City of Kelso, Decision 11672 (PECB, 2013)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KELSO POLICE BENEFIT ASSOCIATION, Complainant, vs. CITY OF KELSO, Respondent.	CASE 24981-U-12-6388 DECISION 11672 - PECB FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Makler, Lemoine & Goldberg, by *Jaime B. Goldberg,* for the union.

Janean Z. Parker, Attorney at Law, for the employer.

On July 16, 2012, the Kelso Police Benefit Association (union) filed a complaint against the City of Kelso (employer) alleging refusal to bargain. On July 27, 2012, Unfair Labor Practice Manager David I. Gedrose issued a preliminary ruling finding a cause of action for employer refusal to bargain. The Commission assigned the case to Jamie L. Siegel, who held a hearing on October 30, 2012. The parties filed post-hearing briefs on December 7, 2012.

ISSUE

Did the employer refuse to bargain in violation of RCW 41.56.140(4) when it initially rejected the union's proposal to increase wages after having previously agreed to parity clauses with two other bargaining units?

After analyzing the evidence and the totality of circumstances, I find the union failed to prove the employer refused to bargain in violation of RCW 41.56.140(4) when the employer initially rejected the union's proposal to increase wages.

BACKGROUND

The employer negotiates with four bargaining units. The union represents a bargaining unit of uniformed law enforcement officers through the rank of sergeant. The employer and union were parties to a collective bargaining agreement that expired December 31, 2011.

The employer, like most employers over the past several years, faced significant economic challenges. Dennis Richards became Interim City Manager in November 2008. During his tenure as city manager, the employer used its financial reserves to reduce the number of employees who were laid off.[1] Its use of reserves left the employer in what Richards described as "dire straits" at the time the employer was bargaining a successor collective bargaining agreement with the union. The Kelso City Council directed Richards not to spend from the reserves which were at $750,000.

Parity Clauses

While negotiating the successor agreement, the union learned that the employer and two of the other bargaining units negotiated parity clauses in their collective bargaining agreements. A parity clause is "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." *Whatcom County*, Decision 8512-A (PECB, 2005). I use "parity clause" and "me-too clause" interchangeably in this decision.

The agreements with other unions included pay freezes accompanied by a guarantee that if other employees received a wage increase during a certain period of time, the bargaining unit employees would receive the same wage increase. The parity clause in section 5.1 of the collective bargaining agreement between the employer and the Washington State Council of County and City Employees Local 1557 (WSCCE), effective from January 1, 2010, to December 31, 2012, provides as follows:

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[1] For several years the employer anticipated Costco would open a store in Kelso. That plan did not materialize.

> Effective January 1, 2010 pay rates across all classifications shall be maintained at the current 2009 rates providing no other bargaining unit within the City of Kelso receives a wage increase prior to December 31, 2012. In the event any other City of Kelso bargaining unit receives a wage increase or bonus during the 36 month period specified above, the AFSCCE employees will receive an identical increase or bonus effective immediately.

The parity clause in section 3.1 of the collective bargaining agreement between the employer and Teamsters Local 58, effective from July 1, 2011, to December 31, 2013, provides as follows:

> Effective July 1, 2011, pay rates across all classifications shall be maintained at the current rates providing no other bargaining unit or unrepresented individual employee working as an employee of the City of Kelso receives a bonus or wage increase during the term of this agreement. In the event any other City of Kelso bargaining unit or individual employee receives a wage increase or bonus during the term of this agreement the City library and clerical employees will receive an identical increase or bonus effective immediately.

The collective bargaining agreement for a three-member bargaining unit of records specialists did not contain a parity clause.

Negotiations for Successor Collective Bargaining Agreement

The record includes no evidence of the number of negotiation sessions held or details about the parties' proposals. At some point during bargaining, the parties sought and used mediation to finalize their negotiations.

During bargaining, the employer rejected the union proposal to increase wages. Instead, the employer offered to increase education incentives and uniform allowances. Because of its limited financial reserves, the employer sought to fund enhancements to the collective bargaining agreement through savings in the police department budget. According to the employer, this approach avoided requesting approval from the city council and protected the reserves. The parties calculated the cost of the employer's offer at $15,000 to $25,000. The union proposed using that amount to fund a wage increase that would apply to the entire bargaining unit, rather than increasing education incentives, which would only impact about half of the bargaining unit.

The majority of the testimony during the approximately one-hour hearing focused on a March 22, 2012 meeting. Rich Fletcher, one of the union bargaining team members, requested the meeting with the employer to clarify the reason the employer was not willing to offer a wage increase. Except for the attorneys representing the parties, the bargaining team members for both the employer and union attended the meeting. Fletcher's type-written notes prepared immediately after the meeting indicate, in part, as follows:

> I asked CM [city manager] if the me-too clauses were inhibiting the City's interest in offering a base salary increase. CM, Chief, and Darr all denied that allegation and claimed the City has no money and any money paid to KPA [union] will come from directly out of the KPD [Kelso Police Department] budget.
>
> All parties agreed there was somewhere between $15,000-25,000 available which had been offered by the City in various forms of payment including: annual uniform allowance increase, uniform allowance stipend, or increased educational incentive, however, no salary increase was ever entertained when it was proposed by KPA. I asked CM why that amount of money couldn't be applied to our base wage instead of the areas where the City proposed to pay it out. CM replied, "That would trigger the me-too clause."

Employer representatives disputed that Richards made the "trigger" statement and testified that Fletcher asked numerous rephrased questions about the parity clauses in an attempt to extract from Richards the answer he wanted. The meeting took place approximately one week before Richards left his position to begin employment with another city.

After Richards left the city manager position, Police Chief Andy Hamilton served as the interim city manager while maintaining his regular police chief duties. Hamilton testified that the employer had been trying to use funds from the police department budget to avoid using the employer's limited reserves. He testified the employer ultimately decided to spend money on wage increases rather than potentially go to interest arbitration.

On June 20, 2012, the parties signed a successor collective bargaining agreement effective through December 31, 2012. The agreement included a three percent wage increase. The employer extended the same three percent wage increase to the bargaining units with parity

clauses and the unrepresented employees. Although the collective bargaining agreement for the bargaining unit with the three records specialists did not have a parity clause, the employer also agreed to a memorandum of understanding giving the records specialists the same three percent wage increase. Hamilton testified that some city employees had not received a wage increase for a longer period of time than the union employees.

APPLICABLE LEGAL STANDARDS

Good Faith Bargaining Obligation

Chapter 41.56 RCW requires a public employer to bargain in good faith with the exclusive bargaining representative of its employees. The duty to bargain extends to mandatory subjects of bargaining including wages, hours, and working conditions. RCW 41.56.030(4).

A fundamental element of the obligation to bargain in good faith is the duty to engage in full and frank discussions on disputed issues, and to explore possible alternatives to achieve a mutually satisfactory resolution of the interests of both the employer and employees. *Snohomish County*, Decision 9834-B (PECB, 2008). Although the duty to bargain does not compel a party to agree to proposals or make concessions, a party is not entitled to reduce collective bargaining to an exercise in futility. *Mason County*, Decision 3706-A (PECB, 1991). In *Mason County*, Decision 3706-A, the Commission described a party's ability to hold a firm position in bargaining:

> Entering negotiations with a take-it-or-leave-it attitude on items of importance is risky for a party, but a party may maintain its firm position on a particular issue throughout bargaining, if the insistence is genuinely and sincerely held, and if the totality of its conduct does not reflect a rejection of the principle of collective bargaining.

In determining whether an employer has committed an unfair labor practice by failing to engage in good faith bargaining, the examiner analyzes the totality of circumstances. To constitute an unfair labor practice, the evidence must support the conclusion that a party's total bargaining conduct demonstrates a failure or refusal to bargain in good faith or an intention to frustrate or avoid an agreement. *Snohomish County,* Decision 9834-B.

A party asserting an unfair labor practice complaint bears the burden of proving its case. WAC 391-45-270(1)(a).

Parity Clauses

The first case before the Commission to address parity clauses was *City of Bremerton*, Decision 7739 (PECB, 2002), *aff'd on other grounds*, Decision 7739-A (PECB, 2003). In that case, the examiner concluded that the union failed to establish the clauses at issue either burdened the collective bargaining process or inhibited the employer's performance of its good faith bargaining obligation.

In *Whatcom County*, Decision 8512-A (PECB, 2005), the Commission rejected the union's argument that parity clauses are illegal as a matter of law. In that case, the employer and four other bargaining units had negotiated medical parity clauses and, in bargaining with the union, the employer proposed a cap on the amount it paid toward employee medical insurance premiums. The Commission explained its support of a case-by-case analysis of parity clauses:

> We cannot say that all parity clauses restrict the ability of other parties to agree to an acceptable contract. . . . 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.

In *Western Washington University*, Decision 9309-A (PSRA, 2008), the employer had not bargained parity clauses but had sought uniformity in wage increases across the bargaining units. The Commission addressed the employer's effort at achieving uniformity as follows: "Different bargaining units have different communities of interest, and unions must have the ability to attempt to negotiate independent contracts for their employees, and to not be constrained by a deal that was previously negotiated with a different union." In a footnote, the Commission affirmed analyzing the totality of the circumstances as follows:

> Although this case does not concern the presence of a "parity" clause contained within a different contract that is affecting negotiations regarding an issue in this case, this Commission has previously held that while parity clauses are not per se illegal, this Commission will examine the totality of the circumstances to

> determine whether the presence of a parity clause affects the good faith obligation. *Whatcom County*, Decision 8512-A (PECB, 2005). This principle applies equally to cases where employers desire parity amongst all represented employees.

ANALYSIS

The union argues in its brief that the parity clauses "inhibited the City's full performance of its obligation to bargain in good faith, because these clauses with other bargaining units prevented the City from sincerely and fully negotiating about Association proposals related to base wage increases." To establish the employer committed an unfair labor practice, the union bears the burden of proving the employer violated its good faith bargaining obligation. Under the cases described above, the existence of the parity clauses alone is insufficient to prove bad faith.

The union also argues that the parity clauses limited the union's ability to bargain for a reasonable wage increase. The union's argument is based upon its knowledge that the employer had previously contractually committed itself to give the same wage increase to two other bargaining units if it agreed to a wage increase with the union. As a result, according to bargaining team member Fletcher, the union believed it could not ask for more than the wage increase it agreed to accept. Fletcher testified about the impact of the parity clauses as follows:

> We as a bargaining unit felt that we weren't able to negotiate a wage that we felt was reasonable, because we knew the City only had so much money to spend. And we knew that they were forced by their me-too agreements to spread that -- that amount of money among three different bargaining units, and not just ours which we were bargaining for. We were bargaining for ourselves not for three different bargaining units.

In *Whatcom County*, Decision 8512-A, the Commission stated that the employer's hard stance on the medical benefits cap issue did not, in and of itself, constitute bad faith bargaining:

> 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 [union president] 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 [deputy sheriffs guild], no violation can be found.

In the present case, the union appears to point to the March 22 meeting and Richards' alleged response to Fletcher's questions as "smoking gun" evidence establishing a connection between the parity clauses and the employer's bargaining position. The parties dispute whether Richards said that a wage increase "would trigger the me-too clause." The two union team members who testified heard Richards say those words. Richards testified that he does not recall making that statement. The other employer bargaining team members testified that they did not recall hearing those exact words and one witness testified that Richards may have talked about "the big picture." Testimony from the employer bargaining team members indicated they were uncomfortable during the March 22 meeting and had concerns with Fletcher's questioning. None of the employer's bargaining team members took notes during or after the meeting.

Based on my review of all the evidence, I find that Richards made the comment or a substantially similar comment concerning a wage increase triggering the parity clauses. The parties do not dispute that a bargaining unit wage increase would, in fact, trigger the same wage increase for those bargaining units with parity clauses. My finding that Richards made the comment or a substantially similar comment does not, however, lead to a conclusion that the employer refused to bargain in violation of RCW 41.56.140(4).

The evidence and the totality of circumstances do not establish that the parity clauses adversely impacted bargaining. While the union witnesses testified they were forced to accept a lesser wage increase than the amount they felt entitled to, the union did not present evidence supporting its claim. The record demonstrates that the bargaining unit agreed to a three percent wage increase for 2012. The evidence does not establish what wage increase the union proposed during the course of bargaining. The record contains no evidence relating to comparable data that shows how the compensation of bargaining unit positions compares to like positions in like jurisdictions. Other than the one statement from the outgoing city manager, the union offered no evidence demonstrating how the parity clauses impacted the bargaining.

The union's argument that it would have achieved a higher wage increase absent the parity clauses is speculative. To reach agreement, parties on both sides of a collective bargaining agreement typically make concessions. Unions often accept less in wage increases than what they believe is warranted; employers often agree to higher wage increases than they intended. That bargaining team members believed they should have received higher wage increases is not persuasive evidence that the parity clauses adversely impacted bargaining.

The record demonstrates the parties bargained during difficult economic times. After several years of spending down its financial reserves, the employer took an initially hard stance that it would not spend its limited budget reserves on wage increases. While bargaining, the employer explored other non-wage contract enhancements.

The union argues that parity clauses are the only reason an employer would reject wage increases in favor of other contract enhancements. While I acknowledge that parity clauses or an employer's interest in uniformity among bargaining units may be reasons an employer may reject wage increases in favor of other contract enhancements, parity clauses and uniformity are not the only reasons. Employer witnesses testified without challenge that the police department budget could absorb the proposed increases in uniform allowance and education incentives. They testified that this approach would preserve the employer's limited reserves and avoid requesting approval from the council. Additionally, employers sometimes reject wage increases due to the compounding effect of wage increases over time, as well as the increases in other contract terms that are often tied to base wages such as overtime and premiums.

Ultimately, after the employer's offer of contract enhancements funded through savings in the police department's budget failed to gain traction with the union, the employer changed its position and the parties agreed to a three percent wage increase. The evidence demonstrates that the employer entered negotiations intending to preserve its limited reserves and not agree to wage increases. The employer did not remain entrenched or locked into a fixed position. To reach agreement with the union, the employer moved from its position and agreed to a wage increase.

The facts of this case are distinguishable from those in *Western Washington University*, Decision 9309-A (PSRA, 2008). In *Western Washington University*, the Commission analyzed the totality of circumstances and found that the employer reduced bargaining to an exercise of futility when it was unwilling to alter its initial wage position:

> The employer's insistence on identical wage provisions among all of its bargaining unit employees without giving serious consideration to alternative non-wage related provisions proposed by the different unions, taken with its conduct as a whole, is not demonstrative of good faith bargaining. The employer's goal to obtain identical wage packages, by itself, is not an unfair labor practice. However, it is clear from the Chief Human Resources Officer's testimony that the employer was taking its marching orders from OFM [Office of Financial Management], and was not independently negotiating an agreement with the union.

Contrary to *Western Washington University*, I find the evidence in this case demonstrates bargaining was not an exercise of futility. I find the employer's total bargaining conduct neither demonstrates a refusal to bargain in good faith nor an intention to frustrate the bargaining process.

CONCLUSION

The union did not prove the parity clauses with the two other bargaining units adversely impacted, burdened, or inhibited the bargaining process in this case. After analyzing the evidence and the totality of circumstances, I conclude the union failed to prove the employer violated its good faith bargaining obligation.

FINDINGS OF FACT

1. The City of Kelso (employer) is an employer within the meaning of RCW 41.56.030(12).

2. The Kelso Police Benefit Association (union) is a bargaining representative within the meaning of RCW 41.56.030(2) and represents a bargaining unit of uniformed law enforcement officers through the rank of sergeant.

3. The employer and union were parties to a collective bargaining agreement that expired December 31, 2011, and were negotiating a successor agreement.

4. The employer faced significant economic challenges. The Kelso City Council directed City Manager Dennis Richards not to spend from the reserves which were at $750,000.

5. While negotiating the successor agreement, the union learned that the employer and two of the other bargaining units negotiated parity clauses in their collective bargaining agreements. The agreements with the two other unions included pay freezes accompanied by a guarantee that if other employees received a wage increase during a certain period of time, the bargaining unit employees would receive the same wage increase.

6. During bargaining, the employer rejected the union's proposal to increase wages. Instead, the employer offered to increase education incentives and uniform allowances. Because of its limited financial reserves, the employer sought to fund enhancements to the collective bargaining agreement through savings in the police department budget.

7. Rich Fletcher, one of the union bargaining team members, requested a meeting with the employer to clarify the reason the employer was not willing to offer a wage increase. The meeting occurred on March 22, 2012, and, except for the attorneys representing the parties, included the bargaining team members for both the employer and union. Fletcher's type-written notes prepared immediately after the meeting indicate, in part, as follows:

> I asked CM [city manager] if the me-too clauses were inhibiting the City's interest in offering a base salary increase. CM, Chief, and Darr all denied that allegation and claimed the City has no money and any money paid to KPA [union] will come from directly out of the KPD budget.
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> All parties agreed there was somewhere between $15,000-25,000 available which had been offered by the City in various forms of payment including: annual uniform allowance increase, uniform allowance stipend, or increased educational incentive, however no salary increase was ever

> entertained when it was proposed by KPA. I asked CM why that amount of money couldn't be applied to our base wage instead of the areas where the City proposed to pay it out. CM replied, "That would trigger the me-too clause."

8. Richards made the comment or a substantially similar comment, concerning a wage increase triggering the parity clauses.

9. Ultimately, after the employer's offer of contract enhancements funded through savings in the police department's budget failed to gain traction with the union, the employer changed its position, and the parties agreed to a three percent wage increase.

10. The employer extended the same three percent wage increase to the bargaining units with parity clauses and the unrepresented employees. Although the collective bargaining agreement for the bargaining unit with the three records specialists did not have a parity clause, the employer also agreed to a memorandum of understanding giving the records specialists the same three percent wage increase.

11. The union failed to present evidence proving that the union was forced to accept a lesser wage increase because of the parity clauses.

12. The union did not prove the parity clauses with the two other bargaining units adversely impacted, burdened, or inhibited the bargaining process.

13. The totality of circumstances and the evidence in this case indicate the union failed to prove the employer violated its good faith bargaining obligation.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW and Chapter 391-45 WAC.

2. By its actions described in the above findings of fact, the employer did not refuse to bargain and did not violate RCW 41.56.140(4).

ORDER

The union's complaint charging an unfair labor practice filed in the above-captioned matter is dismissed.

ISSUED at Olympia, Washington, this 26th day of February, 2013.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Jamie Siegel

JAMIE L. SIEGEL, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	24981-U-12-06388	FILED:	07/16/2012	FILED BY:	PARTY 2
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BAR UNIT:	LAW ENFORCE				
DETAILS:	-				
COMMENTS:					

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