

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE POLICE ASSOCIATION, Complainant

vs.

**CITY OF MILWAUKEE,
CHIEF OF POLICE NANNETTE HEGERTY,
CENTRAL PARKING SYSTEMS, INC.**

Case 511
No. 64068
MP-4094

Decision No. 31221-A

Appearances:

Eggert & Cermele, S.C., by **Jonathan Cermele**, Attorney-at-Law, 1840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin 53202, appearing on behalf of Complainant.

Thomas J. Beamish, Assistant City Attorney, 200 East Wells Street, Room 800, Milwaukee, Wisconsin 53202, appearing on behalf of Respondents.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

On October 13, 2004, Milwaukee Police Association, hereafter "Complainant," filed a complaint with the Wisconsin Employment Relations Commission in which it alleged that Respondents had committed prohibited practices by violating Secs. 111.70(3)(a)1, 4 and 5, Stats., by prohibiting motorcycle parking at MacArthur Square and attempting to contract with individual members of Complainant's bargaining unit. The Commission appointed Coleen Burns, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Secs. 111.07 and 111.70(4)(a), Stats. Hearing was held on March 23, 2005, in Milwaukee, Wisconsin. The record was closed on April 26, 2005, upon the receipt of the parties' post-hearing written argument.

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

No. 31221-A

FINDINGS OF FACT

1. Milwaukee Police Association, herein referred to as “Complainant,” is a labor organization maintaining its principle offices at 1840 North Farwell Avenue, Suite 400, Milwaukee, WI 53202.

2. The City of Milwaukee, herein referred to as the “Respondent-City,” is a municipal employer with offices at 200 East Wells Street, Milwaukee, Wisconsin 53202, and which operates a police department.

3. Nannette Hegerty, herein referred to as the “Respondent-Chief,” is employed as Chief of Police of the Milwaukee Police Department and, in that capacity, acts on behalf of the Respondent-City.

4. Central Parking Systems, Inc., herein referred to as “CPS” or “Respondent-CPS”, is under contract with Respondent-City to operate a municipal parking garage known as MacArthur Square and, at times and in that capacity, has acted on behalf of the Respondent-City.

5. Complainant is the collective bargaining representative of various police officers in the employ of the Respondent-City. The Complainant and Respondent-City have been party to successive collective bargaining agreements, the last of which includes the following relevant provisions:

. . .

ARTICLE 5

MANAGEMENT RIGHTS

1. The Association recognizes the right of the City, the Chief of Police and the Board of Fire and Police Commissioners to operate and manage their affairs in all respects in accordance with the laws of Wisconsin, ordinances of the City, Constitution of the United States and Section 111.70 of the Wisconsin Statutes. The Association recognizes the exclusive right of the Board of Fire and Police Commissioners and/or the Chief of Police to establish and maintain departmental rules and procedures for the administration of the Police Department during the term of this Agreement provided that such rules and procedures do not violate any of the provisions of this Agreement.

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ARTICLE 63

PARKING ALLOWANCE BENEFITS FOR POLICE

ADMINISTRATION BUILDING EMPLOYEES

1. An employee with a regular Departmental assignment that requires him/her to report to a Police Administration Building (PAB) work location at the start of his/her regular work shift as of the 15th day of a calendar month shall be eligible for a Regular Parking Allowance benefit for that calendar month; such an employee shall be termed an “eligible employee.” Two or more eligible employees may form a carpool for a calendar month (or months) by indicating this fact on a form prescribed by the Department for this purpose and the carpool members shall in aggregate be eligible for a Special Parking Allowance benefit for the calendar months the carpool remains in effect. The Special Parking Allowance benefit shall be in lieu of the Regular Parking Allowance benefit.
2. The City shall provide the Association with a list of City-approved parking facilities and will notify the Association of any change that the City may from time to time make in this list at least sixty (60) calendar days prior to the effective date of such change. Eligible employees shall be entitled to receive either a Regular Parking Allowance benefit or a Special Parking Allowance benefit under the terms and conditions hereinafter provided:
 - a. Regular Parking Allowance Benefit:

In order to receive a Regular Parking Allowance benefit for a calendar month, an eligible employee must purchase a monthly parking permit for that month from a parking facility on the City-approved list, endorse the permit (or permit stub/receipt deemed acceptable to the Department, whenever the employee must retain the permit in order to receive parking benefits) by indicating his/her signature and payroll number on the portion of his/her monthly parking permit he/she receives from the vendor and submit the enclosed permit (or acceptable permit stub/receipt) to the Police Department Administration no later than the 15th day of the calendar month covered by the monthly permit (i.e., the 15th of April for the month of April). Following the Department's receipt of the endorsed permit (or acceptable permit stub/receipt), the employee shall be entitled to receive the eighty-five dollars (\$85) monthly Regular Parking Allowance benefit for the month

covered by the permit; provided however, if the monthly parking permit purchase price is less than eighty-five dollars (\$85), the employee shall only be eligible for a Regular Parking Allowance equal to the actual cost of the permit. The Regular Parking Allowance benefit shall be increased to ninety-five dollars (\$95) effective the calendar month following execution of the 2001-2003 City-Union Agreement.

b. Special Parking Allowance Benefit

In order to receive a Special Parking Allowance benefit for a calendar month, two or more eligible employees forming a carpool in accordance with the provisions of paragraph 1, hereof, must purchase one monthly parking permit for that month from a parking facility on the City-approved list. Each employee member of the carpool shall endorse the permit (or permit stub/receipt deemed acceptable to the Department, whenever the employee must retain the permit in order to receive parking benefits) by indicating their signatures and payroll numbers on the portion of the monthly parking permit received from the vendor and submit the endorsed permit (or acceptable permit stub/receipt) to the Police Department Administration no later than the 15th day of the calendar month covered by the monthly permit (i.e., the 15th of April for the month of April). Following the Department's receipt of the endorsed permit (or acceptable permit stub/receipt), the carpool members shall in aggregate be entitled to receive a single Special Parking Allowance benefit in accordance with the following schedule (only eligible employees may comprise the carpool):

- (1) Two-person carpool – A total of \$90 per month;
- (2) Three or more-person carpool – A total of \$110 per month.
- (3) Effective the calendar month following execution of the 2001-2003 City-Union Agreement, the maximum monthly Special Parking Allowance Benefit amounts in (1) and (2), above, shall be increased by \$10 dollars.

If the monthly parking permit purchase price for a carpool is less than the amount to which the carpool is entitled under this schedule, the carpool shall only be eligible for a Special Parking Allowance Benefit equal to the actual cost of the monthly permit.

Payment of a Special Parking Allowance benefit shall be made to one member of the carpool designated to receive the payment; such designation shall be indicated on the form referenced in paragraph 1 hereof. Carpool members shall determine the method of apportioning the monthly Special Parking Allowance to which they are entitled, in aggregate, to receive; any dispute involving this apportionment is specifically excluded from the Grievance/Arbitration provisions of this Agreement.

Payments provided hereunder shall be made as soon as administratively practicable after the close of the calendar month covered by the permit. Except as provided in subsection 3, below, only approved parking facilities' monthly parking permits that are properly endorsed shall be covered by the benefits provided herein. No employee shall be eligible to receive benefits under both paragraphs 2.a. and 2.b. for the same calendar month.

3. The Association recognizes that there are a limited number of parking spaces available at City approved parking facilities; accordingly, monthly parking permits for these spaces will be sold to eligible employees (either individually, or collectively, as one permit for a carpool) on a first-come, first-served basis, subject to their availability. During a calendar month when no monthly parking permit at any City-approved parking facility(ies) is (are) available because the vendor(s) has (have) determined that no space is available, the City will honor monthly parking permit receipts from parking facilities not on the City-approved list that are within the geographic area bounded by West Wisconsin Avenue on the south, North 12th Street on the west, West Juneau Avenue on the north and North Van Buren Street on the east. The employee (or each individual employee comprising a carpool) shall endorse the receipt by indicating his/her signature and payroll number on the monthly parking permit receipt and shall submit the endorsed parking permit receipt to the Police Department Administration no later than the 15th day of the calendar month covered by the monthly permit (i.e., the 15th of April for the month of April). Following submission of the parking permit receipt to the Police Department Administration, the employee (or carpool) shall be entitled to receive a monthly parking benefit for the month covered by the parking permit under the same terms and conditions provided in paragraph 2, above.

4. Daily Parking Receipts

During a calendar month when no monthly parking permit is available to an employee under the provisions of either paragraph 2 or 3, hereof,

because no space is available, the City will honor daily parking receipts from parking facilities within the geographic area described in paragraph 3, hereof, subject to the employee submitting a form prescribed by the Department to the Police Department Administration

within five consecutive calendar days following the close of the calendar month. The form shall contain the following information:

- a. The employee's name, signature, and payroll number (or this information for each individual comprising a carpool);
 - b. A listing of each individual daily parking receipt for the calendar month indicating the date and amount arranged in date order with a total amount ("total amount") for the calendar month plainly indicated; and
 - c. All of the daily receipts for the calendar month stapled to the back of the form. Following submission of the prescribed Departmental form to the Police Department Administration, the employee (or carpool) shall be entitled to receive a monthly parking benefit for the calendar month covered by the daily parking receipts equal to the lesser of (1) the "total amount" described in paragraph 4.b., hereof, or (2) the maximum amount provided in paragraphs 2.a. or 2.b., hereof, whichever is applicable. Such benefit shall be in lieu of the monthly parking benefits provided under paragraphs 2 and 3.
5. No employee shall be eligible for the parking benefits provided by the Parking During Court Overtime Appearance paragraph of this Agreement for a calendar month for which he/she receives benefits hereunder.
 6. The benefits provided hereunder are intended to be used by an employee only for the purpose of commuting to and from his/her Departmental work location in connection with his/her City employment. The use of a parking permit by an employee for any other purpose during a calendar month shall disqualify the employee from the benefits provided hereunder for that calendar month.
 7. Payments made under the provisions of this Article shall not be construed as being part of employees' base pay and shall not be included in the computation of any fringe benefits enumerated in this Agreement. Any payment made under the provisions of this Article shall not have any sum deducted for pension benefits nor shall such payments be included in any computation establishing pension benefits or payments.

8. The City shall be held harmless against any and all claims, actions and lawsuits relating to theft or personal property damage brought against the City by employees using parking facilities pursuant to the parking allowance benefits provided herein. The City shall be held harmless against any and all claims, lawsuits, actions, damages and judgments due to the employee's operation of his or her private vehicle at parking facilities which are subject to the parking allowance benefits provided herein. Nothing herein would operate to relieve the City of any liability it may have arising from its actions or omissions or preclude the employee from pursuing any rights or claims he/she may have under Wisconsin State Statute 895.46.
9. Notwithstanding the foregoing, during a calendar month the employee members of a carpool are receiving carpool benefits, the City will honor daily parking receipts for that calendar month in accordance with the following schedule:
 - a. Two-person carpool – An amount of reimbursement up to \$20 which in aggregate with the carpool benefits received by the employees' carpool, shall not exceed \$90. Effective the calendar month following execution of the 2001-2003 City Union Agreement, an amount of reimbursement up to \$30 which, in aggregate with the carpool benefits received by the employees' carpool, shall not exceed \$100.
 - b. Three-or-more person carpool – An amount of reimbursement up to \$40 which, in aggregate with the carpool benefits received by the employees' carpool, shall not exceed \$110. Effective the calendar month following execution of the 2001-2003 City Union Agreement, an amount of reimbursement up to \$50 which, in aggregate with the carpool benefits received by the employees' carpool, shall not exceed \$120.

Carpool members shall determine the method of apportioning the amounts of reimbursement; any dispute involving this apportionment is specifically excluded from the grievance/arbitration provisions of this Agreement.

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ARTICLE 70

WAIVER OF FURTHER BARGAINING

1. The parties agree that each has had full and unrestricted right and opportunity to make, advance and discuss all matters within the province of collective bargaining. This Agreement constitutes the full and complete agreement of the parties and there are no others, oral or written, except as herein contained. Each party of this Agreement specifically waives the right to demand or to petition for changes herein, whether or not the subjects were known to the parties at the time of execution hereof as proper subjects for collective bargaining.

. . .

The parties agree that the 2001-2003 agreement is in effect because it has been extended beyond its expiration date by the parties. On or about October 9, 2004, MPA member and Police Officer Robert Garcia filed a grievance alleging, *inter alia*:

The City of Milwaukee has prohibited motorcycle parking in the City owned parking structures. This action violates the 2001-2003 Labor Agreement between the City of Milwaukee and the Milwaukee Police Association as extended, in that Milwaukee Police Association members are being denied the right to reimbursement for parking under ARTICLE 63 "Parking Allowance Benefits for Police Administration Employees." . . .

Although the parties' agreement provides for final and binding arbitration of grievances, the parties have waived arbitration over the Garcia grievance and have agreed to submit the breach of contract claim to the Examiner.

6. Respondent-City owns a number of parking lots in the vicinity of the Police Administration Building and one of these parking lots is MacArthur Square. MacArthur Square is a covered parking lot and is immediately adjacent the Police Administration Building. Other parking facilities, some owned by the Respondent-City and some privately owned, are approved under Article 63 and are located within a few blocks of MacArthur Square. At all times material to this dispute, Respondent-City's parking lots have been operated under contract with various operators, including Respondent-CPS.

7. In 2003, the Respondent-City determined that the gate mechanism controlling access and egress to MacArthur Square required replacement. The gate system is part of the computer-aided revenue system of MacArthur Square. Respondent-City further determined that there had been advances in the field of parking control and revenue systems and determined to incorporate such advances into its new system. In 2003 and 2004, Respondent-City used its normal proposal and bidding process to obtain bids for a new gate and revenue system. The Respondent-City did not make any specification regarding the parking of motorcycles in its request for proposals for the new system. In late 2004, Respondent installed the equipment, including gate equipment, of Access Control Services, the successful bidder. The manufacturer of the newly installed gate equipment vehicle detection loop states that it is

for automobile traffic only. Due to the lighter weight and smaller size of motorcycles, the newly installed gate equipment may not be able to accurately detect the presence and/or location of a motorcycle and, thus, pose the risk of having an “arm” of the gate prematurely descend upon a motorcyclist, his/her passengers or the motorcycle.

8. Prior the installation of the new equipment at MacArthur Square, the admittance gate machinery carried a placard warning of a hazard of the gate arm injuring individuals and stating:

AUTOS ONLY
No Pedestrians
No Motorcycles * No Bicycles

Prior to September of 2004, when the Respondent-City installed new admittance and egress equipment at MacArthur Square, Respondent-CPS and Respondent-City were aware that various customers of MacArthur Square ignored the prohibition and parked their motorcycles inside MacArthur Square. Prior to September of 2004, City Police Officer and Complainant bargaining unit member Joseph Honzelka rode a Police Department motorcycle to patrol MacArthur Square and would park his personal motorcycle at MacArthur Square and be reimbursed under Article 63 of the Agreement.

9. Prior to and after the installation of the new equipment, the parking operator required all monthly parkers at MacArthur Square, including those represented by Complainant, to sign the same monthly contract. The terms of the monthly contract have varied. In 2002, the monthly contract was issued by “Allright Parking of Milwaukee, Inc.” and contained the statements: “Operator will not be responsible for loss by fire, theft, damage or other loss to the vehicle or its contents, loss of car or any loss due to or attributable bodily injury death.” In 2003, the monthly parking contract was issued by “Allright/CPS Parking of Milwaukee, Inc.” and read, in relevant part:

Contract Parking Agreement

For the privilege of parking ONE (1) automobile in the parking facility, Lessee agrees to pay monthly rate by the first (1st) day of each month, as rental for said parking space. Parking is not available for trailers, pop-up campers, or any other vehicle that cannot be moved on its own. Contract parking is on a month-to-month basis and rates are subject to change. Rate changes will be posted thirty (30) days in advance of implementation at entrances, exits, in the parking office, and on drop boxes. Access cards are non-transferable. There is a \$10.00 charge for replacement cards. There will be a \$20.00 charge for returned checks. Delinquent access cards will be deactivated after the third (3rd) business day. Daily, non-refundable parking fees will be charged after the due date. This agreement may be cancelled by thirty (30) days written notice by either party. Access cards must be submitted to the Parking Operator, along

with your current mailing address, by the last day of the current month to qualify for a deposit refund. No refunds are given for partial months.

Parking operator assumes no responsibility for loss or damage of the vehicle or its contents, however caused. This contract licenses you to park and lock one vehicle in a designated area at your sole risk and our posted rates. We do not guard or assume care for fire, theft, damage or loss. Only a license to park is granted hereby and no bailment is created. We are not liable for any loss due to or attributable to bodily injury or death. Customer waives all laws in conflict with the foregoing. By your acceptance of this contract you agree to all the foregoing terms.

Vehicles should be locked and valuables should be properly sealed and secured.
Parking Operator subject to change

I, the Lessee, have read, understand, and agree to abide by the terms of this contract, as well as any and all regulations pertaining to the use of the facility.

The monthly contracts continued to be issued by "Allright/CPS Parking of Milwaukee, Inc." and included the second paragraph set forth above until late summer of 2004. At that time, the monthly parking contract was modified to reflect that the contract was being issued by "CPS Parking of Wisconsin, Inc." and read, in relevant part, as follows:

Contract Parking Agreement:

For the privilege of parking ONE (1) automobile in the parking facility, Lessee agrees to pay monthly rate by the first (1st) day of each month, as rental for said parking space. Parking is not available for motorcycles, trailers, pop-up campers, or any other vehicle that cannot be moved on its own. Contract parking is on a month-to-month basis and rates are subject to change. Rate changes will be posted thirty (30) days ir.(sic) advance of implementation at entrances, exits, in the parking office, and on drop boxes. Access cards are non-transferable. There will be a \$10.00 charge for replacement cards and there will be a \$20.00 charge for returned checks. Delinquent access cards will be deactivated after the third (3rd) business day of the month. Daily, non-refundable parking fees will be charged after the due date. This agreement may be cancelled by thirty (30) days written notice by either party. Access cards must be submitted to the Parking Operator by the last day of the current month to avoid additional charges for parking. No refunds are given for partial months. Parkers who have paid a deposit for parking, acknowledge that by signing this contract, their deposit will be transferred to and used as a non-refundable administrative fee, which is required by all parkers, effective September 1, 2004.

Parking operator assumes no responsibility for loss or damage of the vehicle or its contents, however caused. This contract licenses you to park and lock one vehicle in a designated area at your sole risk and at posted rates. We do not guard or assume care for fire, theft, damage or loss. Only a license to park is granted hereby and no bailment is created. We are not liable for any loss due or attributable to bodily injury or death. Customer waives all laws in conflict with the foregoing. By your acceptance of this contract you agree to all the foregoing terms.

Failure to adhere to this agreement could result in revocation of parking privileges.
Vehicles should be locked and valuables should be properly concealed and secured.

Parking Operator subject to change.

I, the Lessee, have read, understand, and agree to abide by the terms of this contract, as well as any and all regulations pertaining to the use of the facility.

In September of 2004, the contract issued by "CPS Parking of Wisconsin, Inc." was revised to read, in relevant part:

Contract Parking Agreement

For the privilege of parking ONE (1) automobile in the parking facility, Lessee agrees to pay monthly rate by the first (1st) day of each month as rental for said parking space. Parking is not available for motorcycles, trailers, pop-up campers, or any other vehicle that cannot be moved on its own. Contract parking is on a month-to-month basis and rates are subject to change. Rate changes will be posted thirty (30) days in advance of implementation at entrances, exits, in the parking office, and on drop boxes. Access cards are non-transferable. There is a \$10.00 charge for replacement cards and there will be a \$20.00 charge for returned checks. Delinquent access cards will be deactivated after the third (3rd) business day. Daily, non-refundable parking fees will be charged after the due date. This agreement may be cancelled by thirty (30) days written notice by either party. Access cards must be submitted to the Parking Operator by the last day of the current month to avoid additional charges for parking. No refunds are given for partial months. Administrative fees are non-refundable.

Parking operator assumes no responsibility for loss or damage of the vehicle or its contents, however caused. This contract licenses you to park and lock one vehicle in a designated area at your sole risk and at posted rates. We do not guard or assume care for fire, theft, damage or loss. Only a license to park is granted hereby and no bailment is created. We are not liable for any loss due or attributable to bodily injury or death. Customer waives all laws in conflict with the foregoing. By your acceptance of this contract you agree to all the

Failure to adhere to this agreement could result in revocation of parking privileges.
Vehicles should be locked and valuables should be properly concealed and secured.

Parking Operator subject to change

I, the Lessee, have read, understand, and agree to abide by the terms of this contract, as well as any and all regulations pertaining to the use of the facility.

Due to the installation of the new equipment and the need to issue new key cards, the Respondent-City and Respondent-CPS agreed that it was necessary to have a new monthly parking agreement at MacArthur Square. The monthly parking agreement was prepared in Respondent-CPS' corporate office, but Respondent-CPS collaborated with Respondent-City on the language of the new parking agreement. Respondent-CPS had an increased problem with motorcycles in MacArthur Square and inserted the ban on motorcycles to clarify that motorcycles were prohibited in the facility. An employee representative of Respondent-City directed Respondent-CPS to ensure that all monthly parkers signed the agreement.

10. In September of 2004, the Respondent-City and the Complainant were negotiating the terms of their successor agreement and neither party sought to modify the language of Article 63 except that Complainant sought an increase in reimbursement amounts. On September 21, 2004, the City Attorney issued an opinion which stated, *inter alia*, that the City's DPW had determined to explicitly prohibit persons on motorcycles from entering City-owned parking structures. On September 29, 2004, Assistant Police Chief Leslie T. Barber, acting on behalf of Respondent-Chief, issued a "Memorandum" notifying employees of the City Police Department, including members of Complainant's bargaining unit, that the City was prohibiting the parking of motorcycles in City-owned parking structures. The sole purpose of Respondents' prohibition against parking motorcycles in MacArthur Square was to avoid personal injury to motorcyclists and/or damage to the motorcycle due to the premature lowering of the gates.

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

CONCLUSIONS OF LAW

1. Complainant Milwaukee Police Association is a labor organization within the meaning of Section 111.70(1)(h), Stats.
2. Respondent-City is a municipal employer within the meaning of Section 111.70(1)(j), Stats.
3. By prohibiting motorcycle parking at MacArthur Square, Respondents have not violated Article 63 of the collective bargaining that was negotiated between Respondent-City and Complainant and have not engaged in unlawful unilateral bargaining.

4. The grievance filed by Robert Garcia on or about October 9, 2004, which challenges the prohibition against motorcycle parking, is without merit.

5. Respondent-City and Respondent-CPS, by requesting and/or requiring Complainant's bargaining unit members to sign the monthly parking contract for MacArthur Square that was revised in September of 2004, have not engaged in unlawful unilateral bargaining.

6. Respondents have not violated Sec. 111.70(3)(a)1,4 or 5, Stats., as alleged by the Complainant.

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

ORDER

The Complaint is hereby dismissed in its entirety.

Dated at Madison, Wisconsin, this 1st day of July, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 13, 2004, Complainant filed a prohibited practice complaint alleging that the Respondents had violated Secs. 111.70(3)(a)1,4 and 5, Stats., by prohibiting motorcycle parking at the MacArthur Square parking facility and by attempting to unilaterally bargain with bargaining unit members by seeking to obtain individual contracts with Complainant's bargaining unit members who park in MacArthur Square. Respondents deny that they have violated MERA as alleged by the Complainant.

POSITIONS OF THE PARTIES

Complainant

Complainant argues that Respondents have violated Article 63 of the parties' agreement by prohibiting Complainant's bargaining unit members from parking motorcycles at MacArthur Square. Relying upon the common definition of vehicles to include "motorcycles," Complainant argues that Article 63 is clear and unambiguous. By guaranteeing reimbursement for parking, it guarantees the right to park. Respondents could only modify this obligation by modifying the list of city-approved parking facilities with the contractually required notice.

Complainant additionally argues that Respondents committed prohibited practices by directing CPS to enter into monthly parking contracts with MPA members that exclude motorcycles and include a waiver of liability for bodily injury or death. Complainant maintains that, by such conduct, Respondents unilaterally bargained with Complainant's bargaining unit members in violation of Section 111.70(3)(a)1 and 4, Stats.

Respondents

Respondents deny that they have committed the prohibited practices alleged by the Complainant. Specifically, they argue that they have not violated Article 63 because this provision provides terms of reimbursement for parking, but does not guarantee the right to park any particular type of vehicles.

Respondents note that MacArthur Square has always had posted signs prohibiting the parking of motorcycles. Respondents acknowledge that this prohibition has been ignored until the disputed changes, but denies that the fact that the ban may have been successfully ignored in the past creates a "past practice." Alternatively, relying upon Article 70, Respondents deny that any such "past practice" would be binding on the Respondents. Respondents also deny that they have violated their duty to bargain, as alleged by the Complainant.

DISCUSSION

Sec. 111.70(3)(a)5 Claim

By agreement of the parties, the provisions of the 2001-2003 labor agreement remain in force and effect at all times material hereto. The Garcia grievance, filed as a group grievance on behalf of the MPA bargaining unit members, asserts that Respondent violated Article 63 of the 2001-2003 labor agreement by prohibiting motorcycle parking in City owned parking lots. Specifically, the Complainant asserts that its bargaining unit members have an Article 63 right to park a motorcycle in MacArthur Square.

The parties have agreed to submit the Garcia grievance to the Examiner to hear and decide under Sec. 111.70(3)(a)5, Stats. Sec. 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer “to violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees. . . .” To violate Sec. 111.70(3)(a)5, Stats., is to derivatively violate Sec. 111.70(3)(a)1, Stats.

Article 63, relied upon by the Complainant, is entitled “Parking Allowance Benefits for Police.” As the title indicates, this provision addresses the circumstances under which bargaining unit members will be reimbursed for parking at certain parking facilities, including MacArthur Square.

Complainant argues that a provision that guarantees reimbursement for parking necessarily presumes the right to park at facilities for which reimbursement is guaranteed. Article 63, Section 3, however, expressly recognizes that the parking facility vendors, such as Respondent-CPS, have the right to determine whether or not parking spaces are available. Thus, by the agreement of the parties, the right to park in a facility is subject to control by the parking facility vendor. The language does not distinguish vendors on the basis of whether or not the parking facility is owned by the City-Respondent.

To be sure, the Respondent-City (Respondent Exhibit #17) and Respondent-Chief (Joint Exhibit #5) advised Complainant’s bargaining unit members that the Respondent-City was prohibiting motorcycle parking in City-owned parking structures. However, the testimony of CPS Project Manager Tammy Fiel indicates that Respondent-CPS had experienced an increased problem with motorcycles in MacArthur Square and wanted to clarify that motorcycles were prohibited in the facility. (T. 78-9)

The most reasonable construction of the record evidence is that Respondent-City and Respondent-CPS jointly concluded that motorcycle parking should be prohibited in MacArthur Square. Thus, effectively, Respondent-CPS has determined that no parking spaces were available for motorcycles.

The manufacturer of the newly installed gate equipment states that it is for automobile traffic only. Due to the lighter weight and smaller size of motorcycles, the newly installed gate equipment may not be able to accurately detect the presence and/or location of a motorcycle and, thus, poses the risk of having an "arm" of the gate prematurely descend upon a motorcyclist, his/her passengers or motorcycle.

It may be, as Complainant argues, that Respondent-City could have installed a gating and revenue system that would safely accommodate motorcycle traffic. The parties' collective bargaining agreement, however, does not mandate that Respondent-City install such equipment.

The Respondents' decision to enforce a previously ignored prohibition against motorcycle parking was not motivated by any purpose other than to protect motorcyclists and their motorcycle from this potential risk. Respondents' directive prohibiting motorcycle parking in MacArthur Square is reasonably related to a legitimate business purpose.

By prohibiting motorcycles at MacArthur Square, Respondents have not changed the list of City-approved parking facilities. Thus, contrary to the argument of the Complainant, the sixty (60) day notice requirement contained in Article 63, Section 2 is not required.

In summary, under the terms of Article 63, Complainant's bargaining unit members do not have an unfettered right to park at MacArthur Square. Rather, the right to park is subject to control by Respondent-CPS. In the fall of 2004, Respondent-CPS, in collaboration with Respondent-City, reasonably determined that no parking spaces were available for motorcycles. This determination did not violate Article 63 of the parties' collective bargaining agreement, but rather, involved the reasonable exercise of the discretion granted under Article 63 of the parties' collective bargaining agreement.

The Garcia grievance is without merit. The Respondents have not violated Sec. 111.70(3)(a)5, Stats., as alleged by Complainant.

Sec. 111.70(3)(a)1 and 4 Claims

As a result of the installation of the new gating equipment at MacArthur Square, Respondent-CPS, in conjunction with Respondent-City, developed a new monthly parking agreement that was applicable to all monthly parkers, including the Complainant's bargaining unit members. Complainant asserts that, by requiring its bargaining unit members to sign these contracts, the Respondents engaged in individual bargaining in violation of Secs. 111.70(3)(a) 1 and 4, Stats.

Generally speaking, a municipal employer has a Sec. 111.70(3)(a)4 duty to bargain with the bargaining representative of its employees with respect to mandatory subjects of bargaining. Mandatory subjects of bargaining are those which "primarily relate" to wages, hours and conditions of employment, as opposed to those subjects of bargaining which "primarily relate" to

the formulation and choice of public policy. CITY OF BROOKFIELD V. WERC, 87 WIS.2D 819 (1979); UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY V. WERC, 81 WIS.2D 89 (1977); and BELOIT EDUCATION ASSOCIATION V. WERC, 73 WIS.2D 43 (1976).

By agreement of the parties, their 2001-2003 agreement is in effect. A municipal employer's statutory duty to bargain with a union during the term of a collective bargaining agreement extends to all mandatory subjects of bargaining except those which are covered by the agreement, or to those which the union has clearly and unmistakably waived its right to bargain. SCHOOL DISTRICT OF CADOTT, DEC. NO. 27775-C (WERC, 6/94); CITY OF RICHLAND CENTER, DEC. NO. 22912-B (WERC, 8/86); BROWN COUNTY, DEC. NO. 20623 (WERC, 5/83); and RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 18848-A (WERC, 6/82).

To violate Sec. 111.70(3)(a)4, Stats., is to derivatively violate Sec. 111.70(3)(a)1, Stats. In the present case, the Sec. 111.70(3)(a)1 claim is based upon the individual bargaining claim and, thus, is derivative to the Sec. 111.70(3)(a)4 claim.

Complainant claims that the monthly parking contract significantly undermined bargainable rights by excluding motorcycle parking. As discussed more fully above, the decision to exclude motorcycle parking at MacArthur Square involved the reasonable exercise of the discretion granted to Respondent-CPS under Article 63 of the parties' collective bargaining agreement.

Assuming *arguendo*, that Respondents had a statutory duty to bargain with Complainant over the prohibition against motorcycle parking, this statutory duty was met when Respondent-City bargained Article 63. By including a prohibition against motorcycle parking in the MacArthur Square monthly parking contracts and then requiring bargaining unit members to sign these monthly parking contracts, Respondents have not bargained individually with Complainant's bargaining unit members in violation of Sec. 111.70(3)(a)4, Stats.

Complainant also claims that the monthly parking contract significantly undermined bargainable rights by attempting to limit the City's liability in a manner that directly conflicts with the language of Article 63. Specifically, Complainant asserts that the parking contract language "We are not liable for any loss due or attributable to bodily injury or death" directly conflicts with the Article 63, Section 8, provision that states as follows:

The City shall be held harmless against any and all claims, actions and lawsuits relating to theft or personal property damage brought against the City by employees using parking facilities pursuant to the parking allowance benefits provided herein. The City shall be held harmless against any and all claims, lawsuits, actions, damages and judgments due to the employee's operation of his or her private vehicle at parking facilities which are subject to the parking allowance benefits provided herein. Nothing herein would operate to relieve the City of any liability it may have arising from its actions or omissions or preclude the employee from pursuing any rights or claims he/she may have under Wisconsin State Statute 895.46. (Emphasis supplied)

The liability provisions in Section 8 address Respondent-City liability arising from its employee's parking under Article 63. It does not overtly regulate the liability of vendors who operate parking facilities. To infer that the parties intended such regulation would be inconsistent with the overall language of Article 63, which indicates that parking vendors have a right to control their parking facility. Contrary to the argument of the Complainant, the liability provisions of the CPS contract do not directly conflict with the provisions of Article 63.

The terms restricting the liability of Respondent-CPS existed in similar form in the monthly parking contracts that existed prior to September of 2004. The liability terms imposed by the CPS contract are the same liability terms imposed upon the public and, thus, are not specific to the Complainant's bargaining unit members.

According to Tammy Fiel, Project Manager with CPS Parking, the monthly parking contract is prepared by Respondent-CPS' corporate offices. (T. at 75) Dorinda Floyd, Director for the Respondent-City's Department of Public Works, who oversees the City's parking operations, recalls that, due to the installation of the new equipment and the need to issue new key cards, the Respondent-City and Respondent-CPS agreed that it was necessary to have a new monthly parking agreement for MacArthur Square. (T. at 101) Floyd could not recall who determined the language of the agreement, but "thought" it was collaborative effort between Respondent-City employees and Respondent-CPS staff, and agrees that she, or someone from her office, directed Respondent-CPS to ensure that monthly parkers sign the agreement. T. at (101-2) Floyd's subsequent testimony contains the following:

Q: Did the city instruct CPS to insert the highlighted language in the second paragraph, we are not liable for any loss to bodily injury. This is an agreement signed with CPS, do you see that?

A: Yes. I am aware that this was in there, yes. (T. at 104)

. . .

Q: Did DPW draft language and - - - this language referring to Joint Exhibit 4, all of the provisions of this - - these paragraphs under contract parking agreement and give it to CPS and say every word has got to be in here just as we have drafted it?

A: I can't say that. I don't know. (T. at 107)

. . .

Q: Ms. Floyd, is it fair to say you recall some discussion between city representatives and CPS representatives about first of all the need for a new document for monthly parkers?

A: Yes, because of the new equipment, we were issuing all new key cards, and it was agreed upon at that time that we would issue new agreements with key

cards. There are a number of issues we were trying to address through the agreements as well. (T. at 107-8)

Notwithstanding Complainant's argument to the contrary, the City Attorney's Opinion of September 21, 2004 does not provide a reasonable basis to infer, much less conclude, that the City was trying to obtain benefits that it knew conflicted with the parties' collective bargaining agreement. The record warrants the conclusion that, with respect to the monthly parking contract at issue, certain terms were discussed between employee representatives of Respondent-City and Respondent-CPS. The record also warrants the conclusion that employee representatives of Respondent-City directed Respondent-CPS to ensure that monthly parkers sign the new agreement. The record, however, does not warrant the conclusion that Respondent-City or Respondent-Chief had effective control over all the terms in the Respondent-CPS monthly parking contract; specifically directed Respondent-CPS to include the liability provisions objected to by the Complainant; or directed that a monthly contract be signed on behalf of the Respondent-City, or Respondent-Chief.

Respondents have not engaged in individual bargaining in violation of Sec. 111.70(3)(a)4, Stats., as claimed by the Complainant. Consequently, there has been no derivative violation of Sec. 111.70(3)(a)1, Stats.

Conclusion

Respondents have not violated Sec. 111.70(3)(a)1, 4 or 5, Stats., as claimed by the Complainant. Accordingly, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin, this 1st day of July, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

