

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



BANNING TEACHERS ASSOCIATION, CTA/NEA,)	
)	
Charging Party,)	Case No. LA-CE-1890
)	
v.)	PERB Decision No. 536
)	
BANNING UNIFIED SCHOOL DISTRICT,)	November 18, 1985
)	
Respondent.)	
)	

Appearances: Charles R. Gustafson, Attorney for the Banning Teachers Association, CTA/NEA; Atkinson, Andelson, Loya, Ruud and Romo by Ronald C. Ruud for Banning Unified School District.

Before Hesse, Chairperson; Burt and Porter, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Banning Teachers Association, CTA/NEA (Association) to the proposed decision, attached hereto, of a PERB administrative law judge (ALJ). The ALJ dismissed a complaint alleging that the Banning Unified School District (District) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act),¹ by executing a

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 reads, as follows:

It shall be unlawful for a public school employer to:

parity agreement with its classified employees. We affirm the dismissal for the reasons set forth below.

FACTUAL SUMMARY

The District and the Association were signatories to a collective bargaining agreement covering the period of February 1981 to June 1984. Pursuant to the reopener language in that agreement, on or about May 1983, the parties commenced negotiations for the 1983-84 school year on the subjects of salaries, fringe benefits, grievance procedure, and hours of employment.

On or about September 29, 1983, the District reached a "partial agreement" on salaries with the classified unit. Such agreement provides as follows:

Salary: Effective July 1, 1983 5% applied to base schedule plus \$13,000 to be applied to range adjustments for these departments,

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

maintenance, grounds, transportation, mechanic, and custodians.² Agree that any other unit receiving a higher salary increase than this agreement stipulates, this unit will be adjusted to the higher amount.

The Association subsequently filed an unfair practice charge against the District, alleging a violation of section 3543.5(a), (b), (c), and (d) of the EERA based on the parity or "me-too" clause of the classified unit contract. On February 7, 1984, a complaint was issued alleging that the above-referenced parity, or "me-too," clause violated section 3543.5(a), (b), and (c). Other allegations set forth in the unfair practice charge were dismissed and, accordingly, were not addressed by the ALJ in the proposed decision.

The case was submitted on stipulated facts and the ALJ's proposed decision dismissed the charges. The issues before the Board are:

1. Does a parity agreement with one exclusive representative constitute a per se violation of the EERA?
2. Does a parity agreement with a classified unit which ties salary increases to the certificated unit violate EERA's mandate for a separation of units?³

²The ALJ found that only these five (5) groups of classified employees would receive the parity adjustment. That finding is in error. Instead, the parity agreement provides the equivalent percentage salary increase to the entire classified unit.

³EERA section 3545(b)(3) provides:

DISCUSSION

The Association raises two arguments in the exceptions. First, it argues that the statutory "wall of separation" between the classified and certificated units prohibits parity-clauses and, thus the District committed a per se violation of EERA by agreeing to this parity clause. The Association also claims that it was, in effect, forced to negotiate on behalf of the classified employees. It asserts that since the Wisconsin and Michigan labor laws do not mandate separate units, those cases relied on by the ALJ are not applicable to cases under EERA. The Association further asserts that Education Code section 41372

requires that certificated classroom teachers receive the greatest portion of a school district's expense of education in the form of wages and benefits. (Association's Exceptions, p. 9.) (Emphasis in original.)

Second, the Association argues that such a parity clause limits the District's ability to negotiate in good faith with the Association and does not promote labor harmony.

The legality of parity, or "me-too," clauses is one of first impression for this Board. Other public sector jurisdictions have considered such clauses, but the diversity in the results of these public employee cases limit their

Classified employees and certificated employees shall not be included in the same negotiating unit.

usefulness to PERB.⁴ -

One of the realities of the collective bargaining process is that multi-unit employers must consider the effect of one bargaining unit's contract on other units, and that parity clauses reflect this need. It is indeed incongruous to suggest, as some of the authorities do, that the employer may legitimately bargain for parity in fact, but may not properly include a parity clause in a collective bargaining agreement. We agree with the ALJ that:

[T]o find that the clause at issue in the instant proceeding constituted [sic] a violation of the District's duty to bargain in good faith with the Association would establish an artificial and technical barrier to the District's right to strive for a particular result in its negotiations with its classified and certificated employees. Moreover, a finding that the clause was unlawful might interfere with that which the EERA was intended to promote; labor peace and enhanced communications. (Proposed Decision, p. 13.)

Thus, we hold that parity clauses are not "per se" unlawful under the EERA.

This is not to say, however, that by agreeing to a parity clause, an employer could never violate the Act. We find it appropriate to decide the issue on a case-by-case basis.

⁴We note that although there is a split in authority in public sector jurisdiction, parity agreements appear to be allowed in the private sector. (See Teamsters, Local 126 (Inland Steel) (1969) 176 NLRB 407 [71 LRRM 1661]; Carpenters, Local 379 v. Day & Zimmerman, Inc. (D.C. Tex. 1982) 531 F.Supp. 696 [110 LRRM 2246], affd. (5th Cir. 1983) 706 F.2d 313 [113 LRRM 2736].)

Depending on the facts of a particular case, a parity clause might cause a district to engage in bad faith collective bargaining with the employees. No evidence is presented here, however, on which to base such a finding.

The philosophy behind a parity clause is not unlawful. An employer may, for valid business purposes, hold firm in the desire to provide uniform raises to all units. In this case, the classified contract did not restrict the District's "flexibility" to negotiate with the Association, because the agreement did not directly prohibit the Association from receiving a salary increase greater than that already granted to the classified employees. As the ALJ indicated, a district is not "required to commit or make available all its resources for its negotiations with the Association."

The District may lawfully decide to grant the same percentage increase to all employees and, therefore, allot only a portion of its resources to any one unit. Only one subject of bargaining was affected by the parity clause—percentage of salary increase. The ALJ indicated that the law does not prohibit an employer holding fast on one particular item in negotiations in order to reach a particular result. This parity clause merely formalized this position and yet allowed an early settlement with most of the District employees. To find this parity clause to be a per se violation of the EERA would force employers to refuse to reach agreement with any of the units until salaries are agreed to by all. This would not

foster labor harmony or effectuate the purpose of the EERA.

The Association, in essence, asserts that Education Code section 41372⁵ mandates that its members receive a greater raise than those employees in the classified unit. We disagree.

The Education Code section requires that a certain percentage of a district's education budget be "for payment of salaries of classroom teachers," but does not require that the certificated bargaining unit receive that percentage.

Additionally, this provision of the Education Code does not reflect the same dichotomy between classified and certificated employees as the EERA does in its language regarding separate units. For instance, salaries for instructional aides are included in the definition of "salaries of classroom teachers" (Ed. Code sec. 41011(c)), yet instructional aides are members

⁵Education Code section 41372 provides, in relevant part:

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There shall be expended during each fiscal year for payment of salaries of classroom teachers:

(a) By an elementary school district, 60 percent of the district's current expense of education.

(b) By a high school district, 50 percent of the district's current expense of education.

(c) By a unified school district, 55 percent of the district's current expense of education. . . .

of the classified bargaining unit.⁶ In contrast, school nurses and counselors are members of the certificated unit,⁷ but their salaries are not included in this Education Code mandate. To apply this provision to the entire certificated unit would be to ignore the clear meaning of the statute.

Thus, we hold that parity clauses are not prohibited by the statutory "wall of separation" mandated by the EERA or that such clauses cause a "blurring of unit lines." Therefore, we find that this parity clause does not break down the "walls of separation" between the classified and certificated units. In doing so, we reject the ALJ's discussion of the statutorily-mandated separation of the classified and certificated units.⁸ This separation of classified and certificated units is not "merely a statutory recognition of unit appropriateness," but rather it is a statutory mandate dictated by the express language of EERA. This Board may not

⁶1982-85 Banning Unified School District Collective Bargaining Agreement with California School Employees Association Chapter 147, Appendix A.

⁷1981-84 Banning Unified School District Collective Bargaining Agreement with Banning Teachers Association, p. 1.

⁸The ALJ stated that

The separation of classified and certificated employees is . . . merely a statutory recognition of unit appropriateness and the separation should be considered no more sacred than those separate units determined by the PERB itself. (Proposed Decision, p. 6.)

change or alter the separation as it can with non-EERA units.

The limited evidence provided by the parties shows that each bargaining unit negotiated on its own behalf. We find no "delegation of the duty to negotiate for wages and benefits of the classified employees."

We find, also, that the instant parity agreement does not require the Association to negotiate on behalf of the classified unit. The classified unit negotiated and reached agreement with the District on a new collective bargaining agreement. One of the negotiated aspects was this clause, which would become effective only if the Association negotiated a raise higher than that previously negotiated by the classified employees. Otherwise, the clause has no effect.

ORDER

For the foregoing reasons, we hereby DISMISS the charge in Case No. LA-CE-1890.

Members Burt and Porter joined in this Decision.

maintenance, grounds, and transportation workers, mechanics and custodians would receive a salary increase equal to that achieved by any other bargaining unit pursuant to negotiations.

Pursuant to the practices of the Public Employment Relations Board (hereinafter PERB or Board) the Charge was investigated and on February 7, 1984, a Complaint issued alleging that the above-referenced "me-too" agreement violated sections 3543.5(a), (b), and (c). On February 9, 1984, other allegations set forth in the Unfair Practice Charge were dismissed and, accordingly, they are not before the undersigned for disposition.

On February 23, 1984, the Respondent filed its Answer denying that it violated any provisions of the EERA but admitting that it had executed a "me-too" or parity agreement with its classified unit.

Prior to convening the formal hearing, a pre-hearing conference was scheduled and held at Los Angeles Regional Office of the Public Employment Relations Board. At that time, the parties entered into a stipulation obviating the need for a formal evidentiary hearing. A briefing schedule was agreed to, the parties filed responsive pleadings, and on May 14, 1984, the case was submitted for proposed decision.

II. FINDINGS OF FACT

Pursuant to the stipulation entered into at the pre-hearing conference and the Respondent's Answer, it is found that the

Respondent is a public school employer and that the Charging Party is an employee organization as those terms are defined in the EERA. The Association is the exclusive representative of the certificated unit at Respondent's school district.

The Respondent and the Charging Party are signatories to a Collective Bargaining Agreement effective during the period of February 1981 to June 1984. Pursuant to the reopener language in said Agreement, on or about May 1983, the parties commenced negotiations for the 1983-84 school year on the subjects of salaries, fringe benefits, grievance procedure and hours of employment. As of January 13, 1984, the parties had failed to reach a final agreement on reopener negotiations.

On or about September 29, 1983, during negotiations between Respondent and representatives of the classified unit, Respondent reached a "parity agreement" on salaries with that unit. Such agreement provides as follows:

Salary: Effective July 1, 1983 5% applied to base schedule plus \$13,000 to be applied to arrange adjustments for these departments, maintenance, grounds, transportation, mechanic, and custodians. Agree that any other unit receiving a higher salary increase than this agreement stipulates, this unit will be adjusted to the higher amount.

The Charging Party alleges that the agreement with classified unit constitutes a violation of the EERA.

III. ISSUES

1. Do parity agreements with one exclusive representative constitute per se violations of the EERA?

2. Do parity agreements with a classified unit which ties salary increases to the certificated unit violate EERA's mandate for a separation of units?

IV. DISCUSSION

A. Position of the Parties

1. Association

The question of the legality of parity clauses is one of first impression for the PERB. In its brief, the Charging Party pursues two related but distinct theories. First, the Charging Party argues that parity agreements represent an inherent frustration to meaningful negotiations. Relying upon a series of cases decided by the New Jersey Public Employment Relations Commission and the Pennsylvania and Connecticut Labor Relations Boards, the Charging Party argues that:

The mere existence of the clause is sufficient to chill the free exchange between the 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 (5/5/78) PERC Decision No. 78-87 [4 NJPER 4130].)

²The Charging Party and the Respondent discuss or make reference to the Administrative Law Judge's decision in Sweetwater Union High School District (1983) Case No. LA-CE-1334 [7 PERC 14238]. Exceptions were filed to that proposed decision and ultimately the underlying unfair practice charge was withdrawn. Accordingly, the Board never addressed the issues raised therein and the proposed decision itself never became a final Administrative Law Judge decision.

Next, relying on the same authorities from other jurisdictions, the Charging Party argues that a parity agreement which ties the salaries of classified employees to the salaries of certificated employees violates the EERA's mandate for separate bargaining units of such employees. Section 3545(b)(3) of the EERA provides that "[c]lassified employees and certificated employees shall not be in the same negotiating unit." According to this theory, even if parity agreements are not per se violations of the Act, they inevitably lead to a blurring of the statutory distinction between classified and certificated employees and, in the instant case, require the certificated employees to bargain on behalf of the classified employees in violation of the segregation of those units mandated by the EERA.

2. Respondent

The Respondent addresses both facets of the arguments raised by the Charging Party. The Respondent first argues that parity agreements are not per se violations of the Act. Unlike other per se violations such as unilateral changes or blanket refusals to negotiate which are completely destructive of the bargaining process, a parity agreement, reviewed in a factual vacuum, cannot be considered "inherently destructive of the bargaining process." Whether or not a parity agreement might constitute a violation of the Act is, the Respondent argues, a matter which must be reviewed on a case by case basis to determine whether a particular parity agreement did, in fact,

unduly hamper the employer's obligation to bargain in good faith.

Similarly, the Respondent argues that a parity clause does not, by itself, undermine the statutory separation of classified and certificated units. The separation of classified and certificated employees is, as the Respondent argues and I agree, merely a statutory recognition of unit appropriateness and the separation should be considered no more sacred than those separate units determined by the PERB itself. Accordingly, the Respondent's argument on the second issue dovetails into its argument on the first. Namely, whether or not a parity clause undermines the separation of bargaining units or constitutes evidence of bad faith bargaining is a question which should be determined by reference to the factual context in which such parity agreements exist. The question cannot be resolved in the Charging Party's favor simply because a parity agreement exists.

A. Proposed Decision

The question presented in the instant unfair labor practice proceeding is not easily resolved. Indeed, both the Charging Party and the Respondent have articulated logical arguments on behalf of their respective positions on what is ultimately a matter of policy. As noted above, there is no PERB decision on the issue presented. Other jurisdictions which have considered the issue in the context of public labor management relations

have resolved the question in different fashions. Connecticut, Pennsylvania, and New Jersey have uniformly held that parity agreements are unlawful.³ In New York, although the same ultimate result has been reached, the cases which have reached that state's courts seem to require a case-by-case approach.⁴ As will be discussed in greater detail, infra, Wisconsin and Michigan have apparently resolved the issue in favor of the legality of parity clauses. Cases arising in the private sector have been found to contribute little to the analysis of this issue and indeed no cases were cited by either the Charging Party or the Respondent.⁵

The Charging Party, relying heavily upon the analysis set forth by the Administrative Law Judge in Sweetwater Union High School District, supra, at fn. 2, essentially argues as follows:

[P]arity agreements necessarily affect subsequent negotiations, impermissibly bring another party to the bargaining table, and thereby interfere with good faith negotiations between the employer and the union not protected by a parity agreement. Commonwealth of Pennsylvania (3/22/78) Case No. PERA-C-7323-C [9 PPER 9084].

³See, City of New London (1973) Ct. Board of Labor Relations, Case No. MPP-2268 [505 GERR F-1]; City of Scranton (2/2/84) PLRB Case No. PF-C-82-86-E [15 PPER 15047]; City of Plainfield (5/5/78) PERC Decision No. 78-87 [4 NJPER 4130].

⁴Niagra Wheatfield Central School District (1978) 44 NY 2d 68 [11 NY PERB 7512].

⁵See, however, Inland Trucking Co. (1969) 176 NLRB No. 52 [71 LRRM 1661].

The view that parity agreements unlawfully bring a third party into bilateral negotiations is also shared by the Connecticut Public Employment Relations Board and affirmed by the Connecticut Supreme Court. In Local Union 1219, International Association of Firefighters, Connecticut State Board of Labor Relations (1973) 171 Conn. 342, 370 A.2d 952 [93 LRRM 2098], the Court noted:

By voiding parity clauses . . . the board preserves the wall of separation [between bargaining units] mandated by the statute. The [board's] action will also ensure that the units will be allowed to tie themselves to a rule of equality only if each unit agrees with the other that their interests are the same.

Although the authorities cited by the Charging Party support both its argument that parity clauses are per se violative of the EERA and its argument that parity clauses violate the concept, mandated by statute, that certificated and classified employees should be separate, I find those authorities to be unpersuasive.

The defect I find in the authorities cited by the Charging Party is that the respective employment relations boards and courts do not address or even seem to appreciate certain realities facing a multi-unit employer and its concern for "industrial" peace or labor harmony. Ironically, however, the authorities seem to recognize that certain advantages may result to employer and employees if the employer bargains for

parity in fact but does not commemorate parity in a written collective bargaining agreement.

Although some parity agreements may indeed constitute an abrogation of the employer's duty to bargain in good faith, the agreement at issue in the present dispute does not rise to that level. The agreement between the Respondent and its classified employees is very limited in scope; it only applies to the percentage salary increase. Moreover, the wording of the parity agreement does not evidence an intent to restrict the employer's freedom to bargain with the certificated unit or its ability to reach agreement with the certificated unit on any appropriate salary level as determined by the negotiation process. The Charging Party argues that by a priori committing some of its available resources to classified salaries, the Respondent has limited its flexibility with respect to its salary negotiations with the Association. Such an approach erroneously suggests that the Respondent is required to commit or make available all its resources for its negotiations with the Association. Nothing in the law, however, mandates such a result. Indeed, if an employer in good faith determines that it is in the employer's best interest to grant the same percentage increase to all its employees, there is nothing in the law which prohibits the employer from settling first with the certificated employees for a specific percentage increase and thereby allocating only some of its resources to

certificated negotiations based on its predetermined knowledge that it will grant that same amount to the classified employees. In other words, the law does not prohibit an employer from holding fast on one particular item in negotiations in order to reach a particular result.

In essence, a parity agreement may be viewed as one employer device to achieve labor harmony. In the instant case, the employer was able to conclude negotiations with the classified unit and ratified a collective bargaining agreement, leaving open only the ultimate question of salary increases.⁶ After concluding negotiations with the classified unit, the classified contract did not restrict the employer's flexibility to negotiate with the Charging Party. This is not a case where the employer agreed that the certificated employees would not get a salary increase higher than that granted to the classified employees. Accordingly, the only restriction upon the Respondent's bargaining was the Respondent's resources, and, as mentioned above, the allocation of those resources is a management right, not in fact hampered by the parity agreement with the classified unit.

⁶It is interesting to note that in New York, one jurisdiction relied upon by the Charging Party, if the Respondent herein had merely agreed to reopen negotiations with the classified unit on the question of salaries after the conclusion of certificated bargaining, that jurisdiction would have found the agreement lawful. City of Yonkers (1977) PERB Case No. U-2079 [10 PERB 3048].

As noted by the Wisconsin Employment Relations Commission in West Allis Professional Policemen's Protective Association v. City of West Allis (5/17/74) WERC Decision No. 12706, parity agreements are common and may simply be a written commemoration of a reality in the work place. I find the analysis of the Wisconsin Commission to be quite persuasive. The Commission noted:

Such agreements are not rare or limited to police and fire settlements and do, as the Complainant urges, affect the calculations of a municipal employer in its subsequent negotiations with other labor organizations. However, even in the absence of such agreements, employers, whether in the public or private sectors, calculate the affects of proposed settlements upon their relations with other groups of employes (sic), both unorganized and represented by other unions. This is a "fact of life" in collective bargaining. The Complainant realizes this, but distinguishes the present case on the basis of the existence of a formal agreement. This distinction, in turn, focuses on the legally binding nature of the instant parity agreement, as contrasted to the practical considerations of the more common tacit practices to which we refer.

We hold that this distinction is artificial and not to be adopted herein. The parity agreement does not place an absolute "ceiling" on settlements with the Complainant. It adds to the costs of higher settlements. The normal, unformalized, considerations of employers, on the other hand, are very compelling, not only because of cost considerations, but because of very significant tactical considerations that an employer dealing with a number of unions must make respecting the relative positions of such unions. We would indeed be unrealistic and excessively legalistic if we

attempted to minimize or eliminate these considerations. We would be engaging in unwarranted conclusions if we held agreements reflecting such considerations to be contrary to the duty to bargain in good faith. (Citations omitted.)

Thus, the Wisconsin Commission recognized the appropriateness of parity clauses and refused to find the practice of acknowledging parity arrangements in written contracts illegal. Similarly, the Michigan Employment Relations Commission has found that insistence on parity between police and fire employees did not constitute a violation of the City of Detroit's duty to bargain in good faith. Although the case arose in a posture quite different than that presented by the instant proceeding, the Commission's observations in reversing its hearing officer are germane:

Wage policy in the private sector has been described as a political process in which wage patterns are created by unions operating in "orbits of coercive comparison." Under these circumstances small differences become large, and equal treatment becomes the sine qua non of industrial peace. Arthur Ross, Trade Union Policy, 53 74 (1948). A public employer engaged in collective bargaining must a fortiori, determine the effect of one bargaining unit's contract on any other. To foreclose such considerations during the course of bargaining would cause an undeniable hardship. City of Detroit and Detroit Police Officers Association (12/29/72) MERC Case No. C72 A-1.

Unlike the decisions from other jurisdictions which seem to reach blanket conclusions without clearly analyzing the

realities of collective bargaining relationships, I find that the Michigan and Wisconsin decisions properly reflect a balance between concepts and practicality. Indeed, to find that the clause at issue in the instant proceeding constituted a violation of the District's duty to bargain in good faith with the Association would establish an artificial and technical barrier to the District's right to strive for a particular result in its negotiations with its classified and certificated employees. Moreover, a finding that the clause was unlawful might interfere with that which the EERA was intended to promote; labor peace and enhanced communications.

Thus, based upon the analysis of the authorities cited and the positions urged, it is found that the "me too" clause between the District and its classified employees did not violate sections 3543.5(a), (b), or (c) in terms of the District's obligations vis a vis the Association.

V. PROPOSED ORDER

Based upon the foregoing findings of fact and conclusion of law, it is determined that the Unfair Practice Complaint issued in this matter is DISMISSED in its entirety.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on November 13, 1984, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or

exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on November 13, 1984, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, section 32300 and 32305.

Dated: October 23 , 1984

Barbara E. Miller
Administrative Law Judge