STATE OF WISCONSIN **CIRCUIT COURT** **MILWAUKEE COUNTY**
BRANCH 3

MILWAUKEE POLICE ASSOCIATION,

Petitioner,

Case No: 05-CV-010058

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

DECISION

The Petitioner, Milwaukee Police Association ("the MPA"), appeals from a decision of the Wisconsin Employment Relations Commission ("the Commission") affirming an Examiner's Conclusions of Law and Order. For the reasons set forth below, the decision of the Commission is AFFIRMED.

STATEMENT OF FACTS

On October 13, 2004, the MPA filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against the City of Milwaukee ("the City"), Chief of Police Nannette Hegerty ("the Chief"), and Central Parking Systems, Inc. ("CPS"). The MPA alleged these entities had violated Wis. Stats. § 111.70 by prohibiting motorcycle parking in the MacArthur Square parking structure and by attempting to contract with individual MPA members. MacArthur Square is one of several City-Owned structures available for parking to MPA members, as well as to the public at large. Article 63 of the Collective Bargaining Agreement between the City and the MPA provides that employees that are required to report to the Police Administration Building downtown are eligible for parking reimbursement at any of a number of City-

approved parking facilities designated by the City. MacArthur Square was one of the parking facilities where police employees were eligible to park and receive reimbursement.

Around September of 2004, the City began to install new equipment in MacArthur Square that would not accommodate motorcycles and could result in personal injury to motorcyclists due to premature lowering of parking gates. On September 19, 2004, the Police Department issued a memo indicating that because of the new equipment, the City was prohibiting the parking of motorcycles in City-owned parking structures. Around this same time, a new monthly parking contract was drafted by CPS that included language that indicated motorcycles were no longer allowed in MacArthur Square. The contract also contained language indicating CPS was not liable for any loss attributable to bodily injury or death; this same language had been contained in the monthly contract for many years. The MPA then brought the initial complaint, alleging that the language prohibiting motorcycle parking and waiving liability conflicted with their Collective Bargaining Agreement with the City. By asking MPA members to sign these individual contracts, the City was attempting to contract with individual members of the MPA bargaining unit in violation of Wis. Stat. §§ 111.70(3)(a)1, 4, and 5.

A hearing was held in this matter on March 23, 2005. In a July 1, 2005 Decision, Examiner Burns determined that the City had not violated Article 63 by prohibiting motorcycle parking in MacArthur Square and also had not engaged in unlawful unilateral bargaining by asking MPA members to sign the monthly parking contract for MacArthur Square. The MPA filed a petition for review of the Examiner's decision with the Commission on July 18, 2005. In a October 17, 2005 Decision, the Commission affirmed the Examiner's decision.

The MPA has initiated this judicial review alleging that the Commission's decision was based upon an unreasonable interpretation of the Wisconsin Statutes at issue.

STANDARD OF REVIEW

An agency's interpretation or application of a statute may be accorded great weight deference, due weight deference, or *de novo* review, depending on the circumstances. UFE, Inc. v. LIRC, 201 Wis. 2d 274, 284 (1996). Great deference is awarded only when all four of the following requirements are met:

> (1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is one of long standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency on the application of the statute.

Id. Under the great weight standard, the court will uphold an agency's reasonable interpretation that is not contrary to the clear meaning of the statute, even if an alternative interpretation is more reasonable. Id. at 287.

The court will use due weight deference "when the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court." Id. at 286.

Finally, the court will use the *de novo* standard when the legal conclusion reached by the agency is one of first impression or when the agency's position on the statute has been so inconsistent as to provide no real guidance. Id.

The Commission argues that great weight deference should be given to the Commission's decision. The Court agrees. The legislature has charged WERC with the duty of administering Municipal Employee Relations Act ("MERA"). WERC has

determined questions of mandatory versus permissive bargaining for many years. Racine Educ. Ass'n v. WERC, 214 Wis. 2d 353, 357, 571 N.W.2d 887 (Ct. App. 1997). It is well-settled that the Commission has accumulated experience, technical competence, and specialized knowledge in administering the MERA statutes. St. Croix Falls School Dist. v. WERC, 186 Wis. 2d 671, 677, 522 N.W.2d 507 (Ct. App. 1994). More specifically, the Wisconsin Supreme Court has recognized WERC's expertise in deciding mandatory or permissive subjects of bargaining. Dodgeland Educ. Ass'n v. WERC, 250 Wis. 2d 357, 379, 639 N.W.2d 733 (2002). Consistency and uniformity of interpretation of the MERA statutes is promoted by giving great weight deference to the Commission's decisions. Therefore, the Commission's interpretation and application of the statutes in question in this matter is entitled to great weight deference. The MPA seemingly concedes this point; they do not make an argument that another standard is more appropriate.

ANALYSIS

The Commission's factual finds will be upheld by this Court as long as they are supported by substantial evidence in the record. Wis. Stat. § 227.57(6); Kitten v. DWD, 252 Wis. 2d 561, 569, 644 N.W.2d 649 (2002). The parties do not dispute the Commission's findings of fact in this case. This Court agrees that the findings of the Commission are reasonable and supported by the evidence in the record.

The instant case involves review of only one of the several issues that were originally before the Commission. The MPA seeks this Court's review with regard to the Commission's holding that the City and CPS did not violate Wis. Stats. § 111.70(3)(a)4 when it prohibited motorcycle parking in MacArthur Square and requested that MPA members sign the revised parking contract for MacArthur Square which specified that

motorcycles were now prohibited and also contained a liability waiver. This Court will uphold the Commission's reasonable interpretation when it is not contrary to the clear meaning of the statute, even if the Court feels an alternative interpretation is more reasonable. UFE, 201 Wis. 2d at 287.

The Commission found that the elimination of MacArthur Square as a location available for motorcycle parking was not a subject on which the City had a duty to bargain with the MPA. The Commission presumed that the employee motorcycle parking in City-owned facilities was a mandatory subject of bargaining, but because the contract addressed this subject, the parties can rely on the contractual provision for the duration of the contract and have no obligation to bargain over that subject during the contract's term. The Commission looked to the contract, specifically to Article 63, and found that the City was required only to inform the MPA when a facility was no longer approved for reimbursement; the City had reasonable discretion over how many an which lots were available for parking. The elimination of motorcycle parking at MacArthur Square did not narrow the available parking to a degree such that the reimbursement provision in Article 63 was effectively eliminated. As such, it was only the location of reimbursable lots with parking available for motorcycles that changed. The subject of parking availability was bargained on by the City and the MPA and codified in Article 63; while Article 63 was in effect the parties had no obligated to bargain further on this subject. The City did not circumvent any duty to bargain with the MPA when it eliminated MacArthur Square as a location available for motorcycle parking. This court finds that the Commission's finding on this point is clearly reasonable.

The MPA's specific argument on this point is that regardless of whether Article 63 gave the City the authority to eliminate motorcycle parking, the City violated Wis.

Stat. § 111.70(3)(a)4 by seeking to obtain individual contracts with MPA members prohibiting motorcycle parking in MacArthur Square. The Commission's finding is quite clear, however, that the City was free to exercise its discretion with regard to which parking locations were to be available for reimbursement. The City exercised this discretion by specifying that motorcycles could no longer be parked in MacArthur Square in the monthly parking contract that MPA members had been signing for years if they chose to park at MacArthur Square.

The Court also holds that the Commission's findings with respect to the liability waivers are reasonable and supported by undisputed facts in the record. The Commission found that the requirement that MPA members sign liability waivers to park in MacArthur Square is not individual bargaining. As noted above, there was a long-standing practice in place that required MPA members to sign a parking contract with MacArthur Square if they wish to park there on a monthly basis. The issue of liability waivers at the approved parking facilities is not addressed in the contract; in cases where the initial agreement has left an issue ambiguous WERC has consistently resolved that ambiguity by examining the parties' past and continuing practice. St. Croix Falls Sch. Dist. v. WERC, 186 Wis. 2d 671, 678, 522 N.W.2d 507 (Ct. App. 1994). In a recent case involving the MPA itself the Wisconsin Supreme Court expressed support for examining past practice because it is a "reliable indicator of the parties' intent as to the status quo." Milwaukee Police Ass'n v. Hegerty, 279 Wis. 2d 150, 166, 693 N.W.2d 738 (2005). The record establishes that MPA members have been signing monthly parking contracts with CPS for many years and also that those contracts have consistently contained the liability waiver at issue here.

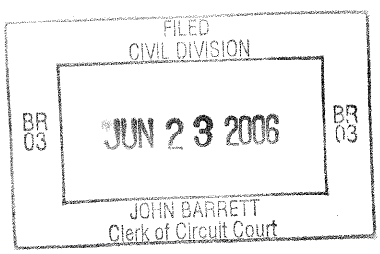
The MPA argues that the record does not contain any evidence that the MPA had been aware of this practice, or that they agreed to the liability waiver language. However, as the Commission stated in their Order, the MPA has not established in the evidentiary record that it actually lacked knowledge of the practice. The MPA simply suggests that the practice may have gone unnoticed. The Commission found this was not sufficient to counter the record evidence that the practice existed and applied to bargaining unit members. This Court agrees. It is clear that contracts including this liability waiver language had been signed by MacArthur Square parkers, including MPA members for years. It is reasonable to conclude that the MPA was aware of this practice and acquiesced to it.

ORDER

Based upon a review of the record, and for the reasons stated above,

IT IS HEREBY ORDERED that the decision of the Wisconsin Employment Relations Commission is AFFIRMED.

Dated this 23rd day of June, 2006 at Milwaukee, Wisconsin.



BY THE COURT:

/s/ CLARE L. FIORENZA

Clare L. Fiorenza
Circuit Court Judge