STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GENERAL DRIVERS AND DAIRY EMPLOYEES UNION LOCAL NO. 563, Complainant, vs. CITY OF APPLETON, Respondent.	Case C No. 22726 MP-829 Decision No. 16178-A

Appearances:
Goldberg, Previant & Uelmen s.c., Attorneys at Law, by Mr. Walter F. Kelly, for Complainant.
Mr. David C. Geenen, City Attorney, for Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and hearing having been conducted on April 13, 1978 at Appleton, Wisconsin, before Examiner Stanley H. Michelstetter II, and the Examiner having considered the evidence, arguments and briefs of counsel, and being fully advised in the premises makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. That General Drivers and Dairy Employees Union Local No. 563, herein referred to as Complainant, is a labor organization with offices at 1366 Appleton Road, Menasha, Wisconsin.

2. That the City of Appleton, herein referred to as Respondent, is a municipal employer which enforces meter, time limit and other parking ordinances within its corporate boundaries; that Respondent's main offices are located in City Hall, Appleton, Wisconsin.

3. That at all relevant times Respondent has recognized Complainant as the representative of certain of its employes in several collective bargaining units, one of which is a unit consisting of four meter checkers, who in order of seniority (lowest to highest) are Delzer, Hamilton, Recker and Andrews; that unit employes enforce meter and other parking ordinances.

4. That Complainant and Respondent were party to a collective bargaining agreement which provides in relevant part as follows:

This Agreement made and entered into by and between the City of Appleton, with the Director of Personnel acting as its agent hereinafter referred to as 'Employer' and General Drivers and Dairy Employees Union Local #563, hereinafter referred to as the 'Union' for the purpose of establishing sound labor relations and to establish minimum wages, hours and working conditions for the employees of the City of Appleton in the Division covered hereby.

ARTICLE 1 - RECOGNITION

The Employer shall recognize General Drivers and Dairy Employees Local Union #563 as the authorized representative and exclusive bargaining agent for the Meter Checkers employed by the City of Appleton excluding all other Municipal employees and Supervisors.

. . .

ARTICLE 4 - HOURS OF WORK

A. The work week for permanent employees covered by this Agreement shall be as follows:

The scheduled work week shall be forty (40) hours to be worked in five (5) days consisting of eight (8) hours per day - Monday through Saturday with a scheduled day off. The scheduled day off shall be on a rotating basis.

If an employee is required to work on his scheduled day off, the employee shall work his scheduled work week in addition thereto.

The regular hours of work shall be from 9:00 AM to 5:00 PM with a (1/2) half-hour paid lunch period unless [sic] by mutual agreement between the Employer and the Union. Employees may be scheduled on Fridays from 1:00 PM to 9:00 PM with a (1/2) half-hour paid lunch period.

. . .

C. Employees will be subject to call at any time for special assignments and/or emergency work.

. . .

ARTICLE 5 - COMPENSATION

. . .

C. Employees required to start work at other than their regularly scheduled starting time shall receive four (4) hours straight time pay in addition to the pay for the actual hours worked.

The foregoing shall not be applicable when employees start not more than two (2) hours ahead of their regular starting time for regularly scheduled daily overtime. (i.e., [sic] employee scheduled to work nine (9) hours daily, 8:00 AM to 5:00 PM.)

. . .

ARTICLE 6 - OVERTIME AND PREMIUM PAY

A. One and one-half (1-1/2) times the base pay exclusive of shift differential or longevity increments shall be paid as follows:

1) All hours worked in excess of eight (8) hours per day.

2) All hours worked in excess of forty (40) hours per week.

3) All hours worked on employee's scheduled day off.

B. All regular employees who work anytime between 6:00 PM and 7:00 AM shall be paid an additional thirty cents (.30) per hour added to their final computed overtime or base pay rate.

C. Two (2) times the base pay exclusive of night premium or longevity increments shall be paid for all hours worked on Sunday.

ARTICLE 7 - PAY PERIOD

All hourly paid employees shall be paid bi-weekly, every other Friday. If Friday is a holiday, pay day shall be on the day preceding. Each pay period ends on midnight the Saturday preceding pay day.

ARTICLE 8 - HOLIDAYS WITH DAY

A. . . .

. . .

Any employees required to work on any of the aforementioned paid holidays shall receive two times their base pay exclusive of night premium or longevity increments for all hours worked in addition to the holiday pay.

. . .

ARTICLE 11 - DISCHARGE

The Employer shall not discharge or suspend any employee with [sic] just cause and shall give at least one warning notice of the complaint against such employee to the employee in writing and a copy of same to the Union. . . .

. . .

ARTICLE 15 - ARBITRATION

Section A

Any grievance relative to the interpretation or application of this Agreement, which cannot be adjusted by conciliation between the parties, may be referred by either party hereto, within five (5) days to the Wisconsin Employment Relations Commission for the appointment of an arbitrator from its staff.

Section B

The arbitrator shall, within five (5) days of appointment conduct hearings and receive testimony relating to the grievance

and shall submit findings and decisions. The decision of the arbitrator shall be final and binding on both parties to this Agreement.

Section C

The expense of the arbitrator shall be divided equally between the parties to this Agreement.

Section D

It is understood that the arbitrator shall not have the authority to change, alter or modify any of the terms or provisions of this Agreement.

ARTICLE 16 - SPECIAL CONDITIONS

A. When employees are required to work two (2) or more hours beyond their normal eight (8) hour shift, they shall receive a meal allowance of two dollars and fifty cents (2.50).

. . .

C. Reasonable compliance shall be expected of employees when called for emergency work.

. . .

ARTICLE 24 - SENIORITY

Section 1

Unless otherwise modified elsewhere in this Agreement, seniority rights shall prevail. Seniority shall prevail on a unit-wide basis. A seniority list of employees shall be posted in a conspicuous place in each Division. Any disagreement concerning an employee's seniority shall be subject to the grievance procedure.

. . .

Section 3

Work outside the regular hours of work shall be offered to the senior available employees in that classification of the Division.

. . .

ARTICLE 31 - TERMINATION

This Agreement shall be in full force and effect from January 1, 1975 to and including December 31, 1976 and shall continue from year to year thereafter unless written notice of desire to cancel or terminate the Agreement is served by either party upon the other at least ninety (90) days prior to the date of expiration.

5. That, while it is unclear whether the agreement specified in Finding of Fact 4, above, was actually in effect at the relevant times, said agreement constituted the terms and conditions of employ-

ment for meter checkers in effect between Respondent and Complainant at all relevant times until March 21, 1978.

6. That sometime during the latter part of 1977 the Common Council of the City of Appleton adopted an ordinance which had the effect of making parking meters operable during the hours between 5:00 and 9:00 PM on Monday and Thursday evenings; that it had not previously operated meters during those hours on those nights.

7. That at all relevant times until March 21, 1978, Complainant and Respondent were engaged in collective bargaining for a successor agreement. That after the decision by the Common Council specified in Finding of Fact 6, above, the central noneconomic issue was whether to hire full-time, part-time or student help to check meters during new Monday and Thursday evening operation and the existing Friday evening operation and Saturday day operation, how to schedule unit employes (including any new employes) to perform said work, and the wages, hours and working conditions of any such new employes. That during the course of said bargaining Complainant and Respondent reached agreement with respect to the hire of new part-time employes and the scheduling of all unit employes, but reached impasse as to whether said new employes would receive any fringe benefits. That on March 21, 1978 the parties reached agreement with respect to a successor to the agreement specified in Finding of Fact 4 above.

8. That at all relevant times previous to the facts stated in Finding of Fact 10, all unit employes always regularly accepted Respondent's offers of voluntary overtime work. That on February 16, 1978, Respondent commenced the extended operations of its parking meters on Monday and Thursday nights; that at that time Respondent first offered the overtime work to more than one and probably only two employes and that all such employes accepted and performed said overtime work fully.

9. That on or about February 16, 1978, but prior to February 20, 1978, Complainant directed all unit employes to refuse overtime work. That Complainant's purpose therefor was to assist Complainant in its attempt to obtain a favorable resolution of the aforementioed negotiations. That at all relevant times Respondent was aware of the foregoing facts.

10. That pursuant to the direction of Complainant to do so, specified in Finding of Fact 9, Delzer, Recker and Andrews each refused any and all of Respondent's various requests that they work overtime

and refused any and all of Respondent's various orders that they work overtime, in the period February 20 to March 23, 1978. That, specifically, for each of the Monday or Thursday evenings of February 20, 23, 27 and March 2, 6, 9, 13, 16, 20 and 23, 1978 Respondent ordered one or more of the three employes to enforce meter parking ordinances of the type they ordinarily enforced on an overtime basis. That all such overtime was, in fact, work which said employes were required to perform. That only for having refused the above listed orders to perform mandatory overtime Respondent disciplined Delzer, Recker and Andrews each by orally and in writing reprimanding them, and later by suspending each for at least one day.

11. That on May 30, 1979, arbitrator Stanley H. Michelstetter II rendered an award under the terms of the agreement specified in Finding of Fact 4 in which he held that Respondent did not violate the agreement when it disciplined the instant employes for refusing its orders to perform overtime; that he also held that Respondent had the authority to require the instant employes to perform the instant overtime; that Complainant and Respondent agreed to be bound by said award; that in making said award the arbitrator actively considered all of the prohibited practice issues raised by the instant Complaint; that the proceedings held with respect to the award were fair and regular; that such award is not repugnant to the policies of the Municipal Employment Relations Act, as amended.

Upon the basis of the above and foregoing Findings of Fact, the examiner makes the following

CONCLUSION OF LAW

That the aforementioned concerted action of the employes, as sponsored and supported by the Complainant, of refusing mandatory overtime assignments, was an unprotected activity, and therefore, the Respondent, by having disciplined such employes for having engaged in said activity, did not, in that regard, commit any prohibited practice within the meaning of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the examiner makes the following

ORDER

It is ordered that the complaint filed in the instant matter be, and the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin this 30th day of May, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Unit employes enforce the Respondent's time limit and metered parking ordinances. They also enforce unlawful parking ordinances of other types as well, but workers are not specifically separately assigned to that task. Both time limit and meter ordinances are enforced during the day. Prior to the change discussed below the only evenings when meters were operational were Friday evenings. Time limit parking is not enforced during evening hours. At all relevant times there were only four meter checkers in this unit. In order of seniority, least to most, they are: Delzer, Hamilton, Recker and Andrews. The Respondent's normal compliment of employes during Friday evenings is two employes.

During the latter part of 1977, the Respondent adopted an ordinance initiating parking meter operation during the hours of 5:00 p.m. to 9:00 p.m. on Monday and Thursday evenings. Implementation was delayed pending the making of necessary changes and bargaining with respect to the effects of the changed operational scheme.

At all relevant times until March 21, 1978, the parties were engaged in negotiations for a successor agreement. After adoption of the aforementioned ordinance change, the central noneconomic issues in those negotiations were whether to hire full-time, part-time or student help to check meters during the new Monday and Thursday evening operation and during the existing Friday evening and Saturday day operation, how to schedule unit employes (including new employes) to perform said work, and the wages, hours and working conditions of new employes. During the course of the bargaining the parties reached agreement with respect to having the aforementioned work done by new part-time employes and the scheduling of all unit employes, but came to an impasse as to whether said new employes would receive any fringe benefits. Thereafter, on March 21, 1978, the parties reached complete agreement with respect to a successor to the prior agreement.

Unit supervisor Captain Marx testified he commenced new night operation of meters (enforcement) on February 20, 1978 and later testified with positive assurance that the employes performed the work as requested. He was unsure of the precise date. Since other evidence establishes Delzer refused overtime on that date, I conclude enforcement must have occurred on the next earlier possible date February 16, 1978. This was after physical arrangements for the new

operation had been made. It is not clear whether the aforementioned impasse occurred shortly before or shortly after the commencement of the operation of the meters at the new times.[1/] On that evening Respondent requested apparently two unit employes to work overtime to check meters during the new hours of operation. The employes accepted and performed the overtime work without incident.

Although it was ordinarily the Complainant's policy to encourage employes to accept overtime in sufficient numbers to meet the Respondent's self-determined needs for overtime workers, Complainant directed all of the unit employes to refuse to perform overtime work during the new hours of operation. This direction apparently occurred between February 16 and February 20, 1978. Complainant's admitted purpose therefor was to assist it in its attempt to obtain a resolution of the aforementioned negotiations. At all relevant times after the direction, Respondent was fully aware of the concerted refusal and its purpose.

Delzer, Recker and Andrews all participated in the concerted refusal (by refusing all overtime offered or ordered in the relevant period), while Hamilton did not participate. For the evenings of February 20, 23 and 27, and March 2, 6, 9, 13, 16, 20 and 23, 1978, Respondent ordered one or more of them to check meters on an overtime basis. Each refused each order. The procedure followed on each day was that Respondent first offered the overtime to each unit employe in order of seniority, most senior first, to those employes scheduled to work regular hours on the same day. On each day Hamilton, and only Hamilton, accepted. Respondent then ordered all employes, other than Hamilton, who were scheduled to work regular hours on the same day, to perform the overtime. It started with the least senior employe and progressed up the seniority list as each refused the order. The following chart summarizes the results and the disciplinary action taken with respect to the refusals of the ordered overtime. [Disciplinary action was limited to only those refusals.]

1/ However, Respondent apparently concedes at page 2 of its brief that the impasse had occurred just before the February 16 overtime.

Date	Employe	Discipline
Monday, Feb. 20	Delzer	Verbally reprimanded, Feb. 22
Thursday, Feb. 23	Delzer	Written reprimand, Feb. 27, corrected Feb. 28
Monday, Feb. 27	Delzer	No action taken, procedural error
	Recker	Verbally reprimanded, Mar. 1
	Andrews	Verbally reprimanded, Mar. 1
Thursday, Mar. 2	Delzer	See Mar. 6
	Recker	Written reprimand, dated Mar. 3
	Andrews	Written reprimand, dated Mar. 3
Monday, Mar. 6	Delzer	Suspended for one day effective Mar. 15, letter dated Mar. 10
	Recker	See Mar. 9
	Andrews	See Mar. 9
Monday, Mar. 9	Recker	Suspended for one day effective Mar. 17, letter dated Mar. 10
	Andrews	Suspended for one day effective Mar. 14, letter dated Mar. 10
Monday, Mar. 13	Andrews	See Mar. 23
Thursday, Mar. 16	Delzer	Suspended for one day effective Mar. 22, letter dated Mar. 20
	Recker	Suspended for one day effective Mar. 25, letter dated Mar. 20
Monday, Mar. 20	Recker	Suspended for two days effective after arbitration award is rendered, letter dated Mar. 29
	Andrews	See Mar. 23
Thursday, Mar. 23	Delzer	Suspended for two days effective after arbitration award is rendered, letter dated Mar. 29
	Andrews	Suspended for three days to take effect apparently after arbitration award is rendered, letter dated Mar. 29

The three employes filed separate grievances alleging the mandatory assignment of overtime violated the agreement, and alleging the disciplinary suspensions each was notified of on March 10 and 20 violated the agreement. No grievance has been filed concerning the March 29 delayed disciplinary actions. All the grievances were properly processed through the applicable procedures. On February 27, 1978, Complainant filed a complaint with the Wisconsin Employment Relations Commission which was later amended to allege, in relevant part, that Respondent unlawfully interfered with and discriminated against the three employes for having exercised their right under Section 111.70(2),

Wis. Stats.,[2/] to engage in ". . . lawful concerted activity. . . ." The parties consolidated the two matters for hearing. I have today rendered an award with respect to the grievances.

POSITIONS OF THE PARTIES

Complainant contends that Respondent unlawfully interfered with and discriminated against Delzer, Recker and Andrews for their exercise of protected rights when it disciplined them for their concerted refusal of overtime.[3/] It contends that under the terms of the 1975-1976 collective bargaining agreement allegedly in effect at all relevant times, Respondent was prohibited from requiring its employes to perform overtime work which is neither emergency work nor a special assignment. Because of the alleged voluntary nature of the work, it denies that the instant refusal was a "strike" and affirmatively alleges that it was protective concerted activity.

Respondent takes the position that the instant refusal of overtime was a "strike" prohibited by Section 111.70(4)(l), whether overtime was voluntary or not, and, therefore, not "lawful" concerted activities within the meaning of Section 111.70(2). It, therefore, denies that it unlawfully interfered with the exercise of any protected right or unlawfully discriminated against any employe when it disciplined for refusing the overtime.

DISCUSSION

Section 111.70(2) states, in relevant part:

> Municipal employes shall have the right . . . to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . [Emphasis supplied.]

Thus, the only concerted activities which are protected are those which are "lawful." Section 111.70(4)(l) prohibits strikes except

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2/ As amended by Ch. 178, Laws of 1977.

3/ This position is taken from page 6 of Complainant's brief. I conclude that Complainant has thereby abandoned the arguments made at pages 10 to 12 of the Transcript to the extent that they are broader than those at page 6 of its brief.

under circumstances not present in this case.[4/] Section 111.70(1)(nm) defines a "strike" as follows:

> (nm) 'Strike' includes any strike or other concerted stoppage of work by municipal employes, and any concerted slowdown or other concerted interruption of operations or services by municipal employes, or any concerted refusal to work or perform their usual duties as municipal employes, for the purpose of enforcing demands upon a municipal employer. Such conduct by municipal employes which is not authorized or condoned by a labor organization constitutes a 'strike', but does not subject such labor organization to the penalties under this subchapter. This paragraph does not apply to collective bargaining units composed of law enforcement or fire fighting personnel. [Emphasis supplied.]

Thus, a "strike" includes any refusal to perform the employes' usual duties, which I conclude includes a refusal to perform overtime work, if its purpose is to enforce demands upon a municipal employer. However, where employes refuse to perform purely voluntary duties, they are not refusing to perform their work or usual duties and, thus, are not engaged in a "strike" within the meaning of the statute.[5/]

Complainant concedes and the evidence confirms that this refusal of overtime was a concerted action taken by the employes and Complainant together.[6/] Complainant's agent Schlieve admitted, in effect, that its purpose in making the direction was to assist it in obtaining a favorable resolution of the then on-going negotiations.[7/]

The performance of the instant overtime was not voluntary. The undisputed testimony of Captain Marx establishes that on each of the dates in question he first offered the overtime to the employes and then ordered them to perform it. Clearly, each employe knew she had been required to perform the overtime. The discipline issued pertained only to the refusal to perform the ordered overtime.

4/ Section 111.70(4)(l) states:

> (l) Strikes prohibited; exception. Except as authorized under par. (cm) 5 and 6, c, nothing contained in this subchapter constitutes a grant of the right to strike by any municipal employe, and such strikes are hereby expressly prohibited. Par. (cm) does not authorize any strike after an injunction has been issued against such strike under sub. (7m). [Emphasis theirs.]

5/ See Chairman Slavney's opinion @ pp. 21-22 of State of Wisconsin (8892) 3/69.

6/ Stipulation at Tr., p. 55, see also Tr., p. 56.

7/ Tr., p. 56.

Further, the collective bargaining agreement which the parties agree constituted the terms and conditions of employment at the relevant times[8/] was ambiguous as to whether Respondent had the authority to compel overtime in situations which were neither emergencies nor special assignments. Arbitrating under the parties' oral submission agreement I have today rendered an award concluding that said agreement permitted Respondent to require the instant employes to perform the disputed overtime. I defer to that arbitration award for that proposition.[9/] Thus, the instant concerted refusal was an unlawful strike and, therefore, unprotected concerted activity. Respondent, therefore, could not have interfered with protected rights or discriminated against Delzer, Recker and Andrews for protected activity when it disciplined them for such conduct.

Dated at Milwaukee, Wisconsin this 30th day of May, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanley H. Michelstetter II, Examiner

8/ Complainant has failed to establish that the collective bargaining agreement was actually in effect at the relevant times. See Transcript page 8 and City of Milwaukee (14251-A, -B) 5/77.

9/ Under the standards of Spielberg Mfg. Co. 36 L.R.R.M. 1152 (1955).