CITY OF NEWTON AND AFSCME, COUNCIL 93, AFL-CIO LOCAL 800, SI-194 (2/13/87). NOTICE TO PARTIES.

107. Picketing
108. Strikes
108.2 withdrawal of services
108.21 refusal of overtime
108.4 setting requirements under Chapter 150E, Section 9

Commissioners participating:

Paul T. Edgar, Chairman
Elizabeth K. Boyer, Commissioner

Appearances:

Harold F. Kowal, Esq. - Representing the City of Newgon

Wayne Soini, Esq. - Representing the American Federation of States, County, and Municipal Employees, Council 93 AFL-CIO, Local 800

NOTICE TO PARTIES

On February 12, 1987, the Labor Relations Commission (Commission) received a petition filed under Section 9A(b) of G.L. c.150E (the Law) by the City of Newton (City). The City alleged that the American Federation of State, County, and Municipal Employees, Council 93, AFL-CIO, Local 800 (the Union) and its members had engaged in a strike on February 11, 1987 and February 12, 1987 and that the strike had been induced, condoned and encouraged by the Union. The petition further alleged that the activities of the Union and its members were in violation of G.L. c.150E, Section 9A.

On February 12, 1987, beginning at approximately 7:30 p.m., an investigation was conducted by the Commission. The parties have stipulated to the following facts:

1. The City of Newton (City) and the Union are parties to a collective bargaining agreement effective from July 1, 1984 to June 30, 1986. The provisions of the labor contract have voluntarily been extended up to and including the present.

2. The labor contract contains a No Strike clause (Article XXX) which embodies the language of M.G.L. c.150E, Section 9A(a).

3. The Union represents a bargaining unit which is comprised of all employees of the City's Public Works, Public Buildings, Parks and Recreation and Police Departments with exclusions for Civil Service Foremen, Police Officers, Supervisors and other employees of the City which exclusions are further specified in the labor contract's Union Recognition provisions. (Article I)

4. Beginning on or about May 8, 1986 the parties met to initiate negotiations

for a successor collective bargaining agreement.

5. The parties continued to meet and negotiate until October 6, 1986 when the Union declared that it believed the negotiations to be at an impasse and, therefore, it intended to file a Petition for Mediation.

6. Subsequent to Union's filing for mediation, two mediation sessions were conducted. At the second mediation session on November 14, 1986 a tentative settlement was reached.

7. The Mayor agreed to the tentative agreement.

8. The Union membership voted to reject the tentative agreement.

9. The parties resumed mediation. Sessions have been conducted on January 29, 1987 and on February 10, 1987. The mediation process is continuing. A mediation session is scheduled for February 17, 1987.

10. On January 30, 1987, the day following the first mediation session conducted after the Union failed to ratify the tentative agreement, the Union President conducted an early morning meeting with other Union officers.

11. A snow storm had been forecast to begin during the afternoon of January 30, 1987 which could require the necessity of overtime work by the bargaining unit employees to perform snow removal, snow plowing and related emergency winter storm activities.

12. The City relies upon the bargaining unit employees to perform the majority of its snow removal and other winter weather related activities. Frequently this work is performed on an overtime basis at night or on the weekends. The City uses the contractually negotiated procedure for procuring employees to work overtime. A sufficient number of employees have always responded to the overtime requests to allow the overtime assignments to be completed. During urgent conditions and during emergency conditions sufficient employees have always responded to requests to work overtime.

13. In the morning of January 30, 1987, the City's Labor Counsel informed the Union's bargaining representative that he heard that services would be withheld. He (the Union's bargaining representative, Frank Moroney, of AFSCME, Council 93) met with Union officers on that day.

14. Bargaining unit employees are also required to work overtime at night and during weekends to perform emergency repair services. They have always performed these services.

15. The mediation session of February 10, 1987 ended at approximately 9:00 P.M. without a settlement. There was a Union meeting on February 11, 1987 at 3:30 P.M. at the 440 American Legion Post in Newton. Approximately 150 (out of 320) bargaining unit employees attended that meeting. Union officers, including the

President, Stewards, Executive Board members, and other Union officials attended the meeting.

16. During the work day on February 11, 1987 employees were notified that overtime work was scheduled for that day. Certain employees were requested to work overtime in the Department of Public Works and the Recreation Department. This is the first time that the City has not been able to perform any overtime work.

17. During this period of the year, sanding and/or plowing of streets and other snow related activities must be performed on an overtime basis, depending upon "Old Man Winter."

18. The labor contract between the parties contains a provision which allows the City "to require a reasonable amount of overtime from the employees, and to take whatever action may be necessary to carry out the work of the departments in situations of emergency." (Article XXIX, Management Rights)

On the basis of the investigation we make the following additional findings:

On the afternoon of February 11, 1987 the Union president, Larry Zastrea, convened and presided at a meeting of Union members, at which he explained the current state of contract negotiations after the mediation session held the previous day. Union members expressed anger and dissatisfaction about the lack of a contract settlement, and some members loudly discussed the possibility of refusing to accept any further overtime assignments offered by the City as a way of expressing their frustration with the City's bargaining position. Union witnesses who testified at the investigation all denied that the local union membership had voted at the meeting to refuse to perform all overtime work; several Employer witnesses testified that they had heard indirectly through Department supervisors and, in one case, directly from a Union steward who attended the meeting, that the Union membership did take a vote to concertedly withhold their services for overtime work. In view of the analysis as discussed infra, we do not need to resolve the credibility disputes in the record concerning whether the Union membership conducted a vote to engage in a concerted refusal to accept overtime requests or whether the Union otherwise participated with or encouraged the employees in such a decision or course of action.

On February 11, 1987 the Employer desired to have three crews of approximately six to eight employees per crew work on an overtime basis in order to remove piled-up snow at the high schools. According to the Employer's evidence, approximately 135 employees in the Public Works and Parks and Recreation Departments who were at work on February 11 were asked whether they would be willing to perform this snow removal work on an overtime basis that day, and no one accpeted the offered overtime work. According to the Employer's witnesses, on February 12, 1987 the City offered overtime work assignments to the approximately 228 bargaining unit employees who were at work that day, and all but two employees declined to work. Although several of the Union witnesses claimed not to have been asked to do the overtime, it was undisputed that these were the first two occasions that overtime work could not be performed because no bargaining unit employee had accepted the offer to perform it. The Commissioners of Public Works, Parks and Recreation and Buildings for the

City testified that no employee who declined the offers to work overtime on February 11 and February 12 was subsequently ordered or directed to perform an overtime assignment that day by any City representatives or supervisors. The City has never ordered any employee to perform an overtime assignment because sufficient numbers of employees had always agreed to accept overtime work when it was offered. Historically, employees have declined offered overtime assignments without being disciplined or threatened with adverse action. The Employer maintains rotating lists of bargaining unit employees available to perform overtime assitnments in order to distribute offered overtime assignments.

Opinion

Section 9A(a) of the Law reads:

> No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services.

Section 9a(b) provides recourse to the Commission "[w]hen a strike occurs or is about to occur."

In prior cases the Commission has found a strike within the meaning of Section 9A(a) where employees are refusing to perform some portion of their assigned work. Town of Arlington, 6 MLC 1327 (1979); Lenox School Committee, 7 MLC 1761 (1980); Southeastern Regional School District Committee, 7 MLC 1801 (1980). In determining whether public employees are engaging in a strike or withholding of services, the Commission considers the following factors: 1) whether the service is one which employees must perform as a condition of employment; 2) whether the service was in fact withheld or is about to be withheld; and 3) the party responsible for the withholding of the service. Newton School Committee, 9 MLC 1611, 1613 (1983).

In the instant case, the Employer argues that because sufficient numbers of bargaining unit members have historically accepted requests to perform snow removal; road sanding; and sewer, drain, water main repairs and other such maintenances services on an overtime basis, such services have become those which employees must perform as a condition of employment. "Duties of employment,...include...those practices...which have been performed by employees as a group on a consistent basis over a sustained period of time." Lenox School Committee, supra at 1775.

However, the facts indicate that although sufficient numbers of employees have historically accepted offered overtime work, the practice has been that employees who are offered overtime work are free to decline to perform overtime without discipline or threat of other adverse action. In fact, the Employer maintains rotating lists of available employees in order to distribute the overtime requests when individual employees decline to perform overtime on a voluntary basis.

While the Employer concedes that individual employees may decline offered overtime, it argues that a nearly unanimous refusal to accept such work amounts to a

strike or withholding of services prohibited by Section 9A(a) of the Law. We disagree. Having established the practice that employees may decline to accept offered overtime, the Employer cannot now claim that the performance of offered overtime is a mandatory duty of employment based upon the number of employees declining to accept the offered overtime. Compare Newton School Committee, 9 MLC at 1613-1614; City of Beverly, 3 MLC 1229 (1976).

The Employer argues that it must be able to respond to the public safety concerns of highway maintenance. However, the Employer clearly has the right to require that overtime be performed by bargaining unit members. Article XXIX provides in part that management has the right "to require a reasonable amount of overtime from the employees... (emphasis added)." In addition, the Employer may "...take whatever action may be necessary to carry out the work of the departments in situations of emergency." We do not read this language to restrict mandatory overtime to emergency situations. Rather, we read the contract as allowing the Employer to require that employees perform overtime assignments when sufficient personnel cannot be secured through voluntary acceptance of offered overtime.

Based upon the foregoing analysis of the facts presented in this case, we must dismiss the petition because the first factor set out in the Newton School Committee case was not satisfied. The Employer did not establish taht the service which was withheld by employees in this case, that is, the performance of offered overtime work, is "one which employees must perform as a condition of employment." Newton School Committee, 9 MLC at 1613. Although virtually all of the bargaining unit employees concertedly declined to accept the Employer's offer to them of overtime work on February 11 and 12, it was clear that the established practice allowed employees to decline to accept overtime opportunities offered by the Employer. The evidence did establish that the performance of overtime when required to do so by the Employer is a service which employees must perform as a condition of employment. However, there was no evidence that employees had yet concertedly refused to perform overtime work required, as opposed to offered, by the Employer. Having decided that the first factor in the Newton School Committee test is not satisfied, and therefore that the employees' concerted withholding of their service did not constitute unlawful strike activity on these facts, we need not decide whether the Union is responsible for the employees' actions. Therefore, the petition is hereby DISMISSED.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN
ELIZABETH K. BOYER, COMMISSIONER