STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

HOTEL, MOTEL, RESTAURANT, BAR & CLUB EMPLOYEES UNION LOCAL #99, Complainant, vs. V.F.W. CLUB, Respondent.	Case I No. 26684 Ce-1878 Decision No. 18138-A

Appearances:

Mr. Richard J. Walsh, Business Representative, for the United Food and Commercial Workers Local 1116, 1231 West Fourth Street, Duluth, MN 55800, and Ms. Carol J. Carlson, President, Hotel, Motel, Restaurant & Club Employees Union Local 99, 601 Providence Building, Duluth, MN, 55802, on behalf of the Complainant.

Mr. David Johnson, Club Steward, VFW Club, 1015 Tower Avenue, Superior, WI 54880, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

AMEDEO GRECO, HEARING EXAMINER: Hotel, Motel, Restaurant, Bar and Club Employees Union Local 99, herein Complainant, filed the instant complaint on September 18, 1980, with the Wisconsin Employment Relations Commission, herein Commission, wherein it alleged that the V.F.W. Club, herein Respondent, had committed certain unfair labor practices under the Wisconsin Employment Peace Act, herein WEPA. On October 9, 1980, the Commission appointed the undersigned to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Section 111.07(5) Stats. Hearing on said matter was held in Superior, Wisconsin on November 13, 1980. Respondent thereafter filed a brief.

Having considered the arguments and the evidence, the Examiner makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant labor organization is the exclusive bargaining representative of certain bartenders employed by Respondent. Complainant has its principal offices at 601 Providence Building, Duluth, Minnesota, 55802. At all times material herein, Carol J. Carlson, Complainant's president and chief executive officer, has served as Complainant's agent. It appears that Respondent some time ago voluntarily recognized Complainant as the collective bargaining representative for some of its bartenders.

2. Respondent, which is engaged in intrastate commerce, operates a club in Superior, Wisconsin, where it utilizes bartenders to serve liquor. At all times material herein, Club Steward David Johnson has acted as Respondent's agent.

3. The parties for a number of years have been privy to a series of collective bargaining agreements, the last one running from April 1, 1978 to March 31, 1980. The duration clause in said contract in part provided that the contract after March 31, 1980 would continue:

> "Thereafter from year to year unless either party hereto shall, at least sixty (60) days previous to the termination of the contract, notify the other party in writing of intention to reopen or terminate this agreement.

It is agreed by both parties that if the notice is to reopen that this agreement shall remain in full force and effect until the requested changes and amendments are agreed to and the contract is signed. It is further agreed that any settlement reached will be retroactive to the reopening date."

4. Article 3 of said contract provides in material part:

"If either the Employer or the Union reopens the contract for the purpose of making changes in this Agreement, the Arbitration clause and the no strike - no lockout clause shall not be applicable."

5. The recognition clause of said contract, Article I, provides in part that "ALL employees must be members of the Union . . ." Said clause does not expressly refer to part-time employes.

6. Article 10 of said contract, entitled "Vacation", provides:

Regular Bartenders employed for a period of one year shall be entitled to one (1) weeks vacation with pay. After one year, the vacation pay shall be pro-rated at (1) day per month or twelve (12) days per year. A regular Bartender is one who has worked 1700 hours or more. Three (3) weeks vacation after seven (7) years service. Vacation pay shall be pro-rated for regular short hour workers.

7. Article 19 of said contract, entitled "Health, Welfare and Sick Leave", states that Respondent shall make monthly payments into the Joint Service Trades Health and Welfare Fund and that Respondent is required to pay into said Fund:

"The established rate set by the Fund per week on all Bartenders working eighteen (18) hours or more per week for the Bartenders and their dependents."

8. Article 17 of the contract, entitled "Pay Periods" states:

Regular employees shall be paid weekly. Extra employees to be paid on completion of shift.

9. Article 21 of said contract, entitled "Wage Scale", in part provides:

Bartenders regular work week shall consist of 40 hours, 6 days in any one week with time and one-half for over 40 hours in any one week, and time and one-half for all hours worked over 8 hours in any one day.

Extra Bartenders shall be paid at the regular rate of pay. Minimum call-in time four (4) hours. Bartenders who are called in for more than 4 hours shall be guaranteed the regular work day of 7 hours. Bartenders working socials, parties and fairs shall be paid at the rate of time and one-half per hour. Any bartender working a party shall be paid at the rate of one and one-half times per hour.

10. The remainder of said contract refers to "all employes" when it lists the various contractual benefits to which they are entitled, e.g. military leave, higher classification pay, workmen's compensation, holidays, and health, welfare, and sick leave benefits.

11. For about at least the last six (6) years, Respondent has not given its part-time employes, the number of which is unknown, any of the aforementioned contractual benefits, because it believed that part-time employes were not covered under the contract. As a result, Respondent unilaterally granted wage increases to part-time employes throughout that time, without any objection from the Union. Complainant throughout that time was unaware of Respondent's treatment of part-time employes.

12. By letter dated January 17, 1980, Carlson advised Respondent that Complainant wanted to reopen the contract and to negotiate over wages, hours, and working conditions. The parties thereafter engaged in negotiations for a successor contract. At one point, they agreed upon a successor contract which, however, was ultimately rejected by the principals from both sides. Thereafter, the parties resumed negotiations and agreed upon all items save one - the question of whether part-time employes should be included in the bargaining unit. Throughout that time, David Johnson, Respondent's chief negotiator, asserted that Respondent would never sign a contract which included part-time employes. Up to the time of the instant hearing, the parties had not agreed to a successor contract.

13. Timothy Williams was hired as a part-time bartender in October, 1979. He was initially hired to work sixteen (16) hours a week, then twenty eight (28) hours a week, and ultimately thirty two (32) hours a week. For one week, Williams was assigned forty one (41) hours, and then only because one of the bartenders was sick. Throughout his tenure, Williams was paid $4.70 per hour. In April, 1980, Williams filed a grievance which claimed that he should be receiving the $5.85 per hour contractual rate which the two full time bartenders received. In response, Johnson orally advised Williams that Respondent could cut Williams' hours down to two (2) hours per week and that he, Williams, was not covered under the contract because it had expired. Thereafter, the subject of Williams' grievance was repeatedly brought up in the negotiations, with Johnson taking the position that he might get rid of the Union if the part-time issue were not resolved to his satisfaction.

14. On August 12, 1980, Williams visited Respondent's bar on his day off. There, he demanded of temporary bartender Marshall Anderson why Anderson did not have keys to the liquor cabinet and whether he had a bartender's license. During that conversation, Williams became quite hostile towards Anderson and asserted, "He's stealing my time." Anderson became so angry over William's behavior that he threatened to leave the bar, but was ultimately prevailed upon to remain. When Johnson heard about the incident, he came to the bar later that day and fired Williams for his verbal altercation with Anderson. Said firing was not based upon any anti-union considerations or Williams' grievance activity.

Upon the basis of the above Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Respondent violated Section 111.06(1)(a) and (d), of WEPA when it refused to include part time employes under a successor collective bargaining agreement.

2. Respondent violated Section 111.06(1)(a) of WEPA when it threatened to reduce the hours of Timothy Williams and when it threatened to get rid of Complainant if it persisted in its demand that part-time employes be covered under a successor contract.

3. Respondent did not violate Section 111.06(1)(a) and (c), nor any other section of WEPA, when it discharged Timothy Williams.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

It is ordered that those parts of the complaint which allege that Respondent reduced the hours of Timothy Williams and subsequently fired him because of discriminatory considerations are hereby dismissed.

IT IS FURTHER ORDERED that Respondent, its officers, agents, successors, and assigns shall immediately:

1. Cease and desist from:

A. Refusing to bargain with Complainant over the inclusion of regular part-time employes in a successor contract.

B. Threatening to get rid of Complainant and threatening to reduce the hours of employes because of their protected activities.

2. Take the following affirmative action which will effectuate the policies of the Wisconsin Employment Peace Act:

A. Immediately cease and desist from refusing to bargain with Complainant over the inclusion of regular part-time employes in a successor collective bargaining agreement.

B. Immediately cease and desist from threatening to get rid of Complainant and from threatening to reduce the hours of employes because of their protected activities.

C. Notify all employes by positing in conspicuous places in its offices where employes are employed copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by the Employer and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Employer to insure that said notices are not altered, defaced or covered by other material.

D. Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 24th day of June, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Amedeo Greco, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify our employes that:

1. WE WILL NOT refuse to bargain with Hotel, Motel, Restaurant, Bar & Club Employees Union Local 99 (the union) over the inclusion of regular part-time employes in a collective bargaining agreement.

2. WE WILL NOT threaten to get rid of the Union and we will not threaten to reduce the hours of any employes because they are engaged in protected union related activities.

3. WE WILL bargain with the Union over the inclusion of regular part-time employes in a collective bargaining agreement.

By_____
V.F.W. CLUB

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS AND MUST NOT BE ALTERED, DEFACED OR COVERED BY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant alleges that Respondent acted unlawfully by: (1) refusing to agree to a successor contract which included part-time employes; (2) threatening that it would get rid of the Union and that it would cut Williams' hours; and (3) first cutting Williams' hours and later firing him because of his protected activities.

The resolution of the first issue turns on whether part-time employes should be included in the collective bargaining unit. On that point, and as noted in Finding of Fact No. 10, the contract at some places is somewhat ambiguous as to exactly what benefits, if any, part-time employes were to receive, as many contractual provisions refer to all employes, without differentiating whether that term included regular part-time employes. Nonetheless, Article 10 of the contract defines a regular bartender as one who works "1700 hours or more" and Article 19 of the contract refers to bartenders "working eighteen (18) hours or more per week . . ." In light of these two provisions, it must be concluded that the parties some time ago did voluntarily agree that regular part-time employes were to be included in the unit. 1/

As a result, Respondent cannot now seek to unilaterally exclude those employes from the unit unless it can show that the parties have agreed to modify the unit by excluding regular part-time bartenders. Here however, there is no evidence that such an agreement ever occurred. Instead, the only possible basis to support such a finding is the fact that Respondent for the past several years has unilaterally set the wage rate for its part-time employes and it has not granted them any contractual benefits during that time. If Complainant were aware of Respondent's actions, a strong case could be made for the proposition that Complainant effectively waived its right to represent part-time employes. But, the record is totally devoid of any evidence to show that Complainant was aware of Respondent's unilateral exclusion of part-time employes from under the contract. Inasmuch a waiver exists only when a party has made "a voluntarly and intentional relinquishment of a known right," 2/ it must be concluded that Complainant has not waived its statutory right to have regular part-time employes included under the contract. Respondent's insistance that regular part-time employes be now excluded from under the contract was therefore violative of its duty to bargain under Section 111.06(1)(a) and (d) of WEPA. 3/ To rectify that unlawful conduct, Respondent will therefore be ordered to bargain with Complainant over the inclusion of regular part-time employes under the contract.

The complaint also alleges that Respondent unlawfully threatened to reduce Williams' hours and that it similarly threatened to get rid of the Union if it did not drop its request that part-time employes be covered under the contract. Since Williams was engaged in protected activities when he filed his grievance, and inasmuch as Complainant had a right to insist upon the inclusion of regular part-time employes under the contract, Respondent's coercive statements were therefore violative of Section 111.06(1)(a) of MEPA.

Left for consideration are allegations that Respondent unlawfully cut Williams' hours and subsequently fired him because of his Union related activities. The record on this issue clearly shows that Johnson obviously resented the fact that Williams had filed a grievance and he

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1/ Commission records do not indicate that the Commission has ever conducted an election in the unit herein.

2/ Faust v. Ladysmith-Hawkins School Systems, 88 Wis. 2d. 525.

3/ Town of Caledonia, Decision No. 16237-B and 16238-B (10/78).

similarly resented Complainant's attempts to have part-time employes like Williams be covered under the contract.

But, dispite that animus, the record fails to establish that Johnson fired Williams because of anti-union considerations. Thus, Johnson testified that he fired Williams solely because Williams on August 12, 1980 had made an unprovoked verbal attack on temporary bartender Marshall Anderson at the Club, an attack which upset Anderson so much that he threatened to leave the bar unattended. At the hearing, Williams denied that such a verbal altercation occurred and, instead, claimed that his discussion with Anderson was of a purely friendly nature. Williams testimony, however, was flatly contradicted by Howard Purcell, a bar patron, who witnessed the exchange. Purcell testified that Williams deliberately provoked Anderson and that Anderson was so upset that he wanted to leave the bar unattended. Faced with such a credibility conflict, I credit Purcell's testimony and discredit Williams' version as to what there transpired. This finding is based solely on the respective demeanor of the two witnesses. I also credit Johnson's testimony that he fired Williams only because of the August 12, 1980 incident and that Williams' grievance activity played no part in his discharge decision. This finding is also solely based on Johnson's demeanor.

As to the alleged reduction of Williams' hours, it is true that Johnson threatened to cut Williams' hours. However, Williams throughout the time material hereto worked thirty two (32) hours a week, with the exception of one week when he worked forty one (41) hours. The latter exception arose only because Williams that week filled in for another bartender.

Since Williams' termination was not based on discriminatory union considerations and inasmuch as Williams did not suffer any reduction in hours, these complaint allegations are therefore dismissed. 4/

Dated at Madison, Wisconsin this 24th day of June, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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4/ Complainant at the hearing moved to withdraw these complaint allegations. Pursuant to Respondent's objection, said motion was denied because it was made near the end of the hearing, after almost all pertinent testimony had been advanced. In such circumstances, Respondent is entitled to a formal ajudication of this issue.