, administrating and enforcing the terms of a collective negotiations agreement. Foust v. Electrical Workers (IBEW), 442 U.S. 42, 191 LRRM 2365 (1979); Conley v. Gibson, 355 U.S. 41, 41 LRRM 2089 (1957). Federal cases addressing the issue of fair representation rely on statutes conferring exclusive representation status on unions. Because minority employees were deprived of the right to choose their own representative or to bargain individually with their employer, the exercise of statutory power implied a duty on the union to represent minority employees without hostile discrimination. Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944).

The Commission has neither specifically limited the duty of fair representation to nor expanded it beyond contract negotiation, administration and enforcement. Bergen Community College Faculty Assn., P.E.R.C. No. 84-117, 10 NJPER 262 (¶15127 1984).

The Newark Firemen's Union denies representing these charging parties in the federal litigation that resulted in the consent decree. The allegations do not suggest that the charging parties asked the Union to represent them. Nor is there an allegation that any contractual provision obligates the Union to represent them in civil rights proceedings or that the Union ever represented unit employees in such cases.

This is not a case where the Union is exercising a statutorily granted right as an exclusive representative. Unlike collective negotiations or grievance processing, the litigation of civil rights claims does not require the exclusive representation of an employee organization. In fact, the result here - a consent decree - was reached without the Union.

The Union is not prohibited from commenting on health and safety issues affecting unit members to administrative agencies, even if those comments criticize an agreement reached by the public employer and a third party. Since the alleged statements did not result in some action by the Union against the parties, no violation of 5.4(b)(1) of the Act is apparent.

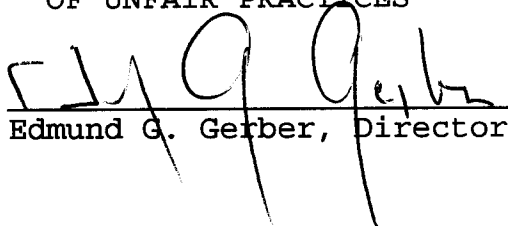
The amended charges all allege that the Union "did represent the charging parties in the federal litigation...and there is a contractual provision that obligates the union to represent unit employees." The amended charges also allege that the "consent decree was reached with the respondents' participation" and that comments made on health and safety issues "did in fact result in injuries to the charging parties by defamation...." These actions allegedly violate 5.4(b)(2), (3), (4) and (5) of the Act. Attached to the amendments are numerous photocopied pages from various sources, some not identifiable and most are not dated. Photocopied newspaper articles and a federal court consent decree were included.

The amended charges assert no dates on which any of the alleged actions occurred. The amendments fail to allege that any action occurred within six months prior to the filing of the charge, a statutory requirement. N.J.S.A. 34:13A-5.4(c). The attachments do not clarify the amended charges, which fail to specify how the respondent(s) "participated" in the litigation or in what way it (they) "represented" the charging parties. Statements which are "defamatory" may be the subject of civil litigation but are not properly the subject of an administrative hearing before this agency. Finally, the charging parties failed to assert any facts suggesting that the Firefighters Association of N.J. is their majority representative.<sup>2/</sup>



Accordingly, I dismiss all the charges.

BY ORDER OF THE DIRECTOR  
OF UNFAIR PRACTICES



Edmund G. Gerber, Director

DATED: June 29, 1995  
Trenton, New Jersey

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2/ No allegations implicate subsections 5.4(b)(2), (3), (4) and (5) of the Act.