

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. No. 82-185; 82-246; 82-259

TITLE BOSTON FIREFIGHTERS UNION, LOCAL 718, Petitioner
v. BOSTON CHAPTER, NAACP, ET AL.;
BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Petitioner v. PEDRO CASTRO, ET AL.; and
NANCY B. BEECHER, ET AL., Petitioner
v. BOSTON CHAPTER, NAACP, ET AL

PLACE Washington, D. C.

DATE April 18, 1983

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(202) 628-9300
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IN THE SUPREME COURT OF THE UNITED STATES

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner

v.

BOSTON CHAPTER, NAACP, ET AL.;
BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Petitioner

v.

PEDRO CASTRO, ET AL.; and
NANCY B. BEECHER, ET AL.,
Petitioner

v.

BOSTON CHAPTER, NAACP, ET AL.

No. 82-185

No. 82-246

No. 82-259

Washington, D.C.

Monday, April 18, 1983

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 2:01 p.m.

APPEARANCES:

THOMAS A. BARNICO, Assistant Attorney General of
Massachusetts; on behalf of State Petitioners.

JOHN MC MAHON, Boston, Massachusetts; on behalf
of Union Petitioners.

JAMES S. DITTMAR, Boston, Massachusetts; on behalf
of Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Barnico, I think you may proceed whenever you are ready.

MR. BARNICO: Thank you.

ORAL ARGUMENT OF THOMAS A. BARNICO, ESQ.

ON BEHALF OF STATE PETITIONERS

MR. BARNICO: Mr. Chief Justice, and may it please the Court:

The Commonwealth of Massachusetts appears here today seeking reversal of orders entered by the United States District Court for the District of Massachusetts on August 7, 1981. We thus seek the same result as the Union Petitioners in these cases.

To accomplish that result, however, we bring a different appeal and different arguments before the Court. We appeal from the unjustified suspension of a Massachusetts law that requires that layoffs in public safety positions be made in reverse order of seniority.

After briefly stating these cases, it is my intention to argue that the District Court abused its discretion by suspending that law where no previous orders or decrees entered in these cases concerned layoffs and where entry of the orders contradicted principles of federalism that govern the exercise of the federal equity power.

The orders at issues were entered in on-going cases

1 with long judicial histories and state-wide application. Ten
2 years ago the District Courts in these cases entered judgments
3 and found that state examination procedures for police and fire
4 positions unintentionally, and I repeat, unintentionally violated
5 the rights of the plaintiffs. Remedial orders were entered.
6 Those orders required a new examination and also required
7 preferential certification of minorities to local cities and
8 towns.

9 As a result of the preferential certifications, the
10 percentage of minorities in Massachusetts city and town police and fi
11 forces increased substantially.

12 QUESTION: Mr. Barnico, were those original orders
13 entered of indefinite duration?

14 MR. BARNICO: The orders that were entered in August
15 of 1981, Your Honor, or the --

16 QUESTION: No, the original -- sometime in the '70's.
17 I don't know when it was.

18 MR. BARNICO: The subsequent decrees entered shortly
19 after those original findings to provide for the remedial phase
20 of the cases applied to the cities and towns until the percentages
21 of minorities reach a percentage commensurate with the percentage
22 in the community.

23 QUESTION: And, has that percentage yet been reached?

24 MR. BARNICO: Not in Boston, Your Honor, but in many
25 communities, yes.

1 QUESTION: So, as far as Boston is concerned, the
2 decree entered in the '70's still has considerable prospective
3 effect?

4 MR. BARNICO: Yes, Your Honor.

5 In the summer of 1981, Boston proposed layoffs in its
6 police and fire departments. The District Court granted what
7 plaintiffs styled a motion to modify prior remedial orders.

8 QUESTION: Should the order that we are reviewing here
9 today, having to do with the layoffs, be interpreted as having
10 a permanent effect in your view?

11 MR. BARNICO: Our view -- That is correct, Your Honor.
12 Our view is by its terms it has permanent application.

13 That order of August 7, 1981 directed city and state
14 officials to ignore the provisions of the state seniority
15 statute, never challenged and never at issue --

16 QUESTION: Hasn't there been some recent legislation
17 requiring the reinstatement of all those firemen and policemen
18 who were laid off?

19 MR. BARNICO: Yes, Your Honor, that legislation was
20 passed in June of 1982.

21 QUESTION: Well, then, what kind of case have we got
22 here?

23 MR. BARNICO: You have a live case here, Your Honor.

24 QUESTION: How?

25 MR. BARNICO: These cases --

1 QUESTION: Everyone who was aggrieved has now been
2 reinstated, hasn't he?

3 MR. BARNICO: The state is aggrieved and --

4 QUESTION: Everyone who has been aggrieved, every
5 fireman and police officer has been reinstated, has he not?

6 MR. BARNICO: The firefighters and police officers laid
7 off in the summer of 1981 were reinstated by the terms of that
8 legislation, that is correct.

9 QUESTION: I ask you again then, what kind of a case
10 do we have here? Do we have any?

11 MR. BARNICO: We have a live case here, Your Honor,
12 because the state defendants have been parties to this case for
13 over ten years, are still subject to the outstanding terms of
14 those orders.

15 QUESTION: Do you mean on back pay?

16 MR. BARNICO: Excuse me?

17 QUESTION: Do you mean by reason of back pay that
18 is paid to these people?

19 MR. BARNICO: No, Your Honor. Mr. McMahon could speak
20 to the permanent effect of the orders on those back-pay claims.
21 Since I represent the state defendants, I rely on the outstanding
22 effect of the orders on the state officials.

23 QUESTION: What orders are you talking about,
24 reinstatement and seniority or what? What orders are you talking
25 about?

1 MR. BARNICO: The orders of August 7, 1981, by their
2 terms apply to any program for reduction in force. They also
3 apply currently to the administrative appeals brought by the
4 terminated officers that are now pending before the Civil
5 Service Commission.

6 In addition, Your Honor, we have a third argument and
7 that is simply that these cases continue in the District Court.
8 We are still subject to the underlying judgments of these cases.
9 And, when we return from this case, the cases that I mentioned
10 before live with on-going --

11 QUESTION: The parties have had to comply with the
12 reduction-in-force orders.

13 MR. BARNICO: I am not sure what you mean by that.

14 QUESTION: Well, the issue in the case was how were
15 they going to discharge people when they reduced force?

16 MR. BARNICO: That is correct. Boston proposed layoffs
17 and the issue was whether the seniority statute of Massachusetts
18 should govern the layoffs last time and --

19 QUESTION: And the orders were that they wouldn't
20 govern them.

21 MR. BARNICO: The orders said that the statute would
22 be ignored and percentages -- any program of reduction in force
23 should be maintained.

24 QUESTION: And the police and fire department have been
25 complying with those?

1 MR. BARNICO: That is correct, Your Honor.

2 QUESTION: And they must continue to comply --

3 MR. BARNICO: Absolutely.

4 QUESTION: Unless the orders are set aside?

5 MR. BARNICO: That is correct, Your Honor.

6 QUESTION: Well, I don't follow that. If the officers,
7 whether firemen or policemen, affected have, by the latest
8 legislation, been ordered reinstated and have, in fact, been
9 reinstated, what do the authorities have to comply with? They
10 are reinstated now.

11 MR. BARNICO: As I said, Your Honor, there is a current
12 effect on the Civil Service Commission's adjudication of their
13 appeals.

14 QUESTION: Well, what is left of their appeals? Their
15 appeals don't concern reinstatement, do they?

16 QUESTION: They are trying to get back pay.

17 MR. BARNICO: That is right.

18 QUESTION: And seniority.

19 QUESTION: Seniority.

20 QUESTION: Those issues are not here in this case.

21 QUESTION: But, they are not moot, are they?

22 MR. BARNICO: Back pay is not an issue in this case, no,
23 Your Honor.

24 QUESTION: But neither is seniority.

25 QUESTION: There is a controversy, I take it, that goes

1 on under the decree.

2 MR. BARNICO: The controversy continues for those reasons
3 that I gave earlier. That is our position.

4 QUESTION: And the reinstatement included too with
5 full seniority, isn't it? Everybody who was discharged has been
6 reinstated with full seniority, is that not right?

7 MR. BARNICO: No, Your Honor.

8 QUESTION: Oh, isn't it?

9 MR. BARNICO: Your Honor, these cases --

10 QUESTION: Well, if not, what? The reinstatement is
11 with what seniority?

12 MR. BARNICO: Seniority only to the time of determination.
13 I think Mr. McMahon could --

14 QUESTION: You don't seem to be too sure of that.

15 MR. BARNICO: Well, Mr. McMahon, I think, could
16 clarify that position, but the back pay issue still remains so
17 that when Justice Stevens suggested that all issues were taken
18 care by the reinstatement, I add that the back pay question
19 still remains.

20 QUESTION: I assume, since you represent the state,
21 your denying that they are entitled to back pay and he contends
22 they are entitled to back pay.

23 MR. BARNICO: The state is an adjudicator actually,
24 Your Honor.

25 QUESTION: Oh, I see.

1 MR. BARNICO: The Commission will decide whether the
2 city will actually pay the back pay.

3 These cases pose important -- --

4 QUESTION: The city under the -- or rather the Civil
5 Service Commission under the modification of 1981 is subject to
6 an express paragraph, is it not, of the modification limiting the
7 authority of the Civil Service Commission?

8 MR. BARNICO: Yes, Your Honor, and that continuing
9 effect keeps this case alive before this Court.

10 QUESTION: The respondents contended, and some copy of
11 a Civil Service Commission decision is attached, to indicated that
12 our decision here will have no effect on the back pay and that is
13 being resolved on different grounds.

14 MR. BARNICO: But, currently, Your Honor, the Civil
15 Service Commission is prevented from even considering the
16 question of seniority in the back pay and termination appeals.
17 We are asking, as the state adjudicator, to be free from an order
18 which currently prohibits us from making an inquiry that we are
19 bound to make under the state law.

20 QUESTION: Yes, but Mr. Barnico, if we were to con-
21 clude that the case is moot because of these reinstatements, I
22 take it we would vacate all those orders, wouldn't we?

23 MR. BARNICO: But, you would have to conclude that
24 there is no continuing and permanent effect on the state
25 petitioners before you vacate these orders, vacate this case and

1 instruct to dismiss. You can only invoke Munsingwear procedure
2 so-called once you determine that there is no current and no
3 permanent effect on the state officials. And, we argue, of
4 course, that there is.

5 QUESTION: Well, I take it we would have to vacate
6 the entire decree if it is moot, wouldn't we?

7 MR. BARNICO: Absolutely.

8 QUESTION: Including the 1970 portion.

9 MR. BARNICO: And that procedure that has been used
10 in the past has often been used to vacate the underlying judgments
11 with instructions to dismiss which is far different than here.
12 In this case, you will not hear plaintiffs' respondents ask the
13 Court to vacate the underlying judgments because those continue
14 and they have orders which effect examinations and certifications
15 in the future.

16 My time is expiring but my case is not, I assure you.

17 (Laughter)

18 MR. BARNICO: Previous school desegregation and
19 employment discrimination cases decided by this Court have
20 required states to address particular instances of racial
21 discrimination. In these cases, implementation of a neutral
22 testing device and the hiring preferences created in the system
23 redress specific wrongs and vindicated entitlements. That
24 entitlement, however, didn't constitute a predicate to the most
25 recent orders which extended the remedy.

1 The District Court ignored fundamental and affirmative
2 limitations on the judicial power. The District Court ordered
3 and the First Circuit Court of Appeals approved a decree that
4 transcended all previous orders that were ever entered in these
5 cases and suspended a valid state law.

6 In closing, we acknowledge the competing interests
7 that are pitted and the important questions that are posed by
8 these cases. The District Court Judge heard argument from these
9 interests. He weighed these issues. Out of sheer exasperation,
10 I think, at one point in the oral argument of the case, he looked
11 at the parties below him and commented that no party had asked
12 him to retain the best policemen or the best firemen.

13 But, faced with those issues, he was not free to
14 impose his own view of who should be retained. He was bound by
15 this Court's previous determination limiting the scope of the
16 equity power to violations previously found. He was bound by
17 Congress' express protection of bona fide seniority systems
18 and he was bound by principles of federalism that prohibited him
19 from suspending a state law never challenged and never at issue
20 in these cases. He ignored those rules and his orders must,
21 therefore, be reversed.

22 If there are no further questions, I conclude here.

23 Thank you.

24 CHIEF JUSTICE BURGER: Mr. McMahon?
25

1 ORAL ARGUMENT OF JOHN MC MAHON, ESQ.

2 ON BEHALF OF THE UNION PETITIONERS

3 MR. MC MAHON: Thank you, Mr. Chief Justice. May it
4 please the Court:

5 Before proceeding to my view of the issue, if I could
6 respond to some of the questions that had been posed with respect
7 to the seniority remedy. In effect, upon reinstatement, because
8 the officers had been laid off for fiscal reasons, they did
9 regain all their seniority back to date of permanent appointment.
10 In that case, the seniority issue, in terms of relief that they
11 are presently seeking before the state agency, dropped out of
12 the case.

13 There is a very serious back pay issue that is involved
14 and it is one which the Civil Service Commission is asked to
15 rule upon.

16 As long as the District Court's August 7, 1981 order
17 does exist, the Civil Service Commission cannot rule upon that
18 order.

19 I would submit to you as a matter of equities as to
20 who should bear the particular loss, the City of Boston or the
21 laid-off officers if, in fact, the seniority suppression was not
22 valid, that should be an issue left best to the Civil Service
23 Commission of Massachusetts.

24 There are a variety of Civil Service appeals which
25 have come up, including a police officer, superior officer's

1 appeal, which, I believe, Justice O'Connor referenced in her
2 question and that order, if I recall it, was based on the fact
3 that the City of Boston had used a political manipulation to
4 lay off a small number of police officers in another group not
5 represented by the union before you today.

6 In effect, I think the Civil Service Commission was
7 stating that they found that there was a political discrimination
8 involved in that order. I have not looked at it and I apologize
9 if I have not quoted it correctly, but my recollection is that
10 it was based on a different series of proofs than would be
11 involved in this case.

12 If I could return to my argument, the unions submit
13 that the issue before you is whether a federal court in an
14 employment discrimination case can grant increased, competitive
15 job security to junior minority firefighters who were not, who
16 were not victims of past acts of discrimination by suppressing
17 a bona fide seniority statute requiring seniority layoffs to
18 the detriment of senior non-minority firefighters who were then
19 terminated.

20 I would submit that this judicial override should be
21 reversed on statutory grounds. If the statutory grounds are
22 not persuasive, this judicial override should fail for reasons
23 found in the equal protection component of the Fifth Amendment.

24 May I note that under current law there are no constitutional
25 violations that are present on the record before you. Certainly

1 Washington v. Davis has now established that in order to have
2 a Fourteenth Amendment violation there would have to be purposeful,
3 deliberate discrimination shown. That is not the case before
4 you.

5 The plaintiffs -- I am sorry, the respondents made no
6 challenge either to Section 39, the Massachusetts Seniority
7 Statute, or to layoffs by its terms. They made no further
8 assertion of any new civil rights violation.

9 I would submit to you that in framing relief the
10 District Court cannot disregard the congressional policies
11 enacted in Section 703(h) of Title VII, protecting and conserving
12 earned seniority rights. I submit to you that that statute
13 extends an immunity to routine applications of seniority systems
14 irrespective of disparate impacts.

15 QUESTION: Mr. McMahon, what is your theory on how
16 703(h) gets into this case since the action wasn't brought under
17 Title VII?

18 MR. MC MAHON: Your Honor, there were two actions.
19 In the police case, the police decision had been adjudicated
20 prior to the effective date of Title VII's application to
21 municipalities and local governments. In the firefighter case,
22 the plaintiffs', private plaintiffs' complaint originally
23 asserted only violations of the Fourteenth Amendment in Sections
24 1981 and 1983. That complaint was filed in November of 1972.
25 The United States filed a complaint repeating those same grounds

1 and asserting a Title VII ground in February of 1973.

2 The focus in both complaints was upon examinations
3 conducted no later than August 1971 and on recruitment techniques.
4 It may be that one could argue that there was never a Title VII
5 violation ever present in these cases. However, I have to note
6 that the record would also show that in April of 1972 a Boston
7 eligibility list was established from the August 1971 exam and
8 some 86 non-minority firefighter appointments were made prior
9 to the filing of the plaintiffs' complaint. Thereafter, the
10 state agencies voluntarily ceased using that list so that there
11 may be a Title VII connection in that respect, but the parties
12 never focused on it in litigation and the theories in both cases,
13 as they were stated by the District Court, were on the Fourteenth
14 Amendment and on the Constitution, not Title VII.

15 But, even if there is a constitutional basis to this
16 case, I would conclude that the Section 1988 of 42 US Code
17 would require a District Court to shape relief in an employment
18 case based on constitutional grounds according to other federal
19 law. Such other federal law should be Section 703(h).

20 You are really redressing, in the constitutional sense,
21 individual violations and only individual rights can be violated.
22 I think then that you would use the same sort of constructive
23 seniority approach that this Court has approved in Franks and
24 approved again in Teamsters and has commented on several times,
25 most recently in Ford Motor Company and in Zipes, in order to

1 extend rightful place relief.

2 So, even under the Constitution or Title VII, I think
3 you come to the same result, Your Honor.

4 In this case, the District Court did establish four
5 priority pools. The first priority pool, the Group A, consisted
6 of all persons who took the August 1971 or earlier examination
7 and failed. The second pool, with which we are concerned, is
8 the Group C. That consisted of all non-minority persons who
9 could not qualify for admission into Groups A but who had passed
10 a new examination. I would submit that those persons who were
11 Group C were not victims of any discrimination, any act of
12 discrimination, and that the conferral of a random benefit upon
13 them without establishing any victim identification was not only
14 inconsistent with this Court's decision in Teamsters, but, indeed,
15 it bears upon the claim that the disadvantaged senior firefighters
16 have that their rights were invaded by the order in the sense
17 that they lost an equal protection component that they possessed.

18 May I add that the particular order benefit only
19 persons who were not victims of racial discrimination or
20 identified as victims of racial discrimination; that a use of a
21 racial classification should only be approved, if it ever can
22 be approved, when it is used as a remedy for a person who is a
23 victim of past identified discrimination.

24 In this case, that surely was not the use. Instead,
25 and I think both the District Court and the Court of Appeals'

1 opinions reflect this fact.

2 At the August 30 -- I am sorry, the July 30, 1981
3 hearing before the District Court, and if I could paraphrase the
4 District Court, they said that the only issue before the house
5 is an issue of numbers, whether we were going to keep a certain
6 number, whether we were going to decrease a certain number or
7 whether we were going to increase a certain number. We heard
8 arguments on all the other issues. That was the focus. It was
9 on percentages.

10 Again, the Court of Appeals' opinion states that the
11 purpose of the orders was to maintain a semblance of racial
12 balance. I would submit to you that a purpose in that direction
13 is constitutionally invalid.

14 Finally, I would ask the Court to look again at the
15 impact of the orders in terms of any constitutional justification
16 for the orders. The impact wasn't dispersed among some amorphous
17 population. It fell on 83 non-minority firefighters, 96 non-
18 minority police officers. And, if I can go outside the record
19 for a moment, it actually fell on 123 non-minority firefighters,
20 yet they are indistinguishable in terms of advantage of obtaining
21 that employment, in terms of the risks in the kind of employment
22 in which they were involved. They are indistinguishable from
23 the beneficiaries of those orders save in two respects. The
24 disadvantage individuals did not share a preferred racial
25 characteristic and they were senior.

1 I have concluded. Thank you very much.

2 CHIEF JUSTICE BURGER: Mr. Dittmar?

3 ORAL ARGUMENT OF JAMES S. DITTMAR, ESQ.

4 ON BEHALF OF THE RESPONDENTS

5 MR. DITTMAR: Mr. Chief Justice, and may it please the
6 Court:

7 Because the Court voiced almost with one voice a
8 concern about mootness, I would like to address that issue
9 briefly. It is a threshold issue. As the suggestion of mootness,
10 which we incorporated in our brief in the merits, indicates we
11 view this case to be moot.

12 A Massachusetts' Act of 1982, Chapter 190 which was
13 passed approximately one month after the Court of Appeals
14 affirmed the District Court decision, mandates that all officers
15 in both departments who were discharged during the reduction-in-
16 force program in 1981 be rehired. It also, modifying what would
17 otherwise be standard principles of Civil Service law, specifies
18 that all of these individuals who were laid off and then rehired
19 have lifetime job security from layoffs for lack of funds or
20 reduction-in-force programs.

21 In addition, the City of Boston has begun rehiring
22 additional officers over the last approximately nine months
23 under mandates also coming from that same statute to raise and
24 maintain levels of staffing in the two departments.

25 QUESTION: You said "rehiring." Do you mean --

1 MR. DITTMAR: Additional hiring. I did mispeak.

2 The case, we believe, is moot.

3 QUESTION: While you are there, what did they do about
4 the back pay of these men who were laid off?

5 MR. DITTMAR: The back pay is now, to my understanding,
6 in some instances pending before the Civil Service Commission.
7 The pendency of that claim, however, does not make this controversy
8 before this Court still a live controversy. The parties to
9 that back-pay claim are not before this Court. Indeed, on our
10 side of defense in this Court we have no complaint whatsoever
11 whether the officers receive back pay.

12 QUESTION: Mr. Dittmar, wouldn't you say that the
13 state could represent the Civil Service Commissioners?

14 MR. DITTMAR: The state could represent the Civil
15 Service Commissioners but they sit as an adjudicator party.

16 QUESTION: But, they are subject to paragraph four
17 of Judge Caffrey's decree, are they not?

18 MR. DITTMAR: Paragraph four of Judge Caffrey's decree
19 has, for all intents and purposes, has expired, because there
20 are no longer any terminations or layoffs with which the Civil
21 Service officials could in any way interfere by any action that
22 they take.

23 Moreover, Your Honor, this Court nor the lower court
24 on any remand following any action on the merits can issue no
25 relief that has any bearing upon that back-pay claim.

1 QUESTION: But, what if this judgment is reversed, that
2 that level of force order is invalidated? Wouldn't the
3 Civil Service Commission have -- In short, the layoffs were
4 invalid. Wouldn't the Civil Service Commission have a pretty
5 tough time denying back pay?

6 MR. DITTMAR: I don't see how the Civil Service
7 Commission could deny a back-pay claim because an order which
8 was valid and not reversed nor vacated at the time it was in
9 effect is subsequently reversed on appeal. I believe, if
10 anything in terms of alleviating what might be perceived as a
11 hinderance on the part of the Civil Service Commission,
12 a vacation for mootness grants them greater freedom, because that
13 vacates the order.

14 QUESTION: Mr. Dittmar, do you know of any case
15 similar to this where there has been an underlying controversy
16 that is the subject of a basic decree and then there is a
17 modification of the decree and we have simply said, well, this
18 branch of the case is moot but the underlying controversy
19 isn't?

20 MR. DITTMAR: I don't believe so, Your Honor. I
21 don't believe --

22 QUESTION: You ask Mr. Carpenter.

23 MR. DITTMAR: I believe all of the cases in which a
24 correlary -- Excuse me, Your Honor.

25 QUESTION: Allow me to finish my question.

1 MR. DITTMAR: Sure.

2 QUESTION: You are really asking us to go into kind of
3 a new departure, aren't you, where the basic underlying case is
4 not moot, to simply prune off a little branch of it and say,
5 because it is moot, the whole thing is vacated?

6 MR. DITTMAR: No, quite the contrary. The basic
7 underlying controversy is moot and my brethern are asking to
8 have you -- because they say there is a little branch off to the
9 side that is still alive keeps the underlying controversy alive.

10 QUESTION: Yes, but the underlying controversy is whether
11 there should be a minority quota requirement in the Boston
12 policy and fire systems, isn't there?

13 MR. DITTMAR: That has been resolved by the statute.

14 QUESTION: Well, that has been resolved by the District
15 Court decree in the '70's.

16 MR. DITTMAR: Well, as between -- I am sorry, in the
17 '70's, no, not in the '70's.

18 QUESTION: Well, when was the original decree entered?

19 MR. DITTMAR: The original decrees, the original decrees
20 were in the early '70's, that is true, but those decrees
21 terminate by their own terms once any hiring authority achieves
22 a percentage representation of firefighters or police officers.

23 QUESTION: Opposing counsel said that that decree had
24 not terminated so far as the City of Boston was concerned.

25 MR. DITTMAR: That is correct, but that decree is not

1 before this Court. None of the parties to this proceeding have
2 challenged any of the original decrees.

3 QUESTION: If that is a live controversy, any modifi-
4 cation of it is a live controversy, isn't it?

5 MR. DITTMAR: No, I don't believe so, Your Honor. The
6 only controversy that is here before this Court is whether the
7 modification was proper. The fact that there is an underlying
8 lawsuit with on-going remedial measures in place which are not
9 being challenged, stays in place, doesn't make the order which
10 has brought us all before the Court here a live controversy.

11 QUESTION: Well, but, we decide mootness in terms of
12 cases or controversies, not in terms of orders.

13 MR. DITTMAR: You decide it in terms of -- That is true.
14 There is -- The Court has -- The lower court has continuing
15 jurisdiction over this case, but the order, as to which
16 certiorari was granted coming up to this Court, does no longer
17 represent a live controversy. That issue, the relief that is
18 sought, the controversy, the challenges to that relief, the
19 arguments in support of that relief are not longer live. All of
20 the officers have been rehired and they have all been given
21 permanent civil service job security by virtue of statute.

22 QUESTION: But, according to the petitioners, it is
23 a permanent order and any future action by the city or those
24 governed by the order will have to be taken in conformity with
25 it.

1 MR. DITTMAR: I disagree with that. I understand that
2 that is their contention. I believe on the face of the order,
3 Your Honor, it is plainly not a permanent order. It was argued
4 for an entered to address a specific reduction-in-force program
5 that took place in the summer of 1981. If it were, indeed, a
6 permanent order ordering that the City of Boston maintains
7 specific racial percentages indefinitely, and in that sense,
8 permanent as is now contended, it surely would have been
9 challenged on the merits as a matter of substantive and remedial
10 law in the lower court and in the Court of Appeals under the
11 teachings of this Court in the Swann, Charlotte, Mecklenberg
12 case and under the teaching of this Court in the Pasadena
13 Board of Education-Spangler case and it was never raised. There
14 was never any attack on the invalidity of the order as a matter
15 of substantive law, because it set a permanent racial quota,
16 a permanent racial maintenance level, until that issue was
17 raised to defeat the suggestion of mootness in this Court.

18 And, if you look at the terms of the order, the
19 language, any reduction-in-force program is plainly in there
20 in order to avoid any problems of evasion by the manner in which
21 in the summer of 1981 on the factual record before the Court
22 be programmed or structured in a way that would avoid the
23 prohibition of the District Court's order.

24 QUESTION: Was the legislation ordering reinstatement
25 consistent with the Court's order?

1 MR. DITTMAR: The legislation ordering reinstatement
2 had nothing to do with the Court's order except that it followed
3 the Court's order.

4 QUESTION: I just ask you again, was it consistent
5 with it?

6 MR. DITTMAR: Was it consistent with the Court's order?

7 QUESTION: Yes. Was it consistent with the order to
8 maintain a particular racial balance in the forces?

9 MR. DITTMAR: It lead to the same -- It lead to a
10 consistent result, that is true, in the sense that --

11 QUESTION: Well, it ordered reinstatement of the very
12 people that the Court thought should have been laid off.

13 MR. DITTMAR: No, no. The Court simply ordered that
14 during the reduction-in-force program the level of minority
15 representation obtained at the outset of that program be maintained.
16 The city went ahead with a reduction-in-force program, laid off
17 a certain number of minority and a certain number of non-minority
18 officers and then completed its program. Then, the legislature
19 specified that everyone who had been laid off should be rehired
20 and that additional staffing minimums be maintained and that
21 would simply bring the level of officers back to where they were
22 before we all started plus a little bit more.

23 QUESTION: And the same ratio?

24 MR. DITTMAR: I don't know whether it is in the same
25 ratio, Your Honor.

1 QUESTION: That was my question.

2 MR. DITTMAR: I can't answer your question as --

3 QUESTION: That is all I needed to know. Thank you.

4 MR. DITTMAR: I would like to turn to the merits of
5 the case.

6 QUESTION: May I ask just one question to be sure I
7 understand?

8 MR. DITTMAR: Yes, Your Honor.

9 QUESTION: Is it your position that you would be just
10 as content to have the District Judge's order of August 7, 1981
11 vacated?

12 MR. DITTMAR: Well, I suppose having put the suggestion
13 of mootness into the brief, I would have to say, yes, we are just
14 as content.

15 QUESTION: I just wanted to be sure.

16 MR. DITTMAR: I think that is a matter of responsibility
17 to the Court in laying out the full dimensions of the present
18 circumstances to the Court.

19 QUESTION: Well, you made the suggestion contemplating
20 that if the suggestion were favorably received that is exactly
21 what would happen.

22 MR. DITTMAR: That is correct, Your Honor.

23 QUESTION: But, no more stripping down, just that one
24 order?

25 MR. DITTMAR: Just that one order, that is correct.

1 And, I believe --

2 QUESTION: And, the rest of the case remains alive?

3 MR. DITTMAR: The rest of the case remains alive, that
4 is correct.

5 I believe Justice Rehnquist's suggestion or illusion
6 to -- in any kind of vacation in the event of a determination by
7 this Court of mootness, that that vacation would effect to any
8 prior orders. I don't think that is properly before the Court
9 now. The only thing that is before the Court is the challenge
10 by the certiorari petitioners to the relief embodied in the
11 August 7, 1981 order. Indeed, all parties to this case expressly,
12 expressly disclaimed any challenge either to the original judgment
13 or to the remedial measures that were in place prior to August
14 of 1981.

15 QUESTION: Do you think it would have been improper in
16 the original decree for the District Judge to have included
17 provisions dealing with the contingency of possible reductions
18 in force?

19 MR. DITTMAR: Well, Your Honor, I don't believe that
20 it would have been beyond the Court's power to do so, but I
21 believe that it would not have been a sound exercise in discretion.

22 QUESTION: Why wouldn't he have power today to keep in
23 effect a portion of the decree which would deal with that
24 contingency even if we can't see it immediately before us?

25 MR. DITTMAR: Because I think that in exercising

1 discretion for remedial purposes to remedy the exclusion of
2 minorities from public service a court should be very careful
3 to consider the actual circumstances obtaining before it, to
4 consider what extent of relief has been accorded under the
5 on-going remedial program which is incomplete, how far along the
6 remedy is, the extent of the imposition or the frustration of
7 the remedy, which an otherwise proposed governmental action
8 would work, the burden that any particular order would place
9 upon third-party employees, and factors of that sort.

10 I don't believe that that kind of set of considerations
11 ought to be considered in the abstract and ought to be laid down
12 in advance. Those ought to be taken as the case proceeds in
13 precisely the fashion in which the District Court -- Chief Judge
14 Caffrey of the District Court did in this particular case.

15 QUESTION: If the case if not moot, now you are going
16 to address the merits of the case, are you?

17 MR. DITTMAR: If the case is not moot, I would like to
18 address the merits, yes, Your Honor.

19 The order that is under review on the merits is an
20 order that arises out of a case in which, through the operation
21 of Massachusetts Civil Service practices, minorities had been
22 unconstitutionally excluded historically from the police and
23 fire departments of the City of Boston. The District Court in
24 both of these cases in the early 1970's adjudicated that
25 minorities had been unconstitutionally excluded from these two

1 departments. A remedial program was put in place in order to
2 correct the effects, the condition of exclusion which these
3 past practices have brought about.

4 The city and the state Civil Service officials were
5 bound to participate in that remedial program. It was an order
6 of the Court to remedy this condition which the discrimination
7 had accomplished and ultimately they entered into consent orders
8 with respect to both of the cases.

9 The program was on-going when, in the summer of 1981,
10 the City of Boston proposed and started implementing a program
11 such that in six weeks approximately one-half of all Black and
12 Hispanic firemen in the City of Boston and one-half of all Black
13 and Hispanic police officers were going to be laid off.

14 Another way of putting it is approximately one-half
15 of all of the officers in both departments who had been hired
16 under the remedial phase yet to be completed ordered by the
17 Court were going to be laid off.

18 The Court's order came in that context and the Court's
19 order said you may not reduce the present percentage representa-
20 tion levels if you pursue this reduction-in-force program which
21 has been placed before me with statistics indicating its scope
22 and impact.

23 I believe the order was proper and the issue before
24 the Court on the merits is whether the District Court had the
25 power to issue such an order to maintain and protect and promote

1 the original purposes of its remedial orders going back to the
2 original adjudications of liability and whether, in this
3 particular instance on the matters and record before the Court,
4 there was a sound and proper exercise of discretion. I believe
5 the answer to both questions is the Court had its power, had
6 the power and the Court properly exercised discretion.

7 My starting point is that having adjudicated dis-
8 criminatory exclusion of minorities from a public governmental
9 agency, in this case public services agencies, the Court has
10 the power to remedy the effects, the exclusion that the past
11 practices has brought about.

12 QUESTION: Could I ask you what seniority did the
13 Blacks have or the minorities have when they were hired pursuant
14 to the Court's order? Did they just start out from scratch?

15 MR. DITTMAR: They started out from scratch, Your Honor.

16 QUESTION: So, they didn't -- There was no attempt
17 made to jump them over anybody else?

18 MR. DITTMAR: Two things, Your Honor. One, there was
19 no attempt made to jump them up over anyone else with a kind of
20 rightful place, retroactive seniority that the Court has spoken
21 about in several cases. And, equally significant, no attempt
22 was made to identify, to give notice to or bring before the
23 Court and adjudicate who they were out there who had been
24 deterred by years and years of exclusion of minorities.

25 QUESTION: So, at the time -- So, when the layoffs

1 started, the minorities that had been hired were certainly junior
2 to a lot of other people?

3 MR. DITTMAR: That is correct.

4 QUESTION: And junior to a lot of people who were then
5 discharged pursuant to the order?

6 MR. DITTMAR: That is correct, Your Honor. That is
7 correct.

8 It was a proper form of relief, however, in large part
9 because what we had had in the past is we had had the exclusion
10 of minorities from the police and fire departments and the
11 original remedies, the original remedies were the predicate
12 for the modification. The original remedies had been themselves
13 a flexible compromise between the interests of those who had
14 been discriminated against, those who were also already in these
15 various forces and who would be jumped over at the time, and
16 the interests of the municipal authorities in managing, as much
17 as possible in the ordinary fashion, their hiring and operations
18 of their departments.

19 When the layoffs came in 1981, however, because there
20 had been no wholesale attempt to locate and give a remedy to
21 all of the victims of discrimination originally or even to
22 give a full rightful place, retroactive seniority remedy to
23 those who were clearly identified at the outset, the Court once
24 again, I believe, used flexibility to --

25 QUESTION: When you say "clearly identified at the

1 outset," what do you mean?

2 MR. DITTMAR: That would have been individuals who had
3 taken and passed discriminatory examinations and who could be
4 counted -- whose noses could be counted so to speak.

5 But, this Court --

6 QUESTION: But, if they took and passed the examination --

7 MR. DITTMAR: Took and failed the examination. Did I
8 misspeak? I am sorry, Your Honor. Took and failed the old
9 examinations.

10 The unions --

11 QUESTION: But, you were making the argument on behalf
12 of those that didn't, too.

13 MR. DITTMAR: What I am arguing for, Your Honor, is
14 flexibility for the District Court in fashioning remedies to
15 remedy the effects of long-standing exclusion of racial minorities
16 from government service.

17 QUESTION: And, you make that argument on behalf of
18 all those who were hired, but whom you can't prove or you don't
19 allege were themselves ever discriminated against.

20 MR. DITTMAR: No, no, no, no. Many who were hired
21 were discriminated against, many who never got hired --

22 QUESTION: Yes.

23 MR. DITTMAR: -- themselves were victims of discrimi-
24 nation.

25 QUESTION: I am just saying there are a lot of people

1 who were hired pursuant to the Court's order that were never
2 discriminated against themselves.

3 MR. DITTMAR: During the remedial phase --

4 QUESTION: I don't suppose there would be much of a
5 case here if you could show that all of these people were in
6 that category of people who could have been given rightful place
7 seniority when they were hired.

8 MR. DITTMAR: If what Your Honor is saying is that
9 there was an element of the original remedial measures was an
10 affirmative action type of order, that is the case.

11 QUESTION: Yes, all right.

12 MR. DITTMAR: That is the case. That is not now before
13 the Court, but that is, indeed, an accurate description of the
14 original orders.

15 QUESTION: Well, it is certainly before the Court in
16 the sense that when we get to the merits of reviewing the
17 District Court's injunction against firing. It might make some
18 difference as to whether the District Court acted properly if
19 all of the hirees under the minority program had, in fact, been
20 discriminated against or if some of the hirees had never been
21 the victims of discrimination.

22 QUESTION: If that weren't the case, I doubt there
23 would be a case here.

24 MR. DITTMAR: Except that there is a great deal of
25 complexity in this. For example --

1 QUESTION: Well, I think -- I know as much about the
2 complexity on that particular issue, I think, as I need to know.

3 MR. DITTMAR: One of the issues here is that everyone
4 who ultimately was hired had to take civil service examinations
5 and these civil service examinations were never validated ever.
6 And, in fact, given the results over the years, even since the
7 original decrees, of those examinations under EEOC standards,
8 they would be prima facie invalid exams. In a sense, almost
9 every minority applicant and ultimately hiree during the course
10 of remediation here has been a victim of the same type of
11 discrimination that prompted this litigation at the outset.

12 But, the point that I would like to make is confronted
13 back in the early 1970's with governmental practices which had
14 resulted in an exclusion, a dramatic, virtually wholesale
15 exclusion of minorities from public service, public safety
16 forces and then confronted with an effort in 1981 to go back
17 a great half step of the whole step that had been taken, what
18 was the proper extent of the power of the federal court to effect
19 a remedy? And, I believe the proper extent is defined by a
20 number of the opinions of the Justices of this Court indicating
21 that race conscious, affirmative, if you will, remedies, without
22 requiring nose counting proof of individual victimization, are
23 appropriate where there has been an adjudication by a competent
24 tribunal looking at the specific situation which is going to
25 be affected by the remedial measure that there has been

1 unconstitutional discrimination and that we have here. We have
2 it in the original findings of this Court.

3 The Court chose at the outset a remedial measure designed
4 not to leap over everyone who was already there and give the
5 minorities who had been discriminated against their rightful
6 place, not even to go out and find all of the minorities who had
7 been excluded, but to work some balance and that balance was an
8 affirmative action program. And, I suggest that is an
9 appropriate balance for a court to strike in issuing a remedial
10 or designing a remedial program. And, that program was in
11 effect for a number of years. It was on-going. The parties
12 were committed to it. Then, in 1981, the City of Boston, one
13 of the parties to that program, backed out and said one-half
14 of everyone who has been hired we are going to lay off in six
15 weeks.

16 And, the Court at that time took what I believe was
17 another flexible step to preserve the remedial program which was
18 incomplete and to promote the original objectives. It didn't
19 advance the interests of Blacks and Hispanics over whites in
20 absolute numbers. It didn't prohibit any layoffs of minorities.
21 The burden of the layoff program which was instituted by the
22 City of Boston fell on minorities as well as on white officers.
23 The Court did not take away from the City of Boston or the
24 state civil service officials for that matter their powers and
25 prerogatives to make the decisions that they felt were appropriate.

1 The Court did not -- The City of Boston, by the way, and its
2 Police Commissioner and its Fire Commissioner did not oppose the
3 relief that we sought in the District Court, did not participate
4 in the appeal even and are obviously not before this Court today.

5 There was no trammeling of the interests of local
6 government in managing its own affairs. The program was a
7 balanced program to the extent to which the Court's order
8 addressed the operation of a civil service system. In fact,
9 it provided that that system should be preserved as much as
10 possible. The Court's order specifically provided that any
11 individuals who were laid off in accordance with the prohibitory
12 terms of the order during the course of that program the
13 representation levels be maintained and even those individuals
14 who were laid off, they should get restored to service with
15 full seniority as of the time they were laid off. And, indeed,
16 that is exactly what happened.

17 QUESTION: What was the reason for paragraph four
18 of Judge Caffrey's order where it says in the event that a
19 police officer's appeal of his termination to the members of
20 the Civil Service Commission challenges the method of termination
21 set forth herein. The members of the Civil Service Commission
22 are restrained and enjoined from disapproving, invalidating,
23 or interfering with the termination on that basis?

24 MR. DITTMAR: The purpose of that provision, Your Honor,
25 was to insure that as a matter of state civil service law, if

1 there was compliance by the city with the order, the Civil
2 Service Commission would not overturn that in such a fashion
3 as to require the layoffs of minorities in contravention of the
4 Court's order. The Court's order was simply -- has as it
5 essence only one provision and that was that during that program,
6 and only during that program, minority percentages be maintained.

7 The other provisions of the order were designed to
8 insure that that not be sabotaged, that is all. And, for that
9 matter, Your Honor, that provision, in my opinion, has no
10 continuing validity, no continuing vitality, I am sorry, I
11 should say.

12 Now, one other point that is raised by the unions
13 is that the burden of the Court's order falls on third parties.
14 That is true. I believe this Court's orders have clearly
15 established that where the highest national priority of remedying
16 race discrimination, and in this case we have virtually, as I
17 have said, exclusion of minorities from the police and fire
18 departments of the City of Boston. It is appropriate for third
19 parties to share that burden. It didn't fall all on them as
20 I have pointed out. Minorities were laid off and the Court
21 was careful to preserve as much as possible the provisions of
22 the state civil service seniority scheme of things in the event
23 of the very kind of thing which happened which was the political
24 solution to these problems which was frustrated until the day
25 after the District Court order came down was ultimately lifted

1 and a resolution was found.

2 Seniority expectations after all are not vested rights.
3 In Massachusetts they are defeasible at any time by will of the
4 legislature. We don't have involved here collective bargaining
5 agreements which is the fruit of collective bargaining efforts
6 or organized labor. We don't have an interference with national
7 policies favoring collective bargaining arrangements.

8 In short, the extent of burden that the order places
9 on others is within the permissible scope of the District Court
10 and the District Court took care not to step any further than it
11 had to.

12 I would like to just conclude by pointing out that
13 the efforts in this country through legal measures to eradicate
14 several hundreds years of race discrimination are not many years
15 old, barely 25 years, and one of the hallmarks of what this
16 Court has done by way of giving direction to the lower courts
17 is to vest the lower courts with flexibility to deal with the
18 very difficult circumstances, practical, political, and economic,
19 that they face.

20 I believe that the District Court and the Court of
21 Appeals in this case exercised that kind of flexibility wisely
22 and I urge the Court to affirm and not deprive the lower courts
23 of the needed flexibility to meet this pressing national challenge.

24 Thank you.

25 CHIEF JUSTICE BURGER: Mr. Barnico, do you have anything

1 further?

2 MR. BARNICO: No. Thank you, Your Honor.

3 CHIEF JUSTICE BURGER: Thank you, gentlemen, the case
4 is submitted.

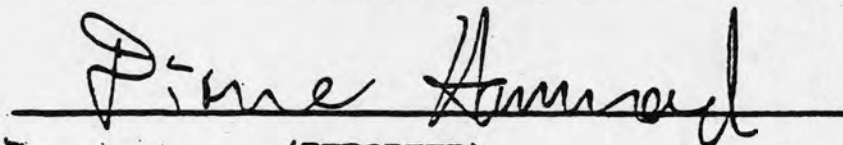
5 (Whereupon, at 2:54 p.m., the case in the above-entitled
6 matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

- #82-185 - BOSTON FIREFIGHTERS UNION, LOCAL 718, Petitioner v. BOSTON CHAPTER, NAACP, ET AL;
- #82-246 - BOSTON POLICE PATROLMEN'S ASSOCIATION, INC., Petitioner v. PEDRO CASTRO, ET AL.: and
- #82-259 - NANCY B. BEECHER, ET AL., Petitioners v. BOSTON CHAPTER, NAACP, ET AL

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

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