STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WHATCOM COUNTY DEPUTY SHERIFF'S GUILD,	)	
Complainant,	)	CASE 17041-U-02-4418
vs.	)	DECISION 8512-A - PECB
WHATCOM COUNTY,	)	DECISION OF COMMISSION
Respondent.	)	

Cline & Associates, by *James M. Cline*, Attorney at Law, and *Christopher J. Casillas*, Attorney at Law, for the union.

Braun Consulting Group, by *Robert R. Braun, Jr.*, for the employer.

Michael A. Sanderson, for the Washington State Nurses Association, amicus curiae.

This case comes before the Commission on a timely appeal filed by the Whatcom County Deputy Sheriff's Guild (DSG) seeking to overturn a decision issued by Examiner Walter M. Stuteville.[1] Whatcom County (employer) and the Washington State Nurses Association (amicus) support the Examiner's decision.

This case concerns the legitimacy of "parity" clauses in collective bargaining agreements the employer has signed with the amicus and other unions representing some of its employees. The DSG is the exclusive bargaining representative of the employer's law enforce-

[1] *Whatcom County*, Decision 8512 (PECB, 2004).

ment employees, and it filed this complaint on December 11, 2002, alleging that the employer refused to bargain with it (in violation of RCW 41.56.140(4)) by reason of the parity clauses it signed with other unions. The Examiner held a hearing on October 8, 2003, and the Examiner granted the amicus leave to file a brief supporting the employer's position. On April 19, 2004, the Examiner dismissed the complaint.

ISSUE

Is the inclusion of a parity clause in a collective bargaining agreement signed with one union a per se refusal to bargain by the employer with a union representing another bargaining unit organized among its employees?

For the reasons outlined below, we affirm the dismissal of the complaint.

APPLICABLE LEGAL PRINCIPLES

These parties bargain under the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. The duty to bargain set forth in RCW 41.56.030(4), and enforced by RCW 41.56.140(4) and 41.56.150(4), is applied separately in each bargaining unit. That duty includes a good faith component. For the purposes of this decision, the term "parity clause" is used to describe a provision in a collective bargaining agreement which automatically triggers some change of employee wages, hours or working conditions based on the terms negotiated by the employer for a different bargaining unit.

This is the second time that this Commission has been asked to rule on the legitimacy of parity clauses contained in collective

bargaining agreements. In the first such case, *City of Bremerton*, Decision 7739 (PECB, 2002), an Examiner ruled that a per se prohibition of parity clauses was not warranted. In coming to that conclusion, that Examiner noted that the record in that case did not contain any evidence demonstrating that the specific clause being challenged had inhibited the full performance of that employer's obligation to bargain in good faith, and also noted that a different parity clause or different facts could warrant a different result. That decision was appealed, but the Commission dismissed that appeal on procedural grounds and declined to make any ruling regarding the legitimacy of parity clauses. *City of Bremerton*, Decision 7739-A (PECB, 2003).

As the agency responsible for the impartial administration of a statute that calls for labor and management to negotiate their own agreements, the Commission is called upon from time to time to decide whether a particular proposal or subject matter is within the "scope of bargaining" under the statute (wages, hours and working conditions). The Commission has traditionally resolved "scope of bargaining" controversies on the basis of their specific facts. *See* WAC 391-45-550. That case-by-case approach was endorsed by the Supreme Court of the State of Washington in *IAFF v. PERC (City of Richland)*, 113 Wn.2d 197 (1989).

The amicus cites National Labor Relations Board (NLRB) precedents that support a case-by-case analysis of parity clauses, including: *Dolly Madison Industries, Inc.*, 182 NLRB 1037 (1970); *Doral Beach Hotel*, 245 NLRB 774 (1979); *Control Services, Inc.*, 303 NLRB 481 (1991).

ANALYSIS OF "PER SE" CLAIM

The DSG asks the Commission to hold that parity clauses are per se illegal. The employer's focus is on the actual facts.

We note at the outset that a per se rule would deprive this Commission of deciding cases individually based upon the particular facts presented. A pivotal concern of the Commission should be to maintain the sanctity of contracts freely negotiated and agreed upon by parties. Any limitation on the terms upon which parties may agree must be imposed only with great caution and restraint. It is only when the terms of a proposal or contract are inherently repugnant to (or outside of) the collective bargaining process that this Commission should use its statutory authority to invalidate bargaining on the offending clause.

The DSG would have us believe that all parity clauses have an unavoidable coercive effect and inherently interfere with the rights of other parties, but we cannot say that all parity clauses restrict the ability of other parties to agree to an acceptable contract. As indicated in the cases cited by the amicus, the NLRB has certainly declined to adopt a per se approach. The same is true under the public sector bargaining laws in at least some other states. For example, in *Banning Teachers Association v. PERB*, 128 LRRM 3009 (1988), the California Supreme Court held that making parity clauses per se illegal would unduly burden public employers, many of whom are already in a cumbersome environment of multi-unit collective bargaining. By taking the case-by-case approach already endorsed by our own Supreme Court, this Commission can best determine whether the parity clause at issue in a particular case has actually inhibited the collective bargaining process called for by the statute we administer. Accordingly, we reject the union's claim that parity clauses are per se illegal.

ANALYSIS OF "BURDEN OF PROOF" ISSUE

The DSG asks the Commission to hold that it need only prove that the parity clause in the collective bargaining agreement(s) signed by the employer with some other union(s) had some minimal impact on bargaining between the employer and the DSG, and that the burden of proof should then be shifted to the employer to show that the parity clause did not impact its bargaining with the DSG. The employer asserts that the DSG needed to prove (and has failed to prove) that the parity clauses in other contracts signed by the employer had an actual impact on the negotiations between the employer and the DSG.

The "burden shifting" approach supported by the DSG as an alternative to a per se approach is reminiscent of the approach used by the NLRB in deciding discrimination cases under *Wright Line*, 251 NLRB 1083 (1980).[2] The DSG would only undertake to make out a prima facie case showing a probability of the parity clause having more than a de minimis impact on the bargaining process, and the burden of proof would then shift to the employer to demonstrate there was no impact on bargaining. If the employer was unable to meet that burden of proof, the parity clause would be deemed unlawful. We decline to adopt such an approach. The Supreme Court of the State of Washington specifically rejected such a burden-shifting approach in *Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46 (1991) and *Allison v. Seattle Housing Authority*, 118 Wn.2d 79 (1991).[3]

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[2] The NLRB cited and relied upon *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977).

[3] Our Supreme Court cited and acknowledged *Mt. Healthy* as the current federal law, but rejected a shifting of the burden of proof for deciding claims under state law.

In proceedings before this Commission under Chapter 391-45 WAC, the complainant has the burden of proof to show, by a preponderance of the evidence, that the respondent has committed the complained-of unfair labor practice. WAC 391-45-270(1)(a); *State - Corrections*, Decision 7872-A (PSRA, 2003). The respondent is responsible for the presentation of its defense, but only has a burden of proof as to affirmative defense. WAC 391-45-270(1)(b).

Application of the standard in this case readily yields a conclusion that the "actual facts" approach taken by the Examiner was appropriate, and that the Examiner properly dismissed the complaint. What we know from the record in this case is very limited: The employer and the DSG commenced bargaining for a successor contract in October 2002; although they did not reach agreement on several subjects of bargaining, they continued to meet and negotiate on health benefits and other matters that remained at issue between them; some time following their exchange of proposals concerning health benefits, the DSG informed the employer that it objected to parity clauses contained within the contracts the employer had signed with other unions. Those parity clauses concerned health benefits, and the DSG asserted that they encumbered the bargaining process between the employer and the DSG. The employer refused those clauses in its other contracts.

This Commission neither receives additional evidence on an appeal nor makes a de novo review of the evidence that was before an Examiner. Rather, we look to whether there is substantial evidence on the record to support the findings of fact the Examiner has made. *Cowlitz County*, Decision 7007-A (PECB, 2000). If substantial evidence exists to support the Examiner's findings, the Commission reviews the Examiner's conclusions of law, to determine whether they are supported by the findings of fact. We have applied those standards in this case. The union does not point to

substantial evidence in this record establishing that the employer bargained in bad faith. Union President Mark Anthony Joseph testified that the employer demanded that a "cap" be placed on the employer's health benefit contributions. The record demonstrates that the employer took a hard stance as to having a cap on medical benefits. That stance does not, in and of itself, constitute bad faith. The employer's position is neither a unique nor unusual position for an employer to take in collective bargaining. Joseph's testimony failed to connect the employer's position with the parity clauses contained in the contracts signed by the employer with other unions. There certainly was no "smoking gun" among the evidence presented. Absent even circumstantial evidence that the complained-of parity clauses impacted the bargaining between the employer and the DSG, no violation can be found.

ORDERED

The findings of fact, conclusions of law, and order issued by Examiner Walter M. Stuteville are AFFIRMED and adopted as the findings of fact, conclusions of law and order of the Commission.

Issued at Olympia, Washington, the 11th day of March, 2005.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

PAMELA G. BRADBURN, Commissioner

Commissioner Douglas G. Mooney did not take part in the consideration or decision of this case.