

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

NEWARK FIREMENS UNION, INC., LOCAL 1846
and FIRE FIGHTERS ASSOCIATION OF NEW JERSEY,

Respondents,

-and-

Docket No. CI-95-49

DARIUS BISHOP,

Charging Party.

NEWARK FIREMENS UNION, INC., LOCAL 1846
and FIRE FIGHTERS ASSOCIATION OF NEW JERSEY,

Respondents,

-and-

Docket No. CI-95-50

CURTIS JOHNSON,

Charging Party.

NEWARK FIREMENS UNION, INC., LOCAL 1846

Respondent,

-and-

Docket No. CI-95-51

EDWIN BISHOP,

Charging Party.

NEWARK FIREMENS UNION, INC., LOCAL 1846
and FIRE FIGHTERS ASSOCIATION OF NEW JERSEY,

Respondents,

-and-

Docket No. CI-95-64

CHARLES BISHOP,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission sustains the Director of Unfair Practices' decision not to issue Complaints based on unfair practice charges filed by Darius Bishop, Curtis Johnson,

Edwin Bishop and Charles Bishop against the Newark Firemens Union, Inc. Local 1846 and the Fire Fighters Association of New Jersey. The charges, as amended, allege that the respondents violated the New Jersey Employer-Employee Relations Act by "intentionally engaging in unconstitutional discrimination" and creating a "capricious, arbitrary and unnecessary employer created barrier to [their] professional development and advancement on the basis of race." The Commission finds that the allegations in the unfair practice charges do not constitute a breach of the duty of fair representation. The Commission finds no factual allegations in the charges to indicate that either respondent was a party to a consent decree; refused to negotiate with the employer over the charging parties' mandatorily negotiable terms and conditions of employment with respect to promotional advancement; or "coerced" the Department of Personnel to score a promotional examination in a manner that would disadvantage minority candidates. The Commission also finds that there are no specific factual allegations that the respondents negotiated any agreement jeopardizing the consent decree or in any other way interfered with the charging parties' individual rights to enforce the rights of racial minorities under the consent decree.

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.

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CHARLES BISHOP,

Charging Party.

Appearances:

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

For the Respondent Fire Fighters 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

DECISION AND ORDER

Charging parties Darius Bishop, Curtis Johnson, Edwin Bishop and Charles Bishop filed identical unfair practice charges and amended charges against the Newark Firemen's Union, Inc., Local 1846. Darius Bishop, Curtis Johnson and Charles Bishop also filed charges against the Fire Fighters Association of New Jersey. The charges, as amended, allege that the respondents violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(b)(1), (2), (3), (4) and (5),^{1/} by

^{1/} 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."

"intentionally engaging in unconstitutional discrimination" and creating a "capricious, arbitrary and unnecessary employer created barrier to [their] professional development and advancement on the basis of race." In 1980, the City of Newark entered into a federal court consent decree with eleven other cities, the State of New Jersey, the Chief Examiner and Secretary of the Civil Service Commission, and the United States Department of Justice. The decree settled most claims relating to the test for and appointments to firefighter positions. The charges, as amended, specifically allege that the respondents:

1. are not holding the Newark Fire Department accountable for its goal of ending "disparity" and achieving proportional representation of its labor force "which they are compelled by law to do";

2. have breached their contracts with the charging parties by not negotiating all terms and conditions of employment "concerning the consent decree";

3. in December 1994, violated the Act when the vice-president of the Newark Firemen's Union said minorities have proven to be detrimental to the fire service and when it implemented a program to eliminate the consent decree;

4. are interfering with the consent decree;

5. in November 1994, misled the Department of Community Affairs and the New Jersey Fire Safety Commission on the percentage of minority employees in the Newark Fire Department;

6. are refusing to negotiate in good faith with the New Jersey Fire Commission, Department of Community Affairs, Department of Personnel, and Newark Fire Department over charging parties' terms and conditions of employment with respect to promotional advancement;

7. in March 1994, violated the Act when the president of the Fire Fighters Association spoke out against the consent decree to the New Jersey Department of Personnel and stated that "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";

8. are "coercing" the Department of Personnel to score the promotional exam in a manner that will adversely impact minority candidates;

9. in August 1994, violated the Act when a vice-president of the Newark Firemen's Union wrote a letter to a newspaper alleging that the consent decree cost taxpayers "countless millions of dollars" and remedies like the decree were "unconscionable";

10. represented the charging parties in the federal litigation leading to the consent decree;

11. are obligated by a contractual provision to represent unit employees; and

12. made false comments on health and safety issues defaming the charging parties.

On June 29, 1995, the Director of Unfair Practices refused to issue a Complaint. D.U.P. No. 95-39, 21 NJPER 293 (¶26186 1995). He found that:

1. the Newark Firemen's Union denies representing the charging parties in the federal litigation leading to the consent decree; the allegations do not suggest that the charging parties asked the union to represent them; and there is no 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;

2. no duty of fair representation attaches to the litigation of civil rights claims since the majority representative does not have any exclusive rights to represent employees in such litigation;

3. the union is not prohibited from commenting to administrative agencies on health and safety issues affecting unit members, even if those comments criticize an agreement reached by the public employer and a third party; and the alleged statements did not result in any union action against the charging parties; and

4. the amended charges assert no dates on which any of the alleged actions occurred; attachments to the amendments do not specify how the respondents participated in the litigation; this agency lacks jurisdiction to hear defamation claims; and the Fire Fighters Association is not the charging parties' majority representative.

On July 14, 1995, the charging parties appealed the Director's refusal to issue a Complaint.^{2/} They claim that the City of Newark is a named defendant in the consent decree and that the respondents have a contract with the City obligating them to determine whether personnel policies are fair and equitably administered. They further claim that amendments to the charges were meant as additions to, not substitutions for, earlier filings specifying the dates of the allegedly illegal actions. Finally, the charging parties claim that the Newark Firemen's Union is a local branch of the Fire Fighters Association of New Jersey which provides advice and guidance to the local and which receives dues from the local and its members.

On August 16, 1995, the Newark Firemen's Union filed a statement opposing the appeal. It also relies on previously filed statements of position. The Union argues that the appeal is procedurally deficient; it was not a party to the consent decree and cannot be held accountable for its terms; it has no obligation to represent the charging parties in that type of litigation; the charge was untimely filed; it and its officers were not prohibited from commenting on health and safety issues affecting unit members, even if those comments criticized the consent decree; and none of the alleged statements resulted in any union action against the charging parties.

^{2/} Initially it was unclear whether the charging parties wanted the Director to reconsider his decision or wanted us to review his decision. At our request, the charging parties clarified that they were appealing the Director's decision.

Designation as an exclusive negotiations representative confers on a union broad powers to represent unit employees and to negotiate the terms and conditions of their employment. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976). Along with this power comes the duty to represent the interests of all employees "without discrimination." N.J.S.A. 34:13A-5.3. "A breach of the statutory duty of fair representation occurs when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." Id. at 491 (quoting Vaca v. Sipes, 386 U.S. 171 (1967)). The duty has its origins in a case involving a white railroad union that negotiated an agreement that would have excluded all black firemen from employment. Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944). The Alabama Supreme Court held that the union had the right to bargain without protecting the rights of minorities. The United States Supreme Court reversed. It held that the duty did not preclude the union from negotiating different treatment for employees based on differences in seniority, skills, job characteristics, or other relevant factors, but did preclude discrimination on the basis of race alone since such discrimination was "irrelevant and invidious" and unauthorized. Id. at 203.

The charging parties essentially claim that the respondents breached the duty of fair representation by failing to enforce the terms of a consent decree affecting their promotional

opportunities and by undermining that decree. But many aspects of the promotional process are not the subject of collective negotiations in the public sector. For example, promotional criteria are not mandatorily negotiable. Further, promotional examinations in the City of Newark are administered by the New Jersey Department of Personnel and are outside the negotiations process.

In Bergen Community College Faculty Ass'n, P.E.R.C. No. 84-117, 10 NJPER 262 (¶15127 1984), we declined to decide whether the duty of fair representation ever extends beyond the context of negotiating and administering the terms of a collective negotiations agreement. We need not reach that question here either. Regardless of whether that question is answered affirmatively or negatively, the allegations in the unfair practice charges do not constitute a breach of the duty of fair representation.

No factual allegations in the charges indicate that either respondent was a party to the consent decree; no factual allegations indicate that either respondent refused to negotiate with the employer over the charging parties' mandatorily negotiable terms and conditions of employment with respect to promotional advancement; and no factual allegations indicate that either respondent "coerced" the Department of Personnel to score a promotional examination in a manner that would disadvantage

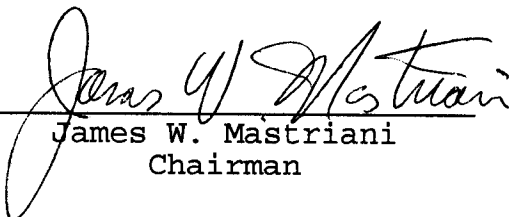
minority candidates. We are therefore left with allegations that criticisms of the consent decree by union officials defamed the charging parties and violated the Act.

We do not have jurisdiction over defamation claims. While we do have jurisdiction over claims that a majority representative failed to represent unit employees properly because of race, we do not believe that the conduct alleged, even if proven, would rise to that level. Some of the respondents' leaders allegedly expressed concerns about health and safety and seniority in the course of commenting on the consent decree. There are no specific factual allegations that the respondents negotiated any agreement jeopardizing the consent decree or in any other way interfered with the charging parties' individual rights to enforce the rights of racial minorities under the consent decree. Accordingly, we sustain the Director's decision not to issue Complaints.

ORDER

The decision of the Director of Unfair Practices not to issue Complaints is sustained.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Boose, Buchanan, Finn, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioner Wenzler was not present.

DATED: December 21, 1995
Trenton, New Jersey
ISSUED: December 21, 1995