TOWN OF PLYMOUTH AND LOCAL 1768, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, SI-239 (10/30/91). RULING ON MOTION TO DISMISS.

16. Strike
108.21 refusal of overtime
111.81 firefighters

Commissioners Participating:

Haidee A. Morris, Commissioner
William G. Hayward, Jr., Commissioner

Appearances:

Edward E. Lenox, Jr., Esq. - Representing the Town of Plymouth

Mark G. Kaplan, Esq. - Representing Local 1768, International Association of Firefighters, AFL-CIO

RULING ON MOTION TO DISMISS

On October 23, 1991, the town of Plymouth (Town) filed a petition with the Labor Relations Commission (Commission) pursuant to Section 9A(b) of G.L. c.150E (the Law), alleging that the officers and members of Local 1768, International Association of Firefighters, AFL-CIO (the Union) had engaged in an unlawful work stoppage on October 9, October 16, and October 23, 1991, in violation of Section 9A(a) of the Law and that the strike was encouraged and condoned by the Union. The Commission scheduled an investigation to commence at 10:00 a.m. on October 28, 1991, and issued a Notice of Investigation to the parties. By mutual agreement of the parties, the date of the investigation was thereafter changed to October 30, 1991 at 10:00 a.m. The Union and the Town appeared by counsel at the scheduled time; at a pre-investigation conference, the Town offered to amend its petition to add certain allegations which are identified in the summary of facts, below. The Union then filed a written Motion to Dismiss with a supporting memorandum, arguing that the allegations contained in the Town's petition, even if true, were not sufficient to establish a violation of Section 9A(a) of the Law. The Town maintains that its allegations are sufficient, but did not request an opportunity to respond in writing or on the record. We have reviewed the Town's allegations and the parties' arguments and hereby grant the Union's motion.

For purposes of deciding this motion, we will assume the truth of the Town's allegations, as supplemented by its further proffer at the pre-investigation conference, which we summarize as follows. The Union represents a bargaining unit of full-time uniformed firefighters. The parties' most recent collective bargaining agreement expired June 30, 1991; since approximately July 22, 1991, they have met on four occasions to negotiate a successor contract, but have neither reached agreement nor embarked upon mediation. During these negotiations, as well as those culminating in the predecessor agreement, the Union has pursued vigorously, though thus far unsuccessfully, its proposal for a 5% "hazardous duty"

premium for undertaking the increased responsibilities relating to the location of the Pilgrim Nuclear Plant in Plymouth.

Under Civil Defense Requirements, the Town must ensure that its firefighters receive certain specialized crisis response and evacuation training in the event of a nuclear crisis at the Pilgrim Plant. Some of this training takes place outside of the fire stations; for example, the "decontamination" portion of the training is undertaken at the Plymouth Airport. During 1987, 1988,, 1989, and 1990, when the Town sent a complement of on-duty firefighters for such off-premises training, it was able to maintain the necessary station coverage because a sufficient number of firefighters accepted the Town's offer of overtime. For example, coverage was maintained during all eight decontamination training sessions during 1989-90 by bargaining unit members working on an overtime basis.

In 1991, the first of seven "decontamination" training sessions was scheduled for October 9. The Town contacted at least 52 bargaining unit members to request them to work overtime in order to maintain coverage on that date, but none accepted and the training session was cancelled. Another training session was scheduled for October 16, 1991; again, no firefighters accepted the overtime. On October 20, 1991, upon inquiry, the Union president informed the Town's fire chief to the effect that the Union's position regarding overtime related to the power plant "had not changed." The town's requests for overtime coverage for the next scheduled training session on October 23, 1991, met with similar failure, thus precipitating the instant petition.

The 1990-91 collective bargaining agreement contained the following language regarding overtime, in Article III (Hours of Work and Overtime):

> * * *
> B. ... Members of the bargaining unit shall be expected to work a reasonable amount of overtime as a condition of their employment provided that they are given as much advance notice as possible of the overtime that they are expected to work and provided further that such overtime is allocated and compensated in accordance with the terms of the contract.
> * * *
> G. Overtime shall be distributed equally and impartially to all personnel covered by this Agreement. ...

On occasion in the past, particularly over the Fourth of July holiday, the Town has been unable to obtain sufficient overtime volunteers to maintain shift coverage and has directed individuals selected through the regular rotation system to report for duty on an overtime basis in order to fill the necessary complement. The Town did not direct any bargaining unit members to report for duty on an overtime basis on October 9, October 16, or October 23, nor did any employee refuse a directive to report for duty on those occasions.

The Union argues that these facts do not establish that the Union or its members engaged in conduct that is unlawful under Section 9A(a), citing Lenox School Committee, 7 MLC 1761, 1772-1774 (1980), aff'd sub nom. Lenox Education Assn. v. Labor Relations Commission, 393 Mass. 276 (1984), and City of Newton, 13 MLC 1463, 1466 (1987). Under Lenox, an employer may legitimately require public employees to perform those duties that have traditionally been within the scope of their employment and, in the event the employees refuse, may resort to the Commission for an order compelling their performance. Overtime that is so regularly performed that a rotation is maintained for its distribution may satisfy the Lenox standard, Town of Nahant, 13 MLC 1041, 1044 (1986), assuming that the duties to be performed during the overtime are themselves within the employees' normal scope of employment. Where the contract or past practice does not confer upon employees an unfettered right to refuse all overtime assignments, the Commission may order employees to comply with an employer's directive to undertake such assignments. Id. ("The refusal or certain police officers to perform duty assignments on an overtime basis when ordered to do so by the Chief is a strike ... in violation of Section 9A(a) of the Law.") However, overtime work that has merely been offered, rather than required, directed, or ordered, remains voluntary; employees may individually or concertedly refuse voluntary overtime without transgressing Section 9A(a) of the Law. See City of Beverly, 3 MLC 1229, 1231 (1976); Newton School Committee, 9 MLC 1611, 1613-14 (1983); City of Newton, 13 MLC at 1465-66.

Assuming, then, that the Town could legitimately require these firefighters to work overtime in order to free their colleagues for "decontamination training," the question is whether the employer's allegations suffice to show that employees have in fact refused to perform such required overtime. The Town alleges that it has in the past directed employees to perform overtime in order to maintain coverage, but concedes that it issued no similar directive in this case. While the contract requires employees to accept a "reasonable amount of overtime," the Town has not alleged or offered to prove the parameters of this contractual commitment or that any members of the bargaining unit have fallen short thereof. Indeed, the Town does not seem to contend that any individual employee had a duty to accept these overtime assignments. Rather, as the Union points out, the Town appears to argue that what is permissible for individuals (to refuse the overtime opportunity) is unlawful when engaged in collectively, an argument that the Commission has previously rejected. City of Newton, 13 MLC at 1466.

Accordingly, we hold that the Town's petition has not proffered facts sufficient to establish that the Union, its officers, or members have engaged in, encouraged, or condoned, a work stoppage in violation of the Law. The petition is DISMISSED.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

HAIDEE A. MORRIS, COMMISSIONER
WILLIAM G. HAYWARD, JR., COMMISSIONER