

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-64-01

UNFAIR LABOR PRACTICE COMPLAINT

PORTLAND POLICE ASSOCIATION,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
CITY OF PORTLAND,)	AND ORDER
)	
Respondent.)	
_____)	

The Board heard oral argument on May 5, 2003, on objections filed by Complainant and Respondent to a recommended decision issued by Administrative Law Judge (ALJ) B. Carlton Grew on March 14, 2003, following a hearing on September 30 and October 1, 2002, in Portland, Oregon. The hearing closed on December 24, 2002, upon receipt of the parties' post-hearing briefs

MacDaniel E. Reynolds, Attorney at Law, Aitchison & Vick, 3021 N.E. Broadway, Portland, Oregon 97232-1810, represented Complainant at hearing; and David A. Snyder, Attorney at Law, 522 S.W. Fifth, Suite 1275, Portland, Oregon 97204, represented Complainant at oral argument.

Stephanie M. Harper, Deputy City Attorney, City Attorney's Office, City of Portland, 1221 S.W. Fourth Avenue, Suite 430, Portland, Oregon 97204-1991, represented Respondent.

The City of Portland (City) reached a collective bargaining agreement with the District Council of Trade Unions (DCTU) in November 2001. As part of that collective

bargaining agreement, the City and DCTU agreed that if the City consented to different terms for health care benefits with another City union, the DCTU could choose to substitute that package for the one in its collective bargaining agreement. On December 19, 2001, before entering into bargaining with the City, the Portland Police Association (Association) filed this unfair labor practice complaint. It alleged that the City, by ratifying the City-DCTU agreement, unlawfully impaired the Association's bargaining rights, in violation of ORS 243.672(1)(e).

The case was transferred to ALJ B. Carlton Grew from ALJ Vickie Stilley-Cowan on September 6, 2002. The City filed an amended answer on September 10, 2002, admitting and denying certain allegations and seeking reimbursement of its representation costs and filing fee.

The issue is: Did the City violate ORS 243.672(1)(e) and unlawfully impair the bargaining rights of the Association by entering into a collective bargaining agreement with DCTU, which provides that if the Association or another union negotiates a better benefits package, DCTU will have the right to choose the new benefits package?

The ALJ concluded that the City did not violate subsection (1)(e) by its agreement to the parity clause in the DCTU contract. The ALJ concluded that parity clauses are not *per se* unlawful, and based upon the totality of the circumstances, this particular clause does not violate the Public Employees Collective Bargaining Act (PECBA). We agree with the conclusions of the ALJ.

Having the full record before it, this Board makes the following:

RULINGS

SECOND UNFAIR LABOR PRACTICE (ULP)

Shortly before the date of hearing, the Association requested a ruling as to whether a separate ULP should be filed regarding the City's decision to enter into a second parity agreement while this ULP is pending.¹ The primary issue in this case is whether entering into a parity agreement with DCTU (which could tie DCTU's health benefit structure to the Association's) violates the City's duty to bargain with the Association. The

¹The second agreement is allegedly with the Portland Fire Fighters Association (PFFA). See *Portland Police Association v. City of Portland, Portland Police Bureau*, Case No. UP-1-03, filed January 7, 2003.

ALJ concluded that it was likely that the issue would be resolved on legal grounds, but that it was possible that some facts might be determinative. Given those circumstances, the ALJ directed the Association to file a second ULP, to be held in abeyance until this ULP is resolved. Based on that decision, the ALJ excluded evidence of the City-PFFA agreement from the hearing. The ALJ acted properly within his discretion in making these rulings.

MOTION TO STRIKE: ALJ'S AUTHORITY

The City moved to strike paragraphs 11 and 12 from the amended complaint on the grounds that they were "speculative, conclusory, argumentative, fail to state relevant facts with specificity, and in some places, fail to state relevant facts at all." The City also argued that paragraph 12 of the complaint sought to "expand the complaint beyond the scope of the original complaint."

The Association argued, as a threshold matter, that this Board is without authority to grant a motion to strike because this Board's rules specifically refer only to motions to make definite and certain. The Association is incorrect. This Board's authority to rule on a motion to strike, and other pre-hearing motions, is implied in ORS 243.676 and several Employment Relations Board (ERB) rules. See ORS 243.676(1)(b) (ERB shall investigate the complaint to determine " * * * if a hearing on the unfair labor practice charge is warranted" and may " * * * dismiss the complaint" if it finds that no issue of fact or law exists); OAR 115-35-020 (to the same effect); OAR 115-35-007 (ALJ may require party to make complaint more definite and certain); OAR 115-35-010 (ALJ may dismiss complaint if party fails to amend complaint to rectify incomplete allegations); OAR 115-35-045 (setting out standards for "motions"). In *Salem-Keizer Association of Classified Employees v. Salem-Keizer School District 24J*, Case No. UP-83-99, 19 PECBR 349, 350-351 (2001), we determined that, although OAR 115-35-007 refers only to making complaints more definite and certain, an ALJ has the authority to rule on "motions" under OAR 115-10-045. The ALJ acted within his authority in considering the motion.

The Association also argued that relevance determinations can be made only at the hearing. This position would require the parties to obtain evidence and witnesses to address irrelevant issues, only to learn at hearing that this preparation and inconvenience to witnesses was not required. The ALJ properly ruled that he has the authority to strike pleadings and portions of pleadings prior to hearing, on legal grounds which include relevance.

Paragraph 11, as amended, asserts in part:

“The PPA has distinct collective bargaining interests from that of the DCTU. In particular, if health insurance reductions remotely approximately [*sic*] those in the DCTU agreement are implemented for PPA members, the City of Portland will be unable to recruit and retain the most qualified police officers.
* * *” Amended Complaint at 3.

The paragraph goes on to explain how, in the Association’s view, the parity agreement might affect police officer recruitment and retention. As pled, the issue of police officer recruitment and retention, though perhaps relevant to a binding interest arbitration under ORS 243.742, has no relevance to this claim for a refusal to bargain under ORS 243.672(1)(e). This allegation was contained in the original complaint, and the ALJ directed the Association to make the allegation more definite and certain. The paragraph was amended to its present form in response to that direction. The ALJ properly granted the motion to strike paragraph 11.²

Paragraph 12 alleges that the City has honored, and intends to continue to honor, the terms of the parity agreement with DCTU. It alleges that the agreement has the effect of requiring the Association to bargain on behalf of the DCTU, as well as its own members. The paragraph also appears to make new allegations that the City will include the effect of the parity agreement in its computation of the cost of any additional benefits granted to Association members, and use that cost, in part, in making decisions about reaching agreement with the Association. Those allegations are relevant to the legal issues raised by the amended complaint. They are sufficiently specific to permit the City to answer.

The City argues that the new allegations “* * * expand the complaint beyond the scope of the original complaint.” (Motion to strike at 1.) The new allegations may suggest a slightly different legal theory (namely, that even if a parity agreement was not *per se* unlawful, it could be unlawful under the facts of this case). However, the basis of the complaint remains the same (the City’s parity agreement with DCTU violates the City’s

²At hearing, the Association sought to introduce evidence that the recruitment and retention of quality police officers was a bargaining priority of the Association, in part, because the Association believes that the quality of officers has an affect on the quality of backup available to officers in the field. The Association argued that the Association and the DCTU had different bargaining priorities, and this inappropriately affected the contents of the parity clause to the Association’s detriment. The City objected to this evidence. The ALJ properly admitted this evidence for the limited purpose of identifying the Association’s bargaining priorities.

duty to bargain with the Association). The ALJ correctly denied the motion to strike Paragraph 12.

MOTION IN LIMINE

The City moved to limit the Association's evidence "to facts occurring prior to the date the complaint was filed." (Motion in limine, emphasis omitted.) The Association again argued that the ALJ and this Board lack authority to rule on such motions. The ALJ properly rejected that argument under the same analysis stated above. The ALJ also concluded that, on the record before him, there was no reason why the date of filing of the original complaint in this case should be used to exclude otherwise admissible evidence. He also ruled that the date of filing would not determine the relevance or materiality of potential evidence. The ALJ properly denied the motion in limine.

MOTION TO EXCLUDE TESTIMONY REGARDING THE UTILIZATION OF HEALTH BENEFITS BY THE ASSOCIATION AND DCTU BARGAINING UNIT MEMBERS

Prior to hearing, the ALJ granted the City's motion to exclude testimony regarding the rate of health benefit utilization by the Association bargaining unit members and other City units. At hearing, the Association moved for reconsideration of that order. The City objected. The ALJ granted the Association's motion.

This is a case of first impression. The Association used the evidence at issue to support its argument that the Association unit had more options to reduce health benefit costs than did the DCTU unit. Therefore, it argued, unlike the DCTU unit, the Association unit could meet the City's health benefit cost reduction goals without cutting benefits. The Association also used this evidence to support its argument that the members of the DCTU and Association had different bargaining priorities. The Association argued that these facts illustrated the harmful effect of the parity clause. The ALJ acted properly within his discretion in receiving this evidence.

OTHER EVIDENCE

The City offered evidence, over the objection of the Association, of its underlying philosophy and goals regarding the structure of health benefits for City employees. The City argued that these goals, which included keeping the vast majority of all City employees in the same insurance pool, were relevant to evaluating the basis of the City-DCTU parity clause agreement and the source of the City's positions in bargaining

health care with the Association. The ALJ properly overruled the objection and received this evidence.

Near the close of the hearing, the City offered an exhibit containing copies of letters between City and Association bargaining representatives. The letters concerned requests for information related to the bargaining about health benefits. Noting that the issue had been amply covered in testimony, the ALJ acted within his discretion in excluding the exhibit as cumulative.

The Association offered an exhibit, not on its exhibit list, regarding the qualifications of its expert witness, William Aitchison. The City objected. Noting that the exhibit would obviate the need for lengthy testimony, the ALJ acted properly within his discretion in receiving the exhibit into evidence. *Cf. Lincoln County Education Association v. Lincoln County School District*, Case No. UP-53-00, 19 PECBR 656, 657-658, *adhered to on reconsideration* 19 PECBR 895 (2002).

The remaining rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

BACKGROUND

1. The Association, a labor organization, is the exclusive representative of a bargaining unit of 1,000 police officers, sergeants, detectives and criminalists employed by the City, a public employer.³
2. The Association and City's last collective bargaining agreement was effective July 1, 1999, and expired June 30, 2002.
3. DCTU, the largest City union, includes 1,900 employees represented by a coalition of seven labor organizations. The job classifications are diverse, and include accountants, plumbers, horticulturalists, and welders.
4. Several labor organizations represent City employees, including: (1) the Association; (2) the DCTU; (3) City of Portland Planning and Engineering Employees

³The parties transcribed the tapes of the hearing and divided the transcript into two volumes, Roman Numeral I and II. We rename those volumes A and B, respectively, to aid the reader.

Association (COPPEA) (600 members); (4) PFFA (600 members); (5) Recreation (100 members); 911 operators (100 members); Portland Police Commanding Officers Association (PPCOA) (50 members); and seasonal maintenance workers. The City also has approximately 1,000 full-time unrepresented employees. The City's health benefit plan serves approximately 4,500 active employees, 50 former employees under COBRA, and 900 retirees.

HISTORY OF CITY HEALTH BENEFIT PLANS

5. For at least 25 years, the City has emphasized one health benefits plan⁴ for *all* City employees.

6. Since the 1980's, the City has addressed health benefits issues, in part, through a Labor Management Benefits Committee (LMBC). The LMBC is made up of 14 City employees, representing a cross-section of the City's work force. Each City union, including the Association, is represented on the LMBC, and each unit's collective bargaining agreements have had a provision describing the LMBC's role. Seven of the 14 members are appointed by the City. The LMBC makes recommendations to the City council regarding benefits packages and the use of City health fund reserves.

7. In 1994, rising health care costs led to voluntary joint bargaining on that subject between the City and all of its labor organizations. The bargaining resulted in a citywide agreement. The City applied the terms of the 1994 agreement to its unrepresented employees. Between 1994 and 2002, the City negotiated separately with each union, but made no significant changes to the health benefits plan.

8. In 1994, the City also provided an option, called "Beneflex," to unrepresented employees, and unions that chose to agree to it, including the PPCOA and COPPEA.⁵ The Beneflex plan allowed employees to choose one of the City plans or to opt out of coverage and receive a cash payment, an option exercised by employees who had health insurance coverage from other sources. Although approximately one-third of City

⁴We use the term "health benefits plan" in the general sense. The City provides the same package of health care options to all employees, an HMO and a two-tiered, self-insured plan. Some employees had an option to opt out of coverage in exchange for cash through the City's "Beneflex" plan, explained below.

⁵The Beneflex option was developed in 1979 or 1980.

employees had access to this option, only approximately 250 employees opted out in any given year.

9. For several years, the City has used a reserve health fund to supplement its payments for health benefits. City collective bargaining agreements provide that (1) the health fund will maintain adequate funds for its obligations; and, (2) reserve funds are pooled, that is, will not be spent for individual employees or groups of employees. City employees have not been required to make contributions to their health care benefit costs, in part, because of the supplemental payments from the fund.

10. In 1999, the City tried to address problems caused by rising health care costs through the LMBC. That process fell apart because of DCTU's mistrust of City's goals and employee fears that health care would suffer from the proposed "gatekeeper" model.

11. In late 2000, the City estimated that the health fund would be exhausted by July 1, 2003, unless changes were made to the cost of the City's health benefits package. Once the fund was depleted, either the City or its employees, or both, would have to make substantial monetary contributions to retain their historic level of health benefits. The Association agreed that, in general, increased costs required changes to the City health benefit structure.

12. In response to this estimate, the City council sought to extend the life of the health fund by (1) increasing the City's contribution to health care premiums, (2) redesigning health plans to reduce their cost, and (3) seeking employee contributions to health care costs. By doing so, the City council hoped to extend the life of the fund to 2006.

CITY-DCTU NEGOTIATIONS

13. In February 2001, the City began bargaining the DCTU successor contract. This was the City's first negotiation with a union after the City council decision described above.

14. The DCTU's priorities in bargaining differed from those of the Association. For example, the DCTU assigned a high priority to the issue of the City's contracting out the work of DCTU employees. The Association was more concerned that unit employee compensation, including health benefits, remain attractive to prospective employees, so that the best quality personnel were available to provide back up to officers

and to protect the public. However, both unions gave health benefits a high priority, and both began bargaining with a demand that the current level of benefits be maintained, with no caps on the City's contribution. DCTU had a large, noisy demonstration about maintaining benefits. The demonstrators circled City hall before bargaining began.

15. The negotiations between the City and DCTU were acrimonious. The negotiators reached a tentative agreement in August 2001. That agreement included health benefit cost reduction measures, as well as a provision to reopen the contract in the event the City reached a more favorable agreement regarding health care benefits with another City union. On September 14, 2001, the DCTU membership rejected the tentative agreement.

16. Because the City and Association were to begin negotiations after the DCTU, Will Aitchison (counsel for the Association) and other Association officials sought to keep apprised of developments in the City-DCTU bargaining.

17. After conversations with DCTU officials, Aitchison concluded that the DCTU's leadership did not have an understanding of the "true nature" of health insurance problems, or possible solutions to those problems, and would not take a fully knowledgeable approach to health insurance issues in negotiations. Nor did the DCTU "understand the numbers, the nature of the problems, nor how to negotiate with the City on the topic of health insurance." DCTU had a professional health insurance benefits consultant who did not attend negotiations. The City had consultants prior to the DCTU negotiations. The Association hired the first of its three consultants in July 2001. Aitchison believes that DCTU's failure to have a health benefits consultant at the bargaining table was a major disadvantage in DCTU's bargaining with the City.

18. Aitchison also concluded that despite the acrimony between the City and the DCTU, the DCTU did not have sufficient support in its bargaining unit to support a successful strike in the face of the extensive contingency planning the City had undertaken. Some DCTU members had publicly stated their intention to cross picket lines in the event of a strike. The City had engaged in extensive strike preparation and was prepared to hire outside contractors to carry on City work. Aitchison believed that DCTU's lack of expertise in health insurance and weak bargaining position would lead DCTU to adopt unfavorable terms for health insurance.

19. In early October 2001, DCTU leaders asked to meet with the leadership of the Association and PFFA. The parties met approximately two weeks before the announced DCTU strike date. DCTU's representatives informed the other unions that

the health care negotiations with the City were difficult and asked if they would be willing to participate in a collaborative approach to bargaining health benefits with the City.

20. The Association leaders then met with bargaining unit members and their legal advisor. Based on that discussion, Association President Robert King telephoned City Labor Relations Manager David Shaff seven to ten days before the DCTU strike date. King told Shaff that the DCTU would propose joint bargaining on health care, and that the Association was open to the possibility of discussing or negotiating health care with DCTU and other City bargaining units. Shaff did not take a position on the joint bargaining proposal during the conversation, nor was the Association contacted by the City after that conversation. The PFFA president communicated a similar message to Shaff.

21. After the September 14, 2001, rejection of their first tentative agreement, the City and DCTU engaged in mediation on September 25, October 10, 17, 19, and 21. Midnight on October 21 was DCTU's strike deadline. The mayor participated in the final bargaining session, something a mayor had not done in at least 24 years.

22. Between 6:30 and 7 a.m., on October 22, the City and DCTU resolved all outstanding issues, including health care benefits. DCTU representatives stated that unit members began a strike at 6 a.m., but returned to work shortly thereafter. The tentative agreement was later adopted by the DCTU membership and was ratified by the City council on November 21, 2002.

CITY-DCTU AGREEMENT

23. The City-DCTU health care agreement includes the following terms:

(a) **Prong 1 (caps):** The City's increased contribution to health care costs is tied to the medical index of the Portland CPI-W and capped at 4.5 percent (year one), 10.5 percent (year two), and 10 percent (year three).

(b) **Prong 2 (joint bargaining):** "Notwithstanding Article 16.3.2 and 16.3.2.1 above, the City and the DCTU agree that a city-wide approach and solution to health benefits is preferred. Therefore, the parties agree to engage in a joint collective bargaining process on the subject of health benefits with the DCTU and all other collective bargaining units in the City which agree to joint bargaining. The goal of the joint bargaining process is to achieve total savings of as much as 25% on the self-insured core plan to be effective July 1, 2002. The bargaining will commence as soon as possible after the ratification of this agreement is completed. If no settlement is reached by February 1,

2002, the City contribution rates in Article 16.3.2, the plan design changes in Article 16.3.2.1 [reducing cost projections by at least 19 percent and implementing new insured plans (Kaiser and Dental) which reduce those cost projections by at least 9.1 percent] and the employee contribution rates in 16.3.5 will be implemented.”

(c) **Prong 3 (employee co-payments):** After July 1, 2003, employees must begin monthly premium co-payments to the health care fund. The amount of those payments will depend on the results of the joint bargaining, but would be between \$15 and \$33 per month for family coverage.

(d) Individual employees may choose to receive cash instead of benefits if they receive health insurance from another source.

24. The DCTU agreement also added several new health care costs to employees, including (1) deductibles of \$150 individual/\$450 family, and (2) an increase in maximum out-of-pocket costs from \$600 individual/\$1,700 family to \$1,800 individual/\$5,400 family.

25. The City-DCTU health care agreement also includes a “parity clause,”⁶ which was proposed by the DCTU:

“If the City of Portland agrees to a different health care package in its current negotiations with COPPEA or Recreation, or with [the Association] or PFFA in its upcoming negotiations, the DCTU may elect to choose one of those packages and have the entire package applied in lieu of the health care package that is reflected in Article 16 or that results from the joint bargaining provided for in Article 16.3.2.2. This provision shall not apply in the event either the PPA or PFFA bargaining unit wins an interest arbitration which includes health benefits changes which are different than those reflected in this agreement.^[7] In addition, the City agrees that if it implements a different health

⁶A typical parity clause, or “me too” clause, is a provision in a collective bargaining agreement between A and B that provides that if C obtains a different benefit under an agreement with A, the benefit will be automatically provided to B.

⁷The interest arbitration exception was sought by the City because of its lack of control over the outcome of that arbitration.

care package for non-represented employees, the DCTU may elect to accept that package in its entirety. In any event, the DCTU may elect only one of the five health care packages (non-represented, [Association], PFFA, COPPEA or Recreation) and must accept it in its entirety.”

26. For tax reasons, any option selected under Article 38 would have to be made by February 1, 2002, or February 1, 2003, to become effective July 1 of the year of the selection.

27. Shaff was certain that despite the City’s long history to the contrary, DCTU negotiators “were absolutely convinced that they were going to step up to the plate, agree to some very tough provisions, you know, employee premium share, reduction in benefits, and that we would turn around and do something different for the other bargaining units.” Shaff believed that there was “no way we were going to get an agreement” without Article 38.

28. Pursuant to the terms of the DCTU contract, the City, DCTU, PFFA, COPPEA, Recreation, and the 911 Operators participated in joint bargaining regarding health care in January 2002. The Association refused to join this bargaining because the bargaining was premised on reducing health benefits to its members. Through this process, the City and DCTU reached an additional agreement reducing benefit costs by 25 percent.

CITY-ASSOCIATION BARGAINING

29. In bargaining for prior contracts, the City-Association bargaining relationship included creative solutions to seemingly contradictory interests. For example, in bargaining the 1999-2002 agreement, the Association sought additional compensation in the form of longevity pay, while the City sought to reduce compensation by reducing overtime and pay for “time not worked.” The final agreement met both goals, but only after the City analyzed whether it was willing to agree to, or fight, similar terms in negotiating with other unions. In fact, the City would not have agreed to this term were it extended to all members of the DCTU without an opportunity to bargain for a corresponding reduction in other compensation. Aitchison could not recall an occasion where an extraordinary benefit such as this one had been extended to other bargaining units.

30. The Association began bargaining with the City for a new contract on February 1, 2002. In the first bargaining session, the City’s representatives stated that they considered the City to be bound by Article 38 of the City-DCTU contract. The City

proposals regarding health care included the results of the DCTU bargaining and the January 2002 joint bargaining.

31. The City uses a comprehensive and careful budgeting system (total compensation approach) in connection with collective bargaining. The City considers its obligations under the City-DCTU agreement in determining the cost of adopting Association proposals regarding health care for its unit members.

32. Both the City and the Association consider health benefits to be a very important subject in bargaining. The parties had substantive negotiations regarding health benefits in July 2002. On July 15, the parties and their health benefits consultants met for a full day. The parties have also exchanged several requests for information regarding health benefits.

33. The Association proposed that the City (1) simply maintain the prior benefits, or (2) provide the Association's members with their proportionate share of the health fund and City contributions (set through the January joint bargaining), and let the Association unit select its own benefits package in the market.

34. The demographics of the Association bargaining unit are such that it is possible, if not likely, that a health benefit plan for the Association unit would have a lower cost per member than the same benefit plan for DCTU unit members or City employees as a whole. Therefore, Association leaders believe that the Association could select its own plan (using its proportionate share of the joint bargaining health benefit funding level) and still retain the same level of benefits.⁸

35. The City is concerned that these Association proposals will cause the City to lose control of the health plan design, which is an important tool to control costs. The City took the position that it would not agree to retention of the same level of benefits and would not agree to let the Association leave the City health insurance pool. The City fears that if the pool is fragmented, an employee in a small unit, such as the 50-member PPCOA, could suffer a terrible illness and cause its insurance rates to skyrocket. The City follows the "standard insurance methodology" that larger groups spread the risk. Multiple employee benefit groups would also impose greater administrative costs. The City would

⁸Although the demographics of the Association unit mean that its costs are lower than the City average, its health benefit costs are rising as well and will eventually exceed its proportionate share of City and fund contributions.

take these positions even if Article 38 did not exist and would not agree to a health benefits plan that did not meet its benefits philosophy of a citywide health benefits pool.

36. After receiving the Association proposals, the City began researching "point-of-service" plans suggested by the Association and sought additional information from the Association about its desire to seek its own benefits plan. The City also reviewed information about a health trust concept suggested by the Association.

37. As of the date of hearing, the parties had met for bargaining fourteen times. They had reached tentative agreement on twenty topics, and bargaining was ongoing.

38. As of the date of hearing, the City had not committed itself to any change in the approach to citywide health care benefits memorialized in the City-DCTU agreement and the January 2002 joint bargaining agreement. The Association has not made any concessions regarding health benefits. Other major issues have also gone unresolved.

39. Association Attorney Aitchison testified as an expert in this proceeding. He believes that clauses such as Article 38 chill the good faith bargaining of unions in the position of the Association. He also believes that Article 38 has affected the current bargaining between the Association and City. For example:

- (a) If the second union seeks different benefits than the first union, the second union must, in effect, bargain for the membership of both unions. In this case, to increase health care benefits, the Association must, in effect, bargain for 2,850 employees, rather than its own 1,000.
- (b) When the second union negotiates for the first, the lines between communities of interest of the separate unions are blurred. Here, the DCTU and Association had different priorities in bargaining, but the Association is wedded to DCTU's decisions regarding health benefits based on DCTU's priorities.
- (c) If the first union is relatively large, and the second union relatively small, the employer's potentially increased costs and lack of flexibility in bargaining with the second union are markedly increased. Here, an agreement that Association unit members will pay no insurance costs would cost a substantial amount to extend to the DCTU unit and make such an agreement much more difficult to reach. Aitchison estimated that a one percent increase in health benefits spending

would cost \$83,000 for the Association unit alone, but \$250,000 if DCTU were granted the same increase as well.

- (d) The second union cannot make concessions in other areas in exchange for greater benefits under the subject of the clause because greater benefits increase the costs to the employer anyway. In addition, even under the same financial constraints, the interests of one union may favor a higher deductible, while another would choose a different stop benefits level.⁹ In this case, the City is reluctant to even discuss alternative health benefit plans.
- (e) It is very difficult for a union to prove specific damages resulting from such a clause, because the union must seek to prove a negative, e.g., what failed to happen in negotiations because of the presence of the clause. In addition, the evidence regarding the effect of the clause is basically under the control of the employer.
- (f) Article 38 has an especially "pernicious" effect because of its exemption for agreements resulting from interest arbitration. The likelihood of impasse, and expensive interest arbitration, is increased. These parties have engaged in interest arbitration only once, nearly 20 years ago. Interest arbitration in this context is likely to cost the Association \$100,000.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The City's agreement to the parity clause in the DCTU collective bargaining agreement did not violate ORS 243 672(1)(e).

⁹We note that the parity clause at issue here gives the DCTU the *option* of selecting the Association health benefit plan. If the interests of the two units were so dissimilar that the ideal health plans for each unit were significantly different, it would be less likely that the DCTU would adopt the Association plan.

DISCUSSION

An employer may violate ORS 243.672(1)(e) by (1) conduct “so inimical to the bargaining process that it amounts to a *per se* violation of the duty to bargain in good faith,” or (2) “by the totality of conduct during the period of negotiations that indicates an unwillingness to reach a negotiated agreement.” *Public Works Association Local 626 v. Lane County*, Case No. UP-1-98, 17 PECBR 879, 885, emphasis in original; quoting *Amalgamated Transit Union, Division [ATU] 757 v. Rogue Valley Transportation District*, Case No. UP-80-95, 16 PECBR 559, 583 (Chairman Ellis dissenting), *adhered to on reconsideration* 16 PECBR 707 (1996).

The Association argues that this Board should declare that “parity clauses” are *per se* illegal, as “utterly inimicable [*sic*] to the duty to collectively bargain in good faith” and contrary to public policy. In the alternative, the Association argues that parity clauses should be voidable upon a showing of minimal harm, or that this clause should be voided because its negative impact on bargaining exceeds its beneficial effect.¹⁰ The City argues that this Board should use its totality of conduct standard to evaluate the City’s conduct in bargaining, and that the City’s conduct has met that standard.

PER SE AGREEMENTS

On a few occasions, this Board has determined that certain conduct is “* * * so inimical to the bargaining process * * *” that we have concluded that it constituted a *per se* violation of the duty to bargain in good faith. (*Rogue Valley Transportation District*, 16 PECBR at 583.) That conduct has included (1) an employer’s unilateral implementation of a change in a mandatory subject of bargaining; (2) submitting a new proposal at the mediation stage; and, (3) submitting a new proposal in a final offer. *City of Portland v. Portland Police Commanding Officers Association*, Case Nos. UP-19/26-90, 12 PECBR 424, 464-466, *reconsidered* 12 PECBR 646 (1990); and *Rogue Valley Transportation District*, 16 PECBR at 583-588.

Citing a variety of cases from other jurisdictions, the Association argues that an employer’s agreement to a parity clause, or “me too” agreement, should be added to this list. Cases holding that parity clauses are *per se* unlawful base their holdings, in part, upon the notion that a parity clause requires the second union to negotiate for the first. In the words of the New Jersey Public Employment Relations Commission,

¹⁰DCTU did not intervene in these proceedings; nor was there a motion to join DCTU as a party.

“* * * [t]he parity clause has a natural and unavoidable coercive effect. When considering economic proposals of one employee organization, the public employer must inevitably reconcile such a proposal with the ultimate result of providing similar economic proposals to any other employee organization which has the protection of a parity clause in its collective negotiations agreement. This result interferes with the right to negotiate in good faith. The issue is not whether or not a public employer actually relies upon a parity clause to deny an employee organization’s economic proposals. The mere existence of the clause is sufficient to chill t-he free exchange between a public employer and an employee organization by permitting a third employee organization, not a party to the negotiations, to have impact on those negotiations. * * *” *City of Plainfield*, PERC No. 78-87, at 7-9 (NJ PERC 1978).

See also: Lewiston Firefighters Association Local 785, International Association of Firefighters, AFL-CIO v. City of Lewiston, 354 A2d 154, 161-162 (Me 1976); *Local 1219, International Association of Fire Fighters v. Connecticut Labor Relations Board*, 171 Conn 342, 351, 370 A2d 952 (1976); *Medford School Committee and Medford Teachers Assoc.*, 3 MCL 1413, MUP-2349 (1977).

This Board’s approach to good faith bargaining cases is based on the actual conduct of the parties. We reject the notion that the mere existence of a parity clause entered into with one union chills the process of bargaining between the employer and another union. “Parity” clauses come in different shapes and colors. A parity agreement with the first union might cover a matter of no moment to the employer or second union, or the employer might simply accept the second union’s first offer on the issue. The first union may be so much smaller than the second that the affect of the clause may be insignificant. Thus, the existence of a parity clause need not affect bargaining at all, much less to the extent we have previously held as per se unlawful. We will not hold that parity clauses are *per se* illegal because *some* clauses of that type *may* affect a party’s approach to bargaining.

THE TOTALITY OF THE CITY'S CONDUCT¹¹

We turn to the question of whether the City's conduct in this case represents a violation of its duty to bargain in good faith. The purpose of the "totality of conduct" standard is "to determine whether the party engaged in behavior intended to frustrate an agreement." (*Lane County*, 17 PECBR at 885.) This Board has identified a variety of conduct as significant, including dilatory tactics, unduly harsh or unreasonable proposals, behavior of the spokesperson, efforts to settle negotiation differences, failure to explain or reveal bargaining positions, and the course of the negotiations (*Lane County*, 17 PECBR at 885, citing *Hood River Education Association v. Hood River School District*, Case No. UP-47-94, 15 PECBR 603, 613-614 (1995); and *Lane Unified Bargaining Council v. McKenzie School District*, Case No. UP-14-85, 8 PECBR 8160, 8196-8202 (1985).)

We note that the parity clause at issue in this case is not a classic parity clause because it does not require that the Association health care package be extended to DCTU. Instead, a City-Association agreement may include a unique health benefits package obtained through interest arbitration, or it may include a package that the DCTU does not choose. We also note that the clause was sought by DCTU after a contentious bargaining process that included the DCTU membership's rejection of the previous tentative agreement, which included a reopener clause instead of a parity clause. Finally, nothing in Article 38 binds the City to refuse to bargain, or to refuse to bargain in good faith, with the Association.

In bargaining, the City has not refused to discuss alternative proposals with the Association. It has not engaged in dilatory tactics. There is no evidence of inappropriate behavior of the spokesperson, lack of effort to resolve differences, or a failure to explain or reveal bargaining positions. The proposals at issue are not unduly harsh or unreasonable proposals. Article 38 is consistent with the City's longstanding practice of maintaining one primary health benefit plan for a pool comprised of all of its employees. Retaining control over all health benefits, and preventing fragmentation of its health insurance pool resulting from the withdrawal of units comprised of younger or healthier workers, are reasonable bargaining goals.

The Association argues that the terms of the clause, the relative size of the Association and DCTU, and the City's adherence to the terms of the DCTU and group

¹¹We see no need to create a unique test to determine whether a party has complied with its duty to bargain in good faith regarding a parity clause. Proving that a parity clause has violated a party's duty to bargain in good faith is no different than proving that a party has violated its duty to bargain for other reasons. We use the same test as in any other bad faith bargaining case.

bargaining plan structure demonstrate that Article 38 has caused the City to fail to bargain in good faith. We disagree.

In *Lane County*, 17 PECBR at 879, the employer presented two wage packages to the union. One package was the same as one reached with another union. The second package would retain the union's previous salary structure with no wage increases. The employer held its position despite the union's rejection of both proposals. There were no other indicia of bad faith bargaining. This Board dismissed the union's complaint that the employer had violated ORS 243.672(1)(e), stating that, although the proposals were unappealing to the union, the employer's conduct was lawful. (*Lane County*, 17 PECBR at 888-889 and n. 7.) This Board also noted:

"The County's bargaining position in this case is the mirror-image of the not uncommon position of a labor organization that seeks 'me too' treatment with respect to economic terms agreed to by an employer and another labor organization. Absent other facts showing a lack of good faith, such a proposal generally is lawful." 17 PECBR at 889, n. 8.

In *AFSCME v. State of Oregon*, Case No. C-268-79, 5 PECBR 2967, 2972 (1980), the employer ultimately made a wage proposal which was identical to that reached with another union by that employer. This Board concluded that the employer had not violated its duty to bargain in good faith, because the employer had not announced an unwillingness to bargain, and there was no evidence that the employer's mind was closed to argument.

The Association argues that the City's adherence to the terms of Article 38 requires, as a practical matter, that the 1,000-member Association bargain on behalf of the 1,900-member DCTU. It also argues that Article 38 has deprived the City of the required flexibility in bargaining necessary to reach agreement. Given the City's longstanding, legitimate practice of maintaining a single plan for the vast majority of its employees, and its continued commitment to that goal, this record does not support a conclusion that the City's position in bargaining would change even absent Article 38. Moreover, as the City notes, a parity clause is similar to other external factors that may affect bargaining. The City cites a California Supreme Court decision as follows:

"* * * Parity agreements no more restrict the [employer]'s bargaining position than do the confines of a limited budget which exist absent such agreement. Each employee bargaining unit necessarily has an impact on the negotiations of every other unit, regardless of the order in which contracts are negotiated or

whether the [employer] enters into parity agreements.” *Banning Teachers Assn. v. PERB*, 44 Cal 3d 799, 750 P2d 313, 128 LRRM 3009, 3013 (Ca Sup Ct 1988).

Addressing the lower court’s distinction between economic facts beyond the control of the employer, and parity agreements, the court stated,

“* * * The distinction is artificial. The effect of the two situations is equiparant: An employer brings to the bargaining table all of its budgetary concerns, one of which is salary increases to be paid to other bargaining units.

“* * * A parity agreement, which is a contractual budgetary restriction, is no more a disincentive to bargain than is a finite budget absent such agreement. It merely memorializes what is already a fiscal ‘fact of life.’” 128 LRRM at 3013.

There is no evidence that this parity clause bars the Association from trading concessions on health benefits for other economic benefits, such as a salary increase. The Association may or may not be correct that its members, because of the demographics of the unit, could buy better health benefits with the unit’s pro-rata share of money set by the DCTU and group bargaining health agreement. If so, this would theoretically leave more money in the City’s coffers for other purposes, such as wage increases for the Association unit.¹² But the City could decide not to use those funds for that purpose. The City could also decide that any cost savings to the City resulting from a different Association plan would not be worth the burdens of multiple plans, increased costs of benefits to other bargaining unit members, or the response of other employees to a separate insurance plan for the Association.

Neither the City’s agreement to Article 38, nor the City’s conduct in bargaining with the Association, constitute a violation of ORS 243.672(1)(e). We will dismiss the complaint.

¹²The existence of the interest arbitration exclusion actually may reduce any impacts of the parity clause on the Association unit, because the Association might win separate health benefits through that process.

ORDER

The complaint is dismissed.

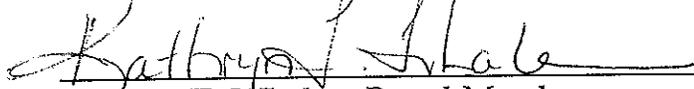
DATED this 20th day of May 2003.



David W. Stiteler, Chair



Rita E. Thomas, Board Member



Kathryn T. Whalen, Board Member

This Order may be appealed pursuant to ORS 183.482.