STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, Complainant,

vs.

MILWAUKEE COUNTY WAR MEMORIAL CENTER, INC., Respondent.

Case 309
No. 56188
MP-3396 1/

Decision No. 29421-B

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., by **Attorney Matthew R. Robbins**, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, WI 53212, appearing on behalf of District No. 10, International Association of Machinists and Aerospace Workers.

Michael Best & Friedrich, LLP, by **Attorney Marshall R. Berkoff** and **Attorney Jesús J. Villa**, 100 East Wisconsin Avenue, Milwaukee, WI 53202-4108, appearing on behalf of Milwaukee County War Memorial Center, Inc.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

District No. 10, International Association of Machinists and Aerospace Workers ("Union"), filed a complaint with the Wisconsin Employment Relations Commission ("Commission") on February 20, 1998, alleging that Milwaukee County War Memorial Center, Inc., ("Center") had committed prohibited practices by refusing to bargain with the Union over the unilateral removal of certain positions and work from the bargaining unit and

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1/ The Commission has designated this case as MP-3396 though, for the reasons related below, the Employer is a private sector employer.

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by refusing to recognize and bargain with the Union since the removal of the aforesaid positions from the bargaining unit. Thereafter, the complaint was held in abeyance pending efforts to resolve the dispute. Those efforts were unsuccessful and on October 8, 1998, the Center filed a Motion to Dismiss the complaint, along with supporting arguments, affidavit and exhibits. The Center also on October 8, 1998, filed its Answer and Affirmative Defenses. On October 30, 1998, the Union filed its response in opposition to the Motion to Dismiss. On November 30, 1998, the Union filed an amended complaint and Motion to Amend the complaint. On December 30, 1998, the parties completed their briefing schedule regarding the aforesaid Motion to Dismiss. By Order dated February 1, 1999, the Examiner denied the Center's Motion to Dismiss.

Hearing in the matter was held on August 11 and September 14, 1999, in Milwaukee, Wisconsin. At hearing on August 11, 1999, the Center amended its Answer and Affirmative Defenses. Also on said hearing date, the Union withdrew any complaint against the Villa Terrace Art Museum. On November 2, 1999, the Center filed its post-hearing brief in the matter. On November 22, 1999, the Union filed its brief.

The Examiner, having considered the evidence and argument of the parties and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Union is a labor organization within the meaning of Sec. 111.02(11), Stats., and has its principal place of business at 1650 South 38th Street, Milwaukee, Wisconsin 53215.

2. The Center is an employer within the meaning of Sec. 111.02(7), Stats., MILWAUKEE COUNTY WAR MEMORIAL CENTER, INC., DEC. NO. 6325 AT 6 (WERB, 4/63), and has its principal offices at 750 North Lincoln Memorial Drive, Milwaukee, Wisconsin 53202.

3. The Union has been the exclusive bargaining representative of all regular full-time and regular part-time security guards employed by Milwaukee County War Memorial Center, Inc., excluding supervisory and executive employes. MILWAUKEE COUNTY WAR MEMORIAL CENTER, INC., DEC. NO. 23090 (WERC, 2/86).

4. The Center is a statutory memorial pursuant to Secs. 45.055 and 45.058, Stats. The mission of the Center, according to Article I, Section 1, of its Articles of Incorporation, is to create "a permanent memorial for the residents of Milwaukee County who were or are members of the Armed Forces of the United States of America participating, or who participated, in any war."

As noted in the aforesaid Articles of Incorporation, the Center is organized, "pursuant to the provisions of Sections 181.37 and 181.39 of the Wisconsin Nonstock Corporation Law," as a non-profit corporation located in Milwaukee County. It has its own Articles of

Incorporation and Bylaws, its own Director and its own staff. It manages its own personnel and human resources and is largely functionally independent of Milwaukee County on a day-to-day basis.

However, the Center's activities are regulated by an operating agreement between Milwaukee County and the Center. Like County departments, the operating budget of the Center is submitted to the County Department of Administration. The aforesaid operating agreement provides that this proposed budget "shall be subject to revision and modification in a manner similar to that provided for County Departments in section 59.84, Wisconsin Statutes."

The budget is then submitted to the County Board as part of the County Executive's budget. The Director of the Center appears before the County Finance Committee like other County department heads to explain the budget. Pay raises are guided by those that the County provides for its employes. Contracts with the Union were normally settled within the guidelines of the Center budget submitted to the County.

Of the $1,872,578 budget for 1999 for the Center and Milwaukee Art Museum (MAM), over $1.5 million were from the property tax levy. The remaining $321,000 was obtained from miscellaneous revenue such as parking, room rentals, food and liquor sales and miscellaneous sources. This is similar to other County departments like the Parks Department which receives part of its revenue from fees (golf and parking) as well as the property tax. The County Executive in 1999 allowed a 3.5 percent increase in personnel services and a 2 percent increase in operating expenses and the Center budget was submitted and approved within the County Executive's directive. Salary and job descriptions for the Center executive employes are based on Milwaukee County Human Resources Department evaluation standards.

Milwaukee County has played a behind-the-scenes role in negotiations between the Center and the Union by assisting the parties in reaching an agreement on their labor contracts.

Milwaukee County owns the Center's building and grounds.

In the past, the Center relied on the County to finance capital projects. Currently, the Center funds capital projects through a combination of County and private monies.

The Center has its own Board, comprised of 15 members: four Milwaukee County Supervisors and four other persons all appointed by the County Executive, and seven people who come from constituent art organizations. The current Chairman is Tom Bailey who is also a Milwaukee County Supervisor.

5. The Center is affiliated with Marcus Center for the Performing Arts, the Charles Allis Art Museum, the Villa Terrace Art Museum and the Milwaukee Art Museum (MAM). It is partially through the functions of these arts, culture and education entities that those who served or are serving in time of war are honored by service to the living.

6. MAM is physically located in portions of the Center's building at 750 North Lincoln Memorial Drive in Milwaukee. MAM is also a non-profit organization and manages its own staff. It has its own board, budget and labor and human resources functions separate from the Center or Milwaukee County. Like the Center, MAM has Milwaukee County Supervisors on its Board, and it receives funding from the County for its various services. MAM pays for use of its facility, including the parking lots.

7. The Center had historically provided and managed Security Guards to monitor and patrol MAM's galleries. These Guards were paid by the Center with funds supplied by Milwaukee County.

8. The Center's Security Guards all wore distinctive uniforms with identifying name tags. They all received training, including guard training for preventing and investigating acts of vandalism. Security Guards all had the authority to detain individuals, engage in crowd control, close the galleries in emergencies and exclude people from coming into the galleries. Security Guards were organized in a para-military fashion with a hierarchy and ranks. The primary duty of Security Guards was to patrol MAM's galleries and guard its art collection.

9. In addition to patrolling the galleries, the Security Guards were assigned to the loading dock, to MAM's admissions desks and to the south parking lot. Only the parking lot assignment was posted. The parking lot assignment would involve collecting parking fees and being responsible for monies collected. Although only one Guard at a time was needed to staff the parking lot, a number of Security Guards were trained in parking lot duties. Generally, the Center assigned parking lot duties to only one or two of the Security Guards. Those Security Guards who were assigned parking lot duties received the same pay as other Security Guards, received the same training as other Security Guards, and rotated to and from the galleries from time to time.

10. MAM wanted control over the Security Guards working in its galleries in order to institute its own philosophy of protecting the art and interacting with gallery customers. Therefore, the Center, Milwaukee County and MAM reached an agreement whereby MAM was to assume responsibility for Security Guards services and become the employer of the Security Guards. The Center notified the Union before the expiration of its last bargaining agreement that it was going out of the Security Guard business.

11. By letter dated March 29, 1996, Attorney Thomas P. Godar, on behalf of the Center, wrote the Union as follows:

> On behalf of the Milwaukee County War Memorial Center, Inc., I would like to respond to your earlier letter requesting that we re-open the current collective bargaining contract for negotiations. We are certainly willing and ready to do so.

> However, as you may know, the War Memorial Center is looking at certain strategic changes which will likely result in a reduction in the operational responsibilities of which the War Memorial would undertake. This may reduce or eliminate certain work of the employees represented by the IAM.
>
> Since this is still in the preliminary stage, I would suggest that we extend the contract through May 31, 1996 and begin our bargaining in May, in the hopes that a more complete understanding of our future plans has emerged.
>
> Please give me a call or drop me a line with your response to this suggestion.

12. By letter dated June 24, 1996, Thomas N. Lesch, Director, on behalf of the Union, requested certain information from the Center related to the Center "going out of the security business." By letter dated July 12, 1996, Attorney Thomas P. Godar, for the Center, responded to the Union's aforesaid request for information by providing certain information as requested and by refusing to provide certain information as requested because the requested information was sought to aid the Union "in negotiating over WMC's decision to discontinue providing guard services within the museum" and the Center "is under no legal duty to furnish such information."

13. By letter dated August 1, 1996, Attorney Thomas P. Godar, on behalf of the Center, again wrote the Union as follows:

> I received your letter dated July 23, 1996, indicating that the Union's counsel was reviewing our response to your request for information. I recognize that there have been various reasons that this bargaining has been delayed, but we must insist on going forward. As we have told you, we are ready to bargain about the impact of our decision. If you are unwilling to meet and bargain over that issue, we will consider this a waiver and move forward with our plans.
>
> Of course, we would rather meet and bargain in a traditional manner to resolve any issues. Therefore, please call or write as soon as possible with dates for our next bargaining session.

14. The Union never requested impact bargaining.

15. The last contract between the Center and the Union was dated May 1, 1995 to April 30, 1996, and was extended to December 31, 1996. This contract expired on December 31, 1996. No new contracts were negotiated between the Center and the Union. By letter dated December 16, 1996, Attorney Marshall R. Berkoff, for the Center, informed the Union that it would be going out of the Security Guard business "completely in the very

near

future." Said letter also stated that "the Guard Service will not operate for longer than 90 days and perhaps less time." The letter added: "I wanted, of course, to give you this notice pursuant to the contract Article II and in response to your notice to reopen the contract." The letter concluded by suggesting that the Center "continue to operate under the wage and fringe benefit provisions of the expiring agreement. Please advise if you wish to have a meeting to discuss any of these matters further."

By letter dated December 17, 1996, Director Lesch, on behalf of the Union, responded to the above letter by requesting that the parties meet "in order to explore an extension for a new agreement." As previously noted, no new contract was agreed to by the parties. The Center did not change Security Guard wages or benefits in 1997 when they were without a contract.

16. By letter dated May 12, 1997, from Attorney David J. Sisson, on behalf of MAM, MAM informed the Union that it might end up taking over operation of its guard services. MAM stated: "In the event that occurs, MAM would desire to hire those employees currently performing guard services" subject to certain conditions including:

. . .

> 2. The definition of the bargaining unit in the labor agreement would be amended to remove any reference to guards employed at Villa Terrace, or otherwise at the War Memorial if not providing services for MAM, and would also specifically exclude coverage of the parking lot.

. . .

17. By letter dated August 14, 1997, David J. Drent, Director of Operations for the Center, informed the Union as follows:

> In answer to your request that the expired agreement be extended, I refer you to the enclosed December 16, 1996 letter sent to you by Marshall Berkoff of Michael, Best & Friedrich.
>
> We will be eliminating the Security Guard Services completely.
>
> I suggest we continue to operate under the wage and fringe benefit provisions of the expired agreement.

18. By letter dated August 28, 1997, Union Director Lesch responded, in material part, to the above letter as follows:

. . .

> You make reference to the December 16, 1996 letter by Mr. Berkoff. Under no circumstances did I agree to give up our jurisdiction for the work that is being performed by employees of the War Memorial. In fact, we waited to address this only because we were attempting to negotiate with the Art Museum, if they were to takeover (sic) the guard services. This contract has expired and these employees are deserving of a raise.

. . .

19. On November 1, 1997, the Center's south parking lot was permanently closed due to construction by MAM. The Center began to use a parking lot on the north side of its building. This parking lot is being used only temporarily – one year after completion of MAM's construction, the parking lot is to be restored to green space.

20. By letter dated January 6, 1998, Center Director of Operations Drent informed the Union as follows:

> As of January 19, 1998, the War Memorial Center will be going out of the security business.
>
> Therefore, we will no longer employ the security guards represented by District 10 of the LAMAW.
>
> The War Memorial does not plan to staff the visitor parking lot with security guards for the period of time that the lot is in operation. Villa Terrace will not be utilizing security guards as part of their restructuring plan.

21. By letter dated January 28, 1998, Union Director Lesch responded in the following manner:

. . .

> This is a follow-up to our conversation of approximately two weeks ago. As I told you then, I cannot agree with your letter of January 6, 1998, in that you are going out of the security business on January 19, 1998. Somehow you failed to recognize that the jurisdiction of manning the parking lot, as well as Villa Terrace, comes under the jurisdiction of District No. 10 of the I.A.M.A.W. In our effort to negotiate a contract for security guards at the Milwaukee Art Museum in no way entailed my agreeing to you that we would give up our jurisdiction to these two jobs, which we have done since your place was organized. I have told the committeeman to file a grievance.

. . .

22. After it went out of the Security Guard business, the Center no longer employed any Security Guards and had no personnel it could assign to the parking lot to collect parking fees. As a result, the Center hired a Parking Attendant to collect parking fees and perform other related duties.

23. Initially, the Center employed only one full-time Parking Attendant. Currently, the Center employs three part-time Parking Attendants who work in excess of forty hours in a work week especially when there are special functions in the building. The Center expects to employ Parking Attendants only until the north parking lot reverts back to green space. The Parking Attendants have no duties related to security for MAM's galleries, and MAM has no management control over the Parking Attendants.

24. The Union filed a grievance on January 29, 1998, claiming that the Center had violated a letter of understanding by "subcontracting" parking lot duties. In said grievance, the Union requested a make-whole remedy and that the Parking Attendants join the Union. By letter dated February 12, 1998, Center Director of Operations Drent responded that the "grievance" was not arbitrable since no labor contract was in effect between the parties. Drent added:

> As the Union has previously been advised, the War Memorial Corporation will no longer employ security guards and all security services are now to be provided by the Milwaukee Art Museum who as you know has negotiated a new contract with the Union which has been ratified.
>
> The War Memorial Corporation will not employ security guards and as the Union has been repeatedly advised, we are going out of the security business.
>
> Based on the above, this "grievance" is without merit and must be denied. It cannot be processed to arbitration since the labor contract has expired.

On February 20, 1998, the Union filed the present complaint with the Wisconsin Employment Relations Commission.

25. On or about March 9, 1998, the Union and MAM reached a collective bargaining agreement covering all Security Guards now employed by MAM. The agreement was made retroactive to January 1, 1998. MAM hired all Security Guards previously employed by the Center, including the Guard who had been assigned to Villa Terrace. No Security Guards were laid off as a result of the succession. The Security Guards now employed by MAM continue performing the same duties they had when they had been employed by the Center, with the exception of parking lot duties since MAM does not operate a parking lot.

26. From the time that the bargaining unit was originally certified, a Security Guard

worked as a Parking Attendant at the south parking lot. Originally, a Security Guard named Jessie Keith worked a regular shift from 7:00 a.m. to 3:30 p.m. at the south parking lot. The parking lot duties are identified in the schedule as a "Post" at the parking lot.

After Keith retired, the position or assignment of Parking Lot Attendant was posted for bidding by bargaining unit employes. Ordinary gallery assignments were not posted. One employe was assigned full time to the aforesaid parking lot.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSIONS OF LAW

1. Milwaukee County War Memorial Center, Inc. is an employer within the meaning of Sec. 111.02(7), Stats.

2. Because Milwaukee County War Memorial Center, Inc. did not discontinue the position of Parking Lot Attendant or refuse to bargain over same, in whole or in part in retaliation for District No. 10, International Association of Machinists and Aerospace Workers engaging in protected, concerted activities, Milwaukee County War Memorial Center, Inc. did not thereby commit unfair labor practices within the meaning of Sec. 111.06(1)(c)1, Stats.

3. Milwaukee County War Memorial Center, Inc.'s actions described above did not have a reasonable tendency to interfere with the exercise of rights guaranteed by Sec. 111.04, Stats., and thus Milwaukee County War Memorial Center, Inc. did not commit unfair labor practices within the meaning of Sec. 111.06(1)(a), Stats.

4. Milwaukee County War Memorial Center, Inc. did not refuse to bargain collectively with District No. 10, International Association of Machinists and Aerospace Workers by its actions noted above, and thus Milwaukee County War Memorial Center, Inc. did not commit unfair labor practices within the meaning of Sec. 111.06(1)(d), Stats.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

IT IS ORDERED that the complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 18th day of January, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/

MILWAUKEE COUNTY WAR MEMORIAL CENTER, INC.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Type of Employer

The parties, in their pleadings, raise an issue regarding the type of employer Milwaukee County War Memorial Center, Inc. is. The Center basically argues that it is a private employer while the Union argues that the Center is a municipal employer, or in the alternative, a private employer.

Both parties introduced evidence and testimony to support their respective positions noted above. The Union argues, for example, that the Center is a municipal employer because the Center submits a proposed budget to the County Department of Administration and goes through the County budget process like any other County department; because the County funds the Center's operations in the form of a significant amount of property tax monies included in the Center's annual budget; and because the County appoints a majority of the Center's Board. The Center, on the other hand, maintains that it is a private employer based on a number of factors including, but not limited to, the fact that the County has no involvement in its human resource or labor management decisions and the fact that it is functionally independent of the County.

The issue has previously been decided by the Commission. In MILWAUKEE COUNTY WAR MEMORIAL CENTER, INC., DEC. NO. 6325 AT 6 (WERB, 4/63), the Commission concluded:

. . .

> The Board concludes that the language of the statutes used in designating the Employer indicates clearly that the Legislature deemed the Employer neither a State agency nor a political subdivision of the State nor the County, but a private corporation and, therefore, an employer within the meaning of Section 111.02 of the Wisconsin Employment Peace Act and the Board has today directed an election among the employes of the Employer pursuant to Section 111.05, Wisconsin Statutes.

. . .

In reaching the above conclusion, the Commission addressed many of the same arguments and concerns raised by the parties in the instant case. See, for example, MILWAUKEE COUNTY WAR MEMORIAL CENTER, INC., SUPRA, AT 3 – 5. In addition, the

parties themselves, during the course of their relationship, treated their bargaining relationship as being governed by the laws and principles relative to parties in the private sector. For example, when the parties were having problems in negotiations, the Union threatened "a strike by this bargaining unit" rather than going to interest arbitration to resolve the dispute. (Tr. 95-96 and Respondent Exhibit No. 2) Center Director of Operations Drent stated that the Union repeated this threat to strike as a tool to get what it wanted during negotiations more than once. (Tr. 179) Based on the foregoing, and absent any persuasive evidence or argument to the contrary, the Examiner finds that the Center is a private employer within the meaning of the Wisconsin Employment Peace Act.

Duty to Bargain

The Security Guard bargaining unit with whom the Center had had collective bargaining agreements was taken over by MAM. On January 19, 1998, after giving timely notice to the Union, the Center went out of the Security Guard business. It is undisputed that the Center made the decision to get out of the Security Guard business lawfully. It properly notified the Union in early summer 1996 of its intention to no longer provide Security Guard services. By letter dated August 1, 1996, the Center invited the Union to bargain over the impact of that decision; however, the Union chose not to engage in impact bargaining. The Center's Security Guard operations then succeeded to MAM.

By letter dated May 12, 1997, MAM informed the Union that it might end up taking over operation of its guard services. In said letter, MAM stated its "desire to hire those employees currently performing guard services" subject to certain conditions including specifically excluding "coverage of the parking lot." Union Director Lesch, on the other hand, wanted MAM to take over "the bargaining unit which was all of the jobs that I now represent." (Tr. at 90.) The Union was under the impression that all employes and all jobs performed by the unit would come under the identity of the MAM. (Tr. at 90.) On or about March 9, 1998, the Union and MAM reached a collective bargaining agreement covering all Security Guards then employed by MAM. The agreement was made retroactive to January 1, 1998. All Security Guards employed by the Center were hired by MAM. Security Guards hired by MAM did not perform parking lot duties since MAM did not operate a parking lot.

The Center argues that once its Security Guard unit ceased to exist when it terminated its security services, its duty to bargain with the Union ended. The Center cites a number of cases in support thereof. In NLRB v. DOUG NEAL MGMT. CO., 620 F.2D 1133, 1138 (6TH CIR. 1980), the Sixth Circuit Court of Appeals held there was no basis to require an employer to meet with the union for the purpose of collective bargaining when that part of the employer's business was discontinued and the represented employes were legally terminated. In TORRINGTON CONTRUCTION CO., INC., 198 NLRB 1158, 1972 WL 5103 (N.L.R.B.) (1972), the National Labor Relations Board ("NLRB") held that the employer violated the Act by rejecting the union's request to negotiate a new collective bargaining agreement on behalf of a unit of field survey employes since they had a reasonable expectancy that they would be

recalled from layoff and there was no merit in the employer's contention that they were terminated when they ceased working for the employer at the beginning of winter. In the aforesaid case, the NLRB also found that the employer's obligation to bargain survived the expiration of the parties' collective bargaining agreement since the union continued to represent a majority of the survey employes. Here, there is a serious question as to whether the Union continues to represent a majority of the disputed employes. As pointed out by the Center, the Union seeks representation of the Parking Attendants now employed by the Center without an election and without persuasive evidence that the Union has been selected by the Parking Attendants as their representative. (Tr. at 151, 161 and 167.) In addition, the Security Guards which constituted the disputed bargaining unit have no reasonable expectation that they will ever work for the Center again. In this regard, the record indicates that the Center legally got out of the Security Guard business; MAM totally took over the Center's Security Guard business and hired all Security Guards previously employed by the Center. Therefore, based on the foregoing, the Center has no obligation to negotiate with the Union with respect to non-security guard type duties previously performed by Security Guards.

The other two cases relied upon by the Center in support of the above position are also supportive of the Center's position. In NLRB v. YUTANA BARGE LINES, INC., 315 F.2D 524, 527 (9TH CIR. 1963), the Ninth Circuit Court of Appeals reiterated the general rule that "when a unit ceases to exist, the employer need not engage in bargaining with the representative of that unit" citing NLRB v. HOUSTON CHRONICLE PUBLISHING CO., 211 F.2D 848 (5TH CIR. 1954). The Ninth Circuit Court of Appeals added:

> It would seem to follow, and we are of the opinion, that if because of business changes there are no longer employees in a component job category within the unit, then an employer is under no obligation to negotiate with respect to wages, hours of employment, and other working conditions for the component group. The Board apparently takes this view, for in NATIONAL DAIRY PRODUCTS CORP., 127 N.L.R.B. 313 (1960), it dismissed a complaint brought against an employer saying that since 'the Respondent did not employ any helpers for whom the Union sought bargaining * * * the Respondent did not violate Section 8(a)(5) of the Act by notifying the Union that it would be a waste of time to negotiate for persons it did not employ.' ID. AT 315.
>
> YUTANA BARGE LINES INC., SUPRA, AT 527.

In the instant case, as noted above, once the Center's Security Guard unit ceased to exist when it terminated its security services, the Center's duty to bargain with the Union ended.

The Union argues, contrary to the above, that the Center acted unlawfully by withdrawing recognition from the Union for the Parking Lot Attendant position and by refusing to bargain with the Union with regard to wages, hours and working conditions of the Parking Lot Attendant position. However, in MILWAUKEE COUNTY WAR MEMORIAL CENTER, INC., DEC. NO. 23090 (WERC, 2/86) the Commission certified the following bargaining unit

represented by the Union: "all regular full-time and regular part-time security guards employed by the Milwaukee County War Memorial Center, Inc., excluding supervisory and executive employes." The Commission's certification of the Union as the exclusive collective bargaining representative of Security Guards employed by Respondent makes no reference to Parking Lot Attendants. In addition, I am taking administrative notice of the original election file for the Center which contains a Stipulation for Election filed by the Center and the Union for a bargaining agreement comprised only of Security Guards. Said election file makes no reference to Parking Lot Attendants.

The Union argues, however, that the Parking Lot Attendant position was a position that existed in the unit since the certification of the Union in 1986. The Examiner agrees that Security Guards did perform duties on a full-time basis at the north parking lot subsequent to the Union's aforesaid certification. (Complainant's Exhibit No. 15, at 1-5.) The Examiner also agrees that the Parking Lot Attendant position at the north parking lot was posted pursuant to the parties' collective bargaining agreement. (Tr. at 110-111; Joint Exhibit No. 2.) However, it is clear that said position was not included in the bargaining unit certified by the Commission as noted above. The record is also clear that while Union represented Security Guards (not civilians) performed the duties of Parking Lot Attendant in the past for the Center after the Center went out of the Security Guard business, MAM became the sole employer of the Security Guards. Security Guards no longer perform parking lot duties. In addition, there has never been a certified bargaining unit of civilian Parking Lot Attendants. As pointed out by the Center, the duty to bargain exists only when a bargaining unit and bargaining relationship exist. Here there is neither.

The Union argues, contrary to the above, that in determining whether a position is a unit position, it is the function of the position rather than the job title that is determinative. Citing MADISON SQUARE GARDEN, 325 NLRB 180 (1998), the Union maintains that an employer may not withdraw recognition of the union by merely changing the job title. The Union claims that in MADISON SQUARE GARDEN certain event staff of the employer were assigned to positions called "guard" where they could deny individuals access to certain areas although they could not detain such persons. The Union states that the NLRB concluded, notwithstanding the employer's labeling of the individuals as "guards," that they were not guards and contends that the situation herein is analogous.

The Examiner agrees with the Union that in determining whether a position is a unit position, it is the function of the position rather than the job title that carries greater weight. For example, the Commission has found that while job descriptions may be helpful in the determination of employment duties, greater weight is accorded actual job duties performed when making determinations regarding supervisory status. CITY OF CUDAHY (LIBRARY), DEC. NO. 26680 (WERC, 11/90). However, the Examiner does not agree that the situation herein is analogous to MADISON SQUARE GARDEN. It is true, as pointed out by the Union, that while Jessie Keith and those who succeeded him had the job title of "guard," they functioned basically as Parking Lot Attendants. They performed few Guard duties except outside their normal Parking Lot Attendant shift. Nevertheless, they were still Security Guards with the

authority and capability of performing Security Guard duties and, in fact, performed Guard duties as noted above and in the Findings. They were not civilians like the Parking Lot Attendants currently employed by the Center. In addition, they did not perform work (parking lot duties) recognized by the aforesaid Certification. Finally, the current Parking Attendants perform no Security Guard functions. (Emphasis added.) Absent a new determination in a representation proceeding or clarification of a certification proceeding, there is no clear obligation for the Center to recognize the Union as the exclusive representative of the Parking Lot Attendants or to meet with the Union for the purposes of collective bargaining. NLRB v. DOUG NEAL MGMT. CO., 620 F.2D 1133, 1136-1138 (6TH CIR. 1980).

The Union raises a number of other issues related to the Center's alleged duty to bargain with it with regard to the Parking Lot Attendant position. However, for the reasons noted above, the Examiner rejects those arguments as well.

Based on all of the above, and the record as a whole, the Examiner finds that the Center has no duty to bargain with the Union since its bargaining relationship ended with the succession of the Security Guard unit to MAM.

The Union also argues that the Center violated Secs. 111.06 "(a) and (c)", Stats., by its conduct. However, the Union offered no additional evidence or argument, except as discussed above, in support of these claims. Therefore, based on same, and the record as a whole, the Examiner dismisses these allegations as well.

Finally, as pointed out by the Center, the Union does have the right to seek representation of the Parking Attendants through a representation election.

Based on all of the foregoing, and the entire record, the Examiner finds that the allegations of unfair labor practices by the Union are without merit, and the Examiner has dismissed the complaint in its entirety.

Dated at Madison, Wisconsin, this 18th day of January, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Dennis P. McGilligan /s/
Dennis P. McGilligan, Examiner

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