

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**MILWAUKEE POLICE ASSOCIATION**, Complainant,

vs.

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

Case 511  
No. 64068  
MP-4094

**Decision No. 31221-B**

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**Appearances:**

**Jonathan Cermele**, Eggert & Cermele, S.C., Attorneys at Law, 1840 North Farwell Avenue, Suite 303, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Police Association.

**Thomas J. Beamish**, Assistant City Attorney, 200 East Wells Street, Room 800, Milwaukee, Wisconsin 53202, appearing on behalf of the City of Milwaukee, Chief of Police Nannette Hegerty, and Central Parking Systems, Inc.

**ORDER ON REVIEW OF EXAMINER'S DECISION**

On July 1, 2005, Examiner Coleen Burns issued Findings of Fact, Conclusions of Law, and Order in this case, holding that the Respondents City of Milwaukee (City), Chief of Police Nannette Hegerty (Chief), and Central Parking Systems, Inc. (CPS) had not violated the collective bargaining agreement between the Respondents and the Complainant Milwaukee Police Association (Association), had not unilaterally changed working conditions, and had not bargained individually with bargaining unit members, when the Respondents prohibited motorcycle parking at the City-owned and CPS-operated MacArthur Square parking structure and required individuals renting monthly spaces in that structure, including bargaining unit members, to sign an agreement acknowledging that motorcycle parking was prohibited and ostensibly limiting CPS's liability in certain situations. Hence, the Examiner dismissed all alleged violations of Sec. 111.70(3)(a)1, 4, and 5, Stats.

Dec. No. 31221-B

On July 18, 2005, the Association filed with the Commission a timely petition for review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. Both parties filed briefs in support of their respective positions, the last of which was received on September 9, 2005. For the reasons set forth in the Memorandum that follows, we affirm the Examiner's decision, although on somewhat different grounds.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

**ORDER**

A. The Examiner's Findings of Fact 1 through 10 are affirmed.

B. The following Finding of Fact 11 is made:

11. At all relevant times before and after September 2004, the City has permitted motorcycle parking in at least some of the City-approved parking facilities subject to Article 63, including at least one covered structure (the MATC structure), and has reimbursed bargaining unit members for motorcycle parking pursuant to the terms of that article in those approved facilities.

C. The Examiner's Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 17th day of October, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

City of Milwaukee

**MEMORANDUM ACCOMPANYING ORDER**

**Summary of the Facts**

Neither party has challenged the Examiner's Findings of Fact and the Commission has affirmed them, with the addition of Finding of Fact 11, as set forth above. The most salient portions of those findings are summarized as follows.

At all relevant times, the collective bargaining agreement between the City and the Association included a provision in Article 63 entitled "Parking Allowance Benefits for Police Administration Building Employees." This provision is set forth in full in the Examiner's decision, Dec. No. 31221-A, at pages 4 to 6. In pertinent part, it provides a parking allowance in a specified amount to certain employees who are assigned to begin their shifts at the Police Administration Building, provided the employee submits a monthly parking permit/receipt from a parking facility on the City-approved list. The provision also requires the City to provide the Association with a list of City-approved parking facilities and to "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." Paragraphs 2, 3, 4, and 8 of Article 63 state in relevant part:

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. ...
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 12<sup>th</sup> Street on the west, West Juneau Avenue on the north and North Van Buren Street on the east. ...

#### 4. Daily Parking Receipts

During a calendar month when no monthly parking permit is available to an employee [under other provisions] 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.

\* \* \*

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.

The City owns several parking lots in the vicinity of the Police Administration Building (PAB), some covered and some open. The covered parking lot closest to the PAB is MacArthur Square, which is City-owned but operated by CPS under a contract with the City. Prior to September 2004, the admittance gate machinery at MacArthur Square carried a placard stating, "AUTOS ONLY, No pedestrians, No Motorcycles \* No Bicycles." However, both the City and CPS were aware that customers (but not necessarily bargaining unit members) sometimes parked motorcycles at MacArthur Square, and the City, pursuant to Article 63 of the collective bargaining agreement, had reimbursed at least one bargaining unit member for parking his motorcycle there.

Prior to the 2004 events giving rise to this case, monthly-permit parkers at MacArthur Square, including members of the Association's bargaining unit, were required by the operators of the parking structure to sign an agreement specifying the fees and other regulations. The 2003 individual agreement began with the sentence, "For the privilege of parking ONE (1) automobile in the parking facility, Lessee agrees to pay monthly rate by the first (1<sup>st</sup>) day of each month, as rental for said parking space." The agreement contained no specific reference to motorcycles. Regarding liability, the agreement stated:

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.

In late 2004, after appropriate bidding processes, the City and CPS took steps to update and upgrade the gate mechanism at MacArthur Square, which included installing a vehicle detection "loop" designed for automobile traffic only. Owing to their lighter weight and smaller size, motorcycles were less detectable when passing through the loop system, posing potential danger to the motorcycle and/or its passengers. Accordingly, the City and CPS determined to implement and strictly enforce a motorcycle prohibition at MacArthur Square.

In September 2004, the City and CPS prepared a revised individual parking agreement for monthly parkers that contained the identical initial sentence as the 2003 agreement, but, in addition to some language changes that are not pertinent herein, inserted the word "motorcycles" into the second sentence, which now reads as follows: "Parking is not available for motorcycles, trailers, pop-up campers, or any other vehicle that cannot be moved on its own." The liability language in the September 2004 individual parking agreement was virtually identical to that in the 2003 agreement, with the addition of the language, "Failure to adhere to this agreement could result in revocation of parking privileges."

By Memorandum issued September 29, 2004, the City informed employees of the Police Department, including members of the Association's bargaining unit, that the City henceforth would prohibit motorcycle parking at City-owned parking facilities. Although the City and the Association were engaged in negotiating the terms of their successor collective bargaining agreement at the time, the City did not notify the Association directly about the motorcycle parking restriction at MacArthur Square, nor did the Association request to negotiate any changes in the contractual parking provisions other than an increase in the reimbursement rate. The Association filed a grievance on October 9, 2004 on behalf of a bargaining unit member, alleging in pertinent part as follows:

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. ...

The City denied the grievance, and both parties waived the contractual arbitration procedure in order to submit the breach of contract claim to the Commission pursuant to Sec. 111.70(3)(a)5, Stats.

At all relevant times before and after September 2004, the City has permitted motorcycle parking in at least some of the City-approved parking facilities subject to Article 63, including at least one covered structure (the MATC structure), and has reimbursed bargaining unit members for motorcycle parking pursuant to the terms of that article in those approved facilities.

### **The Examiner's Decision and the Petition for Review**

The Association argued to the Examiner that the City's action in prohibiting motorcycle parking at MacArthur Square in September 2004 violated the Municipal Employment Relations Act (MERA) in two ways: first, it violated Section (3)(a)5 of MERA by breaching Article 63 of the collective bargaining agreement. According to the Association, that article gives employees the right to park "vehicles," which by common definition includes motorcycles, in City-approved lots. By prohibiting motorcycles at MacArthur Square, the City effectively removed MacArthur Square from the list of approved lots, without providing the 60-day notice required by Paragraph 2 of Article 63. The Examiner held that Article 63 did not guarantee a right to park at the approved facilities, but only a right to reimbursement if parking space was available in those facilities. She concluded that the contract expressly reserved to the parking facility operators the right to determine whether spaces were available. In her view, the City and CPS determined that no motorcycle spaces were available at MacArthur Square, which was within their prerogative under Article 63. She rejected the Association's contention that the City had changed the list of approved facilities within the meaning of paragraph 2 of Article 63, so as to invoke the 60-day notice provision.

The Association's second argument to the Examiner was that, even if the contract had not been violated, the City had negotiated individually with bargaining unit members on a mandatory subject of bargaining by requiring monthly parkers at MacArthur Square to sign an individual agreement that changed employee working conditions. Those changes were (1) the motorcycle exclusion, and (2) a release of City and/or CPS liability beyond what was contained in Paragraph 8 of Article 63. On the first prong, the Examiner concluded that the City had exhausted any duty it may have to bargain over the subject of motorcycle parking by negotiating Article 63 – in effect, a waiver by contract. As to the liability component of the individual parking agreements, the Examiner held that the liability language had not changed in any material way from the prior individual agreement, that the language did not conflict with Paragraph 8 of the Article 63 because it applied to the CPS's liability rather than the City's, and that the City itself had not been shown to be in control of the terms of the individual agreement between CPS and individual employees so as to have engaged in unilateral individual bargaining with the employees. Thus the Examiner also dismissed the alleged violation of Section (3)(a)4 of MERA.

In connection with the instant petition for review, the Association challenges the Examiner's dismissal of both alleged violations. As to the contract violation issue, the Association argues that the Examiner conflated the determination of whether space was

available with the determination whether space would be provided for certain vehicles, i.e., motorcycles. The Association contends that the contract does not concede to the City or the vendor a right to restrict the type of vehicle that may be reimbursed for parking, if space is available. The Association also challenges the Examiner's assertion that the *City* rather than solely the vendor (CPS) had a right under Article 63 to determine whether space was available. Since, in this situation, CPS had not determined that space was unavailable, the Association argues that the City lacked contractual authority to exclude motorcycles, and by doing so violated both Article 63 of the contract and perforce Section (3)(a)5 of MERA.

As to the individual bargaining issue, the Association contends that the City collaborated with CPS to compel individual members to sign the individual parking agreements and thus to "give up their rights under Article 63 to park motorcycles in MacArthur Square." (Assoc. Brief at 6). According to the Association, the Examiner engaged in circular reasoning when she erroneously concluded that Article 63 allowed the City to prohibit motorcycles and therefore satisfied the City's duty to bargain over such a restriction. Moreover, according to the Association, the Examiner erred in concluding that CPS, rather than the City, was responsible for the content of the individual contracts, as the City had sufficient control over the actions of its agent, CPS, to bear responsibility. Finally, argues the Association, it is irrelevant that the language had existed in similar form under earlier contracts because "the fact that this unlawful practice may have gone unnoticed until the September, 2004 CPS contract does not excuse it." Hence, the City's collaboration with CPS regarding the motorcycle and liability language in the individual parking agreements constituted unilateral individual bargaining in violation of Section 111.70(3)(a)4 and 1 of MERA.

The City urges the Commission to affirm the Examiner. Regarding the alleged contract violation, the City states, "The fallacy of the MPA's position is it's [sic] unsupported claim that under Article 63 parking facility owners or operators have no right to regulate the use of their facilities by the public, including MPA members, other than as specifically agreed in Article 63." (City's Br. at 8). Regarding the individual parking agreements, the City's position, in a nutshell, is that the individual agreements were between CPS and the monthly permit holders; the City had no duty to negotiate with the Association about the parking requirements or restrictions that may be imposed in such agreements by a parking facility owner or vendor, such as CPS. While the City discussed the content of those agreements with CPS, the City did not direct or control CPS's actions in compelling customers to sign the agreements.

### **Discussion**

The Commission has affirmed the Examiner's Order dismissing the prohibited practice allegations in this case.

Addressing first the contract violation claim, it is apparent that nothing in Article 63 expressly guarantees bargaining unit members a right to park any vehicle, whether automobile or motorcycle, in any particular location. As the Examiner points out, the language only

expressly establishes a right to reimbursement of monthly parking fees if certain conditions are met. The Association has not supplied any extrinsic evidence, such as bargaining history or past practice, that would transform the plain language, guaranteeing a right to reimbursement, into an unstated guarantee of the right to park particular types of vehicles in particular locations. The language does guarantee the Association a right to be notified as to the lots the City has approved for reimbursement and a right to 60 days' notice of any changes in that list. Arguably this language might require the City to maintain a list including at least some parking facilities; withdrawing approval from all or a significant portion of the previously-approved facilities could be said to undermine the plain purpose of the provision, i.e., to provide an employee parking benefit. However, especially since the language itself provides for situations where space is unavailable in approved facilities, the instant situation is a far cry from such a hypothetical "gutting" of the provision. No one has contended that the City has so narrowed the available parking for motorcycles as to have effectively eliminated the reimbursement benefit set forth in Article 63. Under standard principles of contract construction, therefore, we agree with the Examiner that the language simply does not require the City to make a particular parking space available, whether for automobiles or motorcycles. Hence, the City did not breach the collective bargaining agreement and therefore did not violate Sec. 111.70(3)(a)5 by prohibiting motorcycle parking at MacArthur Square.<sup>1</sup>

The unilateral change/individual bargaining allegation under Section (3)(a)4 presents a more difficult question. As held by the Examiner, where the contract addresses a mandatory subject of bargaining,<sup>2</sup> the parties are entitled to rely upon the contractual provision for the duration of that contract and would have no obligation to bargain over that subject during the contract's term. CADOTT SCHOOL DISTRICT, DEC. NO. 27775-C (WERC, 6/94), AFF'D CADOTT EDUCATION ASS'N V. WERC, 197 WIS.2D 46 (1995). As discussed above, Article 63 does address the issue of parking availability (whether for automobile or motorcycle), but in that regard only requires the City to notify the Association as to the available parking facilities and reimburse employees. Thus, on the subject of parking availability, the contract is most reasonably construed to give the City reasonable discretion over how many and which lots will be available for parking, including motorcycle parking. As far as this record reflects, ample reimbursable parking remains available for motorcycles, and it is only the location of the approved lots that may have modestly changed.<sup>3</sup> Thus the content of Article 63 satisfies us

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<sup>1</sup> Even if the Union were correct that the City has, in effect, withdrawn MacArthur Square from the approved parking list for motorcycles without providing 60 days' notice in violation of the agreement, the remedy for that violation would in all likelihood extend no farther than whatever damages could be attributable to that 60-day period. It would not require the City to provide motorcycle parking in MacArthur Square.

<sup>2</sup> For the purposes of this case, we will presume but need not decide that employee motorcycle parking in City-owned facilities would be a mandatory subject of bargaining. The mandatory/permissive nature of this subject would be determined by balancing the City's management interest in controlling its facilities against the impact on employees' wages, hours and conditions of employment. SEE, CITY OF OSHKOSH, DEC. NO. 29971 (WERC, 10/00) for a discussion of WERC decisions regarding the duty to bargain over the use of employer facilities.

<sup>3</sup> There is some question whether the September 2004 prohibition against motorcycle parking at MacArthur Square actually changed the status quo, inasmuch as motorcycles at least nominally were prohibited even before the upgraded gate installation. While it is clear that some bargaining unit members parked motorcycles in that lot before September 2004, it is not clear that the City was aware of that practice. There is no need to resolve this issue, given the ultimate decision to dismiss the allegations.

that the parties have already bargained on the subject of parking availability and are not obligated to bargain further thereon during the term of the existing agreement. It follows that the City did not circumvent any duty to bargain with the Association when, while Article 63 was in effect, the City eliminated MacArthur Square as one of the locations available for motorcycle parking.<sup>4</sup>

Lastly, the Association contends that the City's and/or CPS's liability for damages sustained by vehicles parked by bargaining unit members at City-owned lots is also a mandatory subject of bargaining and that the City (through CPS) circumvented the Association and bargained individually with bargaining unit members by requiring individual monthly parkers to sign parking permits waiving damage claims. Assuming this is a mandatory subject of bargaining, and leaving aside the dubious enforceability of such liability waivers, the Association concedes that monthly permit holders at MacArthur Square had been signing individual agreements for years containing the same liability language as that contained in the monthly agreements implemented in the fall of 2004. The Association has not established in the evidentiary record nor asserted in its brief that it actually or imputably lacked knowledge of this practice, but merely suggests in its brief that the practice "may have gone unnoticed." This suggestion is not sufficient to counter the record evidence that the practice existed and applied to bargaining unit members. Accordingly, this allegation is also dismissed.

Dated at Madison, Wisconsin, this 17th day of October, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Paul Gordon /s/

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Paul Gordon, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

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<sup>4</sup> Again our analysis diverges from that of the Examiner in a manner that does not affect the outcome. The Examiner viewed Article 63 as ceding to the City and/or lot operators the right to decide whether space was available and further viewed the City/CPS as having eliminated motorcycle "space" at MacArthur Square. We agree with the Association that prohibiting motorcycle parking at MacArthur Square is more accurately cast as a decision that a particular facility will not be available for motorcycles, rather than a decision that space is not available at the MacArthur Square facility.