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Treatment of "me too" Clauses And Permissive Subjects in Collective Bargaining Agreements.

Questions Presented

1. Whether a "me too" clause is a permissive or mandatory subject of bargaining in a collective bargaining agreement between a public sector employee and a union?
2. Whether a permissive subject of bargaining clause in a collective bargaining agreement between a public sector employer and a union is automatically included in future contracts between the public sector employer and other unions?

Short Answers

1. Whether a "me too" clause is a permissive, mandatory or illegal subject of bargaining requires a case-by-case analysis due to conflicting decisions by courts and state employment relation boards.
2. A permissive subject of bargaining clause in a collective bargaining agreement may not be automatically included in future contracts. The permissive item remains in effect only during the term of the agreement.

Discussion

A. Mandatory, Permissive and Illegal subjects of collective bargaining

Subjects for collective bargaining are classified as mandatory, permissive, and illegal. *Houghton Lake Education Assoc. v Houghton Lake Community Schools, Bd. of Education*, 109 Mich. App 1, 310 NW3d 888 (1981). According to MCL 423.215, the employer and the representative of the employees are required to bargain for wages, hours, and other terms and

conditions of employment, which constitute mandatory subjects of collective bargaining. *St. Clair Intermediate Sch. Dist. v. Intermediate Educ. Ass'n*, 458 Mich. 540, 550-551, 581 NW2d 707 (1998).

Mandatory subjects of collective bargaining comprise issues that settle an aspect of the relationship between an employer and employees, and include, but are not limited to, terms and conditions of employment concerning hourly, overtime, and holiday pay, work shifts, pension and profit sharing, grievance procedures, sick leave, seniority, and compulsory retirement age. *St. Clair*, 458 Mich at 551-552. In addition, any matter which has a significant impact on these subjects or which settles an aspect of the relationship between an employer and the employees constitutes a mandatory bargaining subject and the parties are required to bargain in good faith on these subjects, although they need not reach agreement. *Houghton Lake Education Assoc.*, 109 Mich App at 5. See also, *Oak Park Pub. Safety Officers Ass'n v. City of Oak Park*, 277 Mich. App. 317, 326 (Mich. Ct. App. 2007) (the impact of managerial decisions on employee workload or safety may result in conditions that come within the ambit of the phrase "other terms and conditions of employment" that is subject to mandatory bargaining).

Matters not classified as mandatory subjects of bargaining are referred to as either "permissive" or "illegal" subjects of bargaining. *Detroit Police Officers Assoc., v. Detroit*, 391 Mich. 44, 55 (Mich. 1974). A permissive subject of bargaining falls outside of the phrase "wages, hours, and other terms and conditions of employment." *Id.* See also, *Metro Council No 23 & Local 1277, AFSCME, AFL-CIO v City of Center Line*, 414 Mich 642, 660 (1982) (issues of policy are exclusively reserved to government discretion or management prerogative and cannot be made mandatory subjects of bargaining); *City of Sault Ste Marie v Fraternal Order of Police Labor Council, State Lodge of Michigan*, 163 Mich App 350, 355 (1987). Regarding an "illegal" subject of bargaining, the parties are not explicitly forbidden

from discussing matters which are illegal subjects of bargaining, but a contract provision embodying an illegal subject is unenforceable. *Detroit Police Officers Asso*, 391 Mich. 44, 55.

Determinations of what are mandatory subjects of bargaining are done on a case-by-case basis. *Werdlow v. Detroit Policeman & Firemen Ret. Sys. Bd. of Trs.*, 269 Mich. App. 383, 408 (Mich. Ct. App. 2006). The test generally applied is whether the matter has a significant impact upon wages, hours, or other conditions of employment, or settles an aspect of the employer-employee relationship. *Id.*

B. Whether a "me too" clause is a mandatory, permissive or illegal subject of bargaining requires a case-by-case analysis

There are conflicting decisions between the different state courts and state employment relation boards as to whether so called "me too" clauses are mandatory, permissive or illegal subjects of bargaining. It should be noted that many courts and administrative bodies use the term "me too" as interchangeable with the term "parity." A "parity" clause in the labor context denotes a contractual arrangement whereby employees in one bargaining unit are to be automatically granted benefits attained through negotiations by employees in a separate unit. See *City Of Fort Lauderdale*, 13 FPER (LRP) P18, 211 (FPER (LRP) 1987) (internal citations omitted).

There is conflicting case law regarding the enforceability of parity clauses. In those jurisdictions that reject parity clauses per se the belief is that such clauses have an unavoidable coercive effect and inevitably interfere with the right of parties to negotiate in good faith. See, *Township Of Branchburg*, 15 NJPER 601, at p.6-7 (NJPER (LRP) 1989) (quoting *City of Plainfield*, 4 NJPER 255 (1978)). See also, *International Asso. of Fire Fighters v. Connecticut Labor Relations Board*, 171 Conn. 342, 353 (Conn. 1976).

In *International Asso. of Fire Fighters.*, 171 Conn. at 345-346 (Conn. 1976), a firefighter union and a municipal employer entered into a three-year collective bargaining

agreement. The agreement provided that "it is understood and agreed that if the borough grants to the police department any additional [benefits] over and above this contract and during its term, the employees in this bargaining unit will be granted the same additional benefits . . . ." After the municipality refused to give the same additional benefits to the firefighters that it gave police officers, the union initiated a grievance procedure before the board of mediation and arbitration. The board ultimately refused to enforce the parity provision, and this decision was affirmed by the trial court.

The Connecticut Supreme Court agreed, and held that the parity provision was unenforceable. In reaching its decision, the Court relied on Conn. General Statute § 7-471(3), which required employees of municipal fire and police departments to be in separate collective bargaining groups. *International Asso. of Fire Fighters.*, 171 Conn. at 351. The court held that the parity clause between the firefighters union and the municipality would impose equality for the future upon the police union, which has had no part in making the agreement. *Id*. The court held:

> "On this issue, the police union's right to bargain has been completely taken from it. By voiding parity clauses in circumstances similar to those found in the present case, the defendant board preserves the wall of separation mandated by the statute. The defendant'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."

Id.

While the union argued that the duty to bargain collectively required the parties to confer in good faith with respect to wages, hours and other conditions of employment and a parity clause falls within this area, the court held otherwise. Relying on Conn. General Statute § 7-468(a), which provided that employees have the right "to bargain collectively . . . on questions of wages . . . free from . . . interference, restraint or coercion," the court held that the duty to bargain would require an employer and employee to refrain from interfering, coercing or restraining the rights of all employees. *International Asso. of Fire Fighters.*, 171

Conn. at 353. The court held that "the duty to bargain does not make legal those clauses which, if found in the contract, would constitute practices prohibited by the act." *Id*.

A similar result was reached in *Lewiston Firefighters Asso., etc. v. Lewiston*, 354 A.2d 154 (Me. 1976). In *Lewistown*, the city charter contained a parity provision and the firefighters' union entered into a series of contracts that contained a parity provision. After being refused a wage increase based on the parity provision, the police union brought suit challenging both the city charter and contract provision. The reason cited by the city for not increasing the wage of the police was "that the City had already entered into a contract with the Firefighters Union, that the parity pay provision of the City Charter prohibited any increase in police pay without a simultaneous corresponding increase in the Firefighters' wages, and that the City did not have sufficient finances to fund both increases." *Id*. at 158. In support of its position, the police union argued that the city charter wage parity provision had been implicitly repealed by the subsequent passage of the Municipal Public Employees Labor Relations Law ("MPELRL") by the Maine legislature. The Court agreed, and explained:

> the two fundamental purposes of the MPELRL -- freedom of employee self-organization and voluntary adjustment of the terms of employment -- are best effectuated through the creation of coherent bargaining units composed of employees who have "an identifiable community of interest" in the subjects controlled by the collective bargaining agreement.

Id. at 161.

Although, the court agreed that wages were a mandatory subject of bargaining, the effect of the parity pay provision would be to place the police union in the position of negotiating wages not only for themselves, but also indirectly for the firefighters union as well. *Lewiston Firefighters Asso.*, 354 A.2d at 161. As a result, the parity pay provision would affect the public employer's freedom to negotiate. *Id*. In this regard, the court held:

> … the procedures established by the MPELRL for determining the configuration of the unit whose wages will be determined by collective

> bargaining between its elected representative and the employer are evaded by the parity pay provision which, at the bargaining table, necessarily interjects the interests of the Lewiston Firefighters into the unit created to represent the Lewiston Police. This situation unit whose wages are to be determined by the collective bargaining agreement contravenes the employees' collective right to be included in a unit composed of those with whom they share a "community of interest" and hence is contrary to the policy of the MPELRL which, to that end, requires that the configuration of all units not voluntarily established by employee-employer agreement be monitored by the Maine Labor Relations Board.

Id. at 161-162

As such, the Court held that the contract parity provisions were void as "contrary to public policy." *Lewiston Firefighters Asso.*, 354 A.2d at 163.

New Jersey courts have also held that parity clauses are illegal. A parity clause in a collective bargaining agreement is illegal and constitutes an unfair practice because it unlawfully limits the right of an employee organization to negotiate fully its own terms and conditions of employment. *Board of Education v. Employees Asso. of Willingboro Schools*, 178 N.J. Super. 477, 478-479 (App. Div. 1981) (citing *City of Plainfield*, PERC No. 78-87, 4 *NJPER* 255 (1978)). It has further been found that clauses which automatically extend to one unit any increases in salary or benefits negotiated by other units are not mandatorily negotiable. *Borough Of Rutherford*, 14 NJPER 642 (NJPER (LRP) 1988). However, clauses extending to unit employees a benefit ***unilaterally*** conferred upon other employees are mandatorily negotiable. *Id*. (emphasis added). In *Borough Of Rutherford*, the agreement contained the following clause:

> Article XXVI, 4, reads:
> (4)In addition to the regular paid holidays heretofore, set forth, the employees covered under this agreement shall be entitled to such further paid holidays as may be declared from time to time by the Borough's governing body for any other Borough employees.

Id.

The Commission held that to the extent that the paragraph gave the union a benefit negotiated by other units, the clause was not mandatorily negotiable. *Id*. However, to the

extent that the additional holidays were conferred by the unilateral acts of an employer, it was not a parity clause and is mandatorily negotiable. *Id.* See also, *Sweetwater Union High School District* , 7 PERC (LRP) P14,238 (PERC (LRP) 1983) (school district, by agreeing to include parity wage provisions in contracts with several units of classified employees, which provisions required automatic payments to classified employees of wages achieved by certificated employees through negotiations, interfered with certificated employees' right to separate representation and caused the district to engage in bad faith bargaining with the union representing certificated employees). Moreover, a "parity" clause may be a prohibited bargaining subject because it violates collective bargaining principles even though the subject would otherwise be within the scope of bargaining. *Sweetwater Union High School District* , 7 PERC (LRP) P14, 238 (PERC (LRP) 1983).

However, some jurisdictions have held that parity provisions are enforceable. See, *Banning Teachers Ass'n v. Public Employment Relations Bd.*, 44 Cal. 3d 799, 808 (Cal. 1988). In *Banning*, a teachers' union argued that an administrative board erred when upholding a parity provision between teachers and "classified employees." The teachers alleged that the parity provision violated Cal. Government Code section 3545(b)(3), which required that classified and certified employees not be in the same bargaining unit, and section 3543.5(c), which required the employer to negotiate in good faith. The California Supreme Court held that the parity provision was not "*per se* illegal." *Id*. at 808-809. In so doing, the court held that the parity provision did not violate the separate unit requirement.

> "The parity agreement did not require the Teachers Association to negotiate on behalf of the classified unit. The salary increase for which the Teachers Association bargained . . . may 'incidentally' benefit the classified unit, even though the Teachers Association did not in fact bargain on behalf of the classified unit to obtain the bargained-for item. However, such incidental benefit does not violate the section 3545 mandate to maintain separate negotiating units."

Id. at 806.

Likewise, the court held that the parity provision did not violate the duty to negotiate in good faith, because "parity agreements no more restrict the District'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 . . . ." *Banning*, 44 Cal. 3d at 807. The *Banning* court also found that parity provisions were beneficial to the bargaining process. In this regard, the court held:

> "To hold parity agreements per se illegal would place a burdensome limitation on public school employers to negotiate effectively in an already cumbersome environment of multi-unit collective bargaining. It would obstruct employment relations, thus defeating the stated purpose of section 3512 "to foster peaceful employer-employee relations . . . ."

Id. at 809.

A New York court reached the same conclusion in *Schenectady v. City Fire Fighters Union, etc.*, 85 A.D.2d 116, 119 (N.Y. App. Div. 3d Dep't 1982). In *City of Schenectady*, both the police and firefighters contracts contained parity provisions providing that "there will be no disparity in remuneration between employees covered by" the police and firefighters collective bargaining agreements. After the police union was granted certain overtime benefits not given to firefighters, the firefighters sued to uphold the parity provision. The court held that such provisions were not *per se* illegal. *Id*. at 119. Rather, the court held that parity provisions require a case-by-case examination of the specific provision. *Id.* In upholding the particular provision in question, the court explained:

> The award is reasonably limited in time, for the balance of the three-year contract. The actual resolution of the dispute with the [police union] concerning overtime refutes any conclusion that the provision had impaired the city's ability to negotiate that dispute. There is nothing in the record to show that during the balance of the term of the agreement significant overtime work assignments will be required of the city's fire fighters or even if so, that remuneration therefor at the additional rate will imperil the city's finances. Apparently, for some 12 years, the city has found it to be productive of harmonious public employee relations and consistent with financial prudence . . . to include within the agreements thereby achieved a provision for equality of remuneration.

Id. at 119-120.

The Delaware Public Employment Relations Board also reached a similar conclusion and held that parity provisions could be permissive subjects of bargaining. See *City of Wilmington v. Fraternal Order Of Police Lodge No.1 et. al*, No. 02-10-369 (2003). In *City of Wilmington*, the city granted parity in the collective bargaining agreements of a variety of public employee unions with respect to wage and benefit increases. Thereafter, an additional pay increase was granted to the police officers' union. In a dispute by another union, it was ultimately determined that the parity provision was triggered, resulting in a large payout to other employees. In attempting to renegotiate the collective bargaining agreements, the city sought a declaratory statement from the PERB as to its duties, as many unions wanted to retain the parity provisions, but the police officers felt that parity would hinder their own negotiations.

Among the issues presented before the PERB were: (1) whether parity agreements were legal under Delaware public sector collective bargaining laws; (2) if so, whether they are permissive or mandatory subjects of bargaining; and (3) whether the parity provisions of the most recent collective bargaining agreements survived the expiration of those agreements. The Executive Director or PERB held that that parity provisions were permissive subjects of bargaining, and that they were improper only to the extent they interfered with the negotiation rights of third parties. He also concluded that the parity agreements in the prior collective bargaining agreements had expired. On appeal, The Delaware PERB upheld the decision and quoted the July 25, 2003 decision of the PERB Executive Director that stated:

> Wages and salaries are mandatory subjects of bargaining. Parity clauses are not *per se* illegal topics of bargaining and represent permissive bargaining positions to the extent that they do not interfere with the rights of other bargaining units to engage in bargaining under the PERA and the POFFERA.
>
> Negotiated parity provisions are unenforceable and contrary to law to the extent that they trespass on the negotiation rights of a third party exclusive representative which is not a party to the parity agreement. Whether the

> provisions of a particular parity agreement violate an employer's and/or an exclusive representative's statutory obligations will be determined on a case by case basis.
>
> A party's willingness to engage in good faith negotiations concerning a permissive subject of bargaining does not prevent that party from later withdrawing that matter from the scope of negotiations prior to or during impasse resolution procedures. Inclusion of a permissive subject of bargaining in an agreement does not convert that issue to a mandatory subject of bargaining in successive negotiations.
>
> An employer is not obligated under its duty to bargain in good faith to maintain the status quo as it relates to permissive subjects of bargaining after the expiration of a collective bargaining agreement where the parties have not entered into a successor agreement. The wage rates at the expiration of the agreement constitute the status quo at that time, and parity clauses are not applicable to triggers which occur after the expiration of the agreement, unless explicitly extended by agreement of the parties. Wilmington v. FOP Lodge 1, et al., Decision of the Executive Director, DS 02-10-369, IV PERB 2859, 2878 (2003).

Id. at 2992-2993.

Finding that the parity provision did not survive the expiration of a collective bargaining agreement, the PERB once again quoted the Executive Director's opinion:

> It has been determined in this decision that parity provisions are permissive subjects of bargaining. Consequently, there is no obligation for a public employer to maintain a parity provision beyond the expiration of the agreement. This does not, however, mean that an employer can revoke an increase which was provided during the term of the agreement pursuant to a parity clause. The wage rates at the contract's expiration constitute the status quo of that mandatory subject of bargaining.
>
> To find otherwise would be contrary to the express purposes of Delaware's public sector collective bargaining statutes. If the parity provisions existing in the expired AFSCME Locals 320, 1102 and IAFF 1590 agreements were found to survive the expiration of those agreements, and given that wage parity has been herein found to be a permissive subject of bargaining, there would be a clear incentive for these units to forestall negotiations, with the assurance that their members would receive whatever FOP Lodge 1 negotiated. These new "parity" wage rates would become the floor for the negotiations. There would be a clear disincentive to enter into negotiations, and that result would obviously improperly interfere with, coerce and restrain the negotiations between FOP 1 and the City. City of Wilmington (Supra.), pgs. 2876 - 2877.

Id. at 2994.

C. A permissive subject of bargaining remains in effect only during the term of the agreement and may not be automatically included in future contracts

Mandatory subjects of bargaining survive the contract by operation of law and the public employer has a continuing obligation during the bargaining process to apply the "mandatory subjects" until such time as impasse is reached in the bargaining process. *American Federation of State, etc., Council 25 v. Wayne County*, 152 Mich. App. 87, 94 (Mich. Ct. App. 1986). In *American Federation of State, etc.*, the court found that the employer engaged in unfair labor practices by unilaterally changing employment terms, which constitute "mandatory subjects," prior to impasse in negotiations during a collective bargaining process with the employee union in violation of PERA. *Id.* at 93. The court noted that a public employer has a duty under MCL 423.215 to bargain in good faith pursuant to a proposed new contract with regard to mandatory subjects such as "wages, hours, and other terms and conditions of employment" at the expiration of a labor contract. *Id.* At contract expiration, those "wages, hours, and other terms and conditions of employment" established by the contract which are "mandatory subjects" of bargaining survive the contract by operation of law during the bargaining process. *Id.* at 93-94.

However, this is not the case with "permissive subjects" of bargaining. Due to the permissive nature of the subject, neither party is obligated to discuss the subject, nor can a party insist to impasse on that subject. *Metropolitan Council No. 23 & Local 1277, etc. v. Center Line*, 414 Mich. 642, 653 (Mich. 1982). As such, even if the parties agree to discuss a permissive subject of bargaining, it does not thereafter become a mandatory subject. *Id.* at 654. The fact that a permissive clause may have been a subject of bargaining in past contract negotiations does not make such a subject mandatory for future collective bargaining agreements. *Id.*

Courts from other jurisdictions have reached similar conclusions. In *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187-88 (1971), the court held

that when an agreement expires, an employer need not bargain to an impasse over terms and conditions involving permissive subjects but may alter them upon expiration. A permissive item remains in effect only during the term of the agreement. *Paterson Police PBA Local v. Paterson*, 87 N.J. 78, 88 (N.J. 1981). See also, *Blount County Educ. Ass'n v. Blount County Bd. of Educ.*, 78 S.W.3d 307, 322 (Tenn. Ct. App. 2002) (with regard to permissive subjects, once the contract expired, the Board was no longer bound by the terms of the contract with regard to these subjects and to hold otherwise would require the Board to negotiate post-contract over permissive subjects which would, in turn, convert them into mandatory subjects). A public employer is free to delete any permissive item from a successor agreement by refusing to negotiate with respect to that item. *Blount County Educ. Ass'n*, 78 S.W.3d at 322. Its inclusion in an existing agreement does not convert such an item into a mandatory subject. *Id.* See also, *Wilmington v. FOP Lodge 1, et al., Decision of the Executive Director*, DS 02-10-369, IV PERB 2859, 2878 (2003) (when parity provisions are permissive subjects of bargaining. there is no obligation for a public employer to maintain a parity provision beyond the expiration of the agreement).