No. S172377

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 188,	Court of Appeal No. A114959
Plaintiff and Appellant,	Contra Costa County Superior Court No. N050232
v.	
PUBLIC EMPLOYMENT RELATIONS BOARD OF THE STATE OF CALIFORNIA,	
Defendant and Respondent,	
CITY OF RICHMOND,	
Real Party in Interest and Respondent.	

ANSWER TO RESPONDENT PERB'S PETITION FOR REVIEW

After a Decision of the Court of Appeal
First Appellate District, Division Three

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I. INTRODUCTION

Respondent PERB's Petition for Review of the Court of Appeal decision herein of March 18, 2009, does not present an issue for which review is necessary to secure uniformity of decision, or present an important question of law that is unsettled. Instead, the issues presented by PERB's petition were decided by the Court of Appeal consistently with decisions of this Court and decisions of other Courts of Appeal, all of which compel the conclusion that a PERB decision not to issue a complaint in an unfair practice case is a decision of a nature that can be subject to judicial review by way of a writ of mandate.

Although PERB correctly contends that the Court of Appeal's decision improperly invades PERB's exclusive jurisdiction (Gov. Code, § 3509) to decide in the first instance on the basis of an evidentiary hearing and factual record whether "the manpower issue primarily involves the workload and safety of the men ('wages, hours and working conditions') or the policy of fire prevention of the city ('merits, necessity or organization of any governmental service')" (see *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 620-21), that error is also presented by Plaintiff/Appellant Local 188's Petition for Review and can be more appropriately remedied by granting Local 188's Petition rather than PERB's Petition.

PERB's Petition for Review should therefore be denied.

II. THE COURT OF APPEAL'S DECISION IS CONSISTENT WITH DECISIONS OF THIS COURT AND DECISIONS OF OTHER COURTS OF APPEAL WHICH COMPEL THE CONCLUSION THAT A PERB DECISION NOT TO ISSUE A COMPLAINT IS A DECISION OF A NATURE THAT CAN BE SUBJECT TO JUDICIAL REVIEW BY WAY OF A WRIT OF MANDATE

PERB does not cite any decisions of this Court or other Courts of Appeal inconsistent with the Court of Appeal's conclusion in its decision herein of March 18, 2009 (Slip Opinion, pp. 10-13) that a PERB decision not to issue a complaint in an unfair practice case is subject to judicial review if the decision erroneously construes an applicable statute. PERB is unable to cite any such authority because, as shown below, this conclusion of the Court of Appeal is consistent with and amply supported by extensive precedent.

Judicial review of PERB decisions rests upon Article 6, section 10 of the California Constitution, which states that the Supreme Court, courts of appeal, and superior courts have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition.

The writ of mandate was invented to provide a remedy where no other remedy exists. Where there is no statutory method of review available to those aggrieved by the ruling of an administrative agency, review of the administrative agency's ruling may be had by way of a writ of mandate. Because the California

Constitution grants judicial authority to the superior courts to conduct proceedings for extraordinary relief in the nature of mandamus, the Legislature may not prohibit the courts from reviewing an administrative agency's ruling by way of a writ of mandate unless the Legislature has provided a different method for judicial review of the agency's ruling. (*Drummey v. State Board of Funeral Directors* (1939) 13 Cal.2d 75, 82.)

The cases cited by PERB and the City of Richmond do not hold to the contrary.

PERB and the City both rely primarily on *Modern Barber Colleges v. California Employment Stabilization Commission* (1948) 31 Cal.2d 720. (PERB's Brief to Court of Appeal at pp. 5-7; City's Brief to Court of Appeal at pp. 11-14.) In *Modern Barber Colleges* the San Francisco Superior Court denied a writ of mandamus to compel the California Employment Stabilization Commission to vacate its findings that certain persons, including the owner, part-time bookkeeper, and student barbers, were employees of a barber college for purposes of the Unemployment Insurance Act. Because the barber college had a statutory method of review of the Commission's decision, namely, the remedy of a lawsuit to recover taxes paid, the Court of Appeal upheld the Superior Court's decision that the Legislature can prohibit, as was done in Unemployment Insurance Act, § 45.11(d), the use of mandamus in advance of payment of unemployment contributions.

The holding of *Modern Barber Colleges* was thus that the Legislature had the authority to prohibit the issuance of a writ of mandamus because the petitioner had another remedy for the Commission's alleged error in determining that certain persons were employees within the meaning of the law. Accordingly, the statute prohibiting the issuance of mandamus was not an interference with the jurisdiction over such remedies vested in the courts by the California Constitution.

The other cases cited by PERB and the City are similar. These cases hold, generally, that the Legislature may prohibit the issuance of a writ of mandamus for review of an administrative agency's erroneous decision when the party aggrieved by the agency's decision has another remedy for the error.

Here, however, Local 188 has no remedy other than a writ of mandate for PERB's decision not to issue a complaint on the basis of an erroneous construction of the applicable statutes.

In this regard, Gov. Code, § 3509.5 provides in pertinent part as follows:

> (a) Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case, except a decision of the board not to issue a complaint in such a case, ... may petition for a writ of extraordinary relief from that decision or order. . . .

This is an unfair practice case. According to Government Code section 3509.5, a writ of extraordinary relief is the only

judicial review available to Local 188 for a final decision of PERB. However, because the final decision in this case was a decision of the Board not to issue a complaint, the statutes provide no method at all by which Local 188 can obtain judicial review of PERB's erroneous construction of the applicable statutes.

As stated previously, because the California Constitution grants judicial authority to the superior courts to conduct proceedings for extraordinary relief in the nature of mandamus, the Legislature may not prohibit the courts from reviewing an administrative agency's ruling by way of a writ of mandate unless the Legislature has provided a different method for judicial review of the agency's ruling.

Inasmuch as the Legislature has not provided any method at all for Local 188 to obtain judicial review of PERB's erroneous construction of the applicable statutes, it necessarily follows that the courts may review PERB's erroneous construction by way of a writ of mandate notwithstanding the provision of Government Code section 3509.5 that writs of extraordinary relief are not available to charging parties for review of a decision of the Board not to issue a complaint in an unfair practice case.

Belridge Farms v. Agricultural Labor Relations Board (1978) 21 Cal.3d 551 involved analogous facts. Although the Court denied a petition for a writ of review as to the decision of general counsel for the Agricultural Labor Relations Board not to issue unfair labor

practice complaints against a labor union, the Court stated that it had jurisdiction to issue a writ of mandamus even though the decision of the general counsel not to issue complaints is not judicially reviewable under Labor Code section 1160.8. However, the Court concluded that the general counsel's interpretation of the Agricultural Labor Relations Act was proper and that, for this reason, it would not issue the writ.

Cadiz v. Agricultural Labor Relations Board (1979) 92 Cal.App.3d 365 is another example of the application of this principle. The Agricultural Labor Relations Board ("ALRB") had issued an order dismissing as untimely a petition for decertification of the United Farm Workers of America ("UFW") as the collective bargaining representative of the agricultural employees of M. Caratan, Inc. (*Id.*, p. 369.) The employer and one of its employees sought a writ of mandate from the court of appeal directing the ALRB to set aside the order and count the ballots that had been cast in the decertification election. The ALRB and the UFW contended that the Court of Appeal had no jurisdiction to issue a writ of mandate. The ALRB and the UFW contended that review of ALRB orders in the Court of Appeal is exclusively by the procedural provisions of Labor Code section 1160.8. The ALRB's order did not come within those provisions because it was not a final order and did not either dismiss an unfair labor practice complaint nor direct a remedy for an unfair

labor practice complaint. (*Id.*, pp. 380-81.) The Court of Appeal rejected this contention and issued the writ of mandate sought by the petition. The Court of Appeal stated that the ALRB's order was based on an erroneous construction of Labor Code section 1156.7, subdivision (c) (*id.*, pp. 370-79), and was therefore reviewable pursuant to *Belridge* and other cases recognizing that a petition for direct review of administrative agency decisions is permissible when the basis for decision is an erroneous construction of an applicable statute, notwithstanding the fact that the decision did not come within the provisions of the statute defining appealable orders. (*Id.*, pp. 381-82.)

Thus, long-established precedent compels the conclusion that when a PERB decision not to issue a complaint in an unfair practice case is based on an erroneous construction of an applicable labor relations statute, the decision may be reviewed by the courts through an extraordinary writ petition even though the statute purports to bar judicial review of a decision of that nature.

PERB concedes there are exceptions to the rule that there is no right to judicial review of a PERB decision not to issue a complaint on the basis that an unfair practice charge fails to state a prima facie violation of the Meyers-Milias-Brown Act. The exceptions to this rule, according to PERB, are that equitable review might be appropriate in a case where PERB has made a decision not to issue a complaint: (1) if the decision violates a

constitutional right; (2) if the decision exceeds a specific grant of authority; or (3) if the decision erroneously construes an applicable statute. (PERB Brief to Court of Appeal at p. 11.)

However, PERB cites *Nishikawa Farms, Inc. v. Mahony* (1977) 66 Cal.App.3d 781, 790 for the proposition that "these limited exceptions are not to be applied even when the courts believe the labor agency's decision is erroneous." (PERB Brief at p. 12.)

So, is there a conflict between *Belridge Farms*, which holds that judicial review is available by way of a proceeding for a writ of mandate to review a decision of an agency similar to PERB when the agency's decision not to issue a complaint erroneously construes an applicable statute, and *Nishikawa Farms*, which states at p. 790, "Even if it were shown that the determination of the ALRB was erroneous, such would not be sufficient to warrant direct review of an election under the *Kyne* exception."?

There is no conflict. The alleged error in *Nishikawa Farms* was a factual determination by the Agricultural Labor Relations Board that the United Farm Workers had submitted a sufficient showing of interest for a representation election to be conducted among an incorporated farm's agricultural workers. As stated at p. 789 of the *Nishikawa Farms* decision, the rule that a Board decision to conduct a representation election may be set aside where the Board has violated a mandatory provision of the applicable statute does not extend to a circumstance where "an

erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law."

The PERB decision in this case was not based on a factual determination by the Board. PERB did not make an erroneous assessment of the facts of this case and then issue an erroneous decision not to issue a complaint on the basis of that erroneous assessment of the facts. Instead, the PERB decision in this case erroneously construed the provisions of the Meyers-Milias-Brown Act which define the scope of the matters subject to collective bargaining under the MMBA as not encompassing a decision to reduce daily firefighter shift staffing levels in the City of Richmond Fire Department. Because the issue in this case is not whether PERB made an erroneous factual determination, *Nishikawa Farms* has no application to this case. Instead, this case falls squarely within the *Belridge Farms* exception that a PERB decision may be reviewed by way of a petition for writ of mandate if the decision erroneously construes an applicable statute.

Respondent PERB's Petition for Review of the Court of Appeal decision herein of March 18, 2009, thus does not present an issue for which review is necessary to secure uniformity of decision, nor does the Petition present an important, unsettled question of law. The Petition thus does not satisfy the grounds for review specified in Rule 8.500(b)(1) of the California Rules of Court.

III. THE COURT OF APPEAL'S IMPROPER INVASION OF PERB'S EXCLUSIVE JURISDICTION CAN BE MORE APPROPRIATELY REMEDIED BY GRANTING LOCAL 188'S PETITION RATHER THAN PERB'S PETITION

Although PERB's Petition does satisfy the grounds for review specified in Rule 8.500(b)(2) of the California Rules of Court, the Petition should nevertheless be denied because the issue raised in PERB's Petition of whether the Court of Appeal exceeded its jurisdiction is also raised in Local 188's Petition for Review of the Court of Appeal decision herein of March 18, 2009, and can be more appropriately addressed and resolved by granting Local 188's Petition rather than PERB's Petition.

As Local 188 states in its Petition for Review, PERB performs the same role as the arbitration panel established by the Vallejo Charter in that PERB must decide in the first instance if firefighter staffing level changes are mandatory subjects of bargaining. (Gov. Code, §§ 3509, 3511; Stats. 2000, ch. 901 § 8.) *Fire Fighters Union v. City of Vallejo, supra*, 12 Cal.3d 608, thus compels the conclusion that where, as here, an unfair practice is filed alleging that a local public agency has decided to make firefighter staffing level reductions or personnel reductions which have the result that working conditions for firefighters become far less safe and the work performed by firefighters becomes substantially more dangerous, PERB is required by the MMBA to hold an evidentiary

hearing and make a decision on the basis of the factual record as to whether the reductions primarily involve firefighter workload and safety or the policy of fire prevention of the city.

PERB apparently agrees with Local 188 that the Court of Appeal improperly invaded PERB's exclusive jurisdiction to make any factual determinations necessary for a decision of whether an unfair practice has been committed. (See Respondent PERB's Petition for Review, pp. 11-12.) However, PERB apparently disagrees with Local 188 that PERB should have issued a complaint and held a hearing in order to make factual determinations regarding the scope-of-bargaining issues in this case. Instead, PERB contends there were no factual determinations to be made in this case because decisions to lay off employees are categorically not subject to collective bargaining. (App. Tab 2, p. 252.)

PERB's contention that the Court of Appeal has improperly invaded PERB's exclusive jurisdiction to make any factual determinations necessary to decide whether an unfair practice has been committed is manifestly in conflict with PERB's contention that there were no factual determinations to be made in this case because decisions to lay off employees are categorically not subject to collective bargaining. Inasmuch as the Court of Appeal's improper invasion of PERB's exclusive jurisdiction is also presented by Plaintiff/Appellant Local 188's Petition for Review,

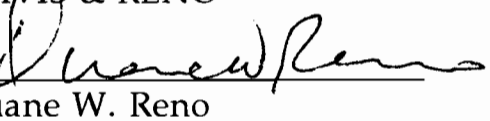
the Court can more appropriately address and resolve this issue by granting Local 188's Petition rather than PERB's Petition.

IV. CONCLUSION

For all of the reasons set forth above, PERB's Petition for Review should be denied.

Dated: May 7, 2009

DAVIS & RENO

By 
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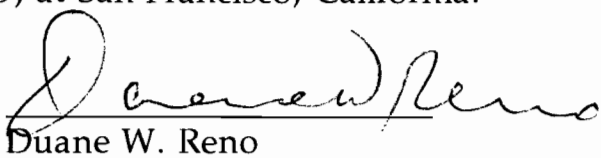
CERTIFICATE OF COUNSEL RE: WORD COUNT

I, Duane W. Reno, am the attorney of record in this action for Plaintiff/Appellant IAFF Local 188.

This Answer to Petition for Review was prepared using Wordperfect X3 and the Palamino 13 point font. The word count of the brief, as determined by the Wordperfect program, is 2,565, including footnotes but excluding the tables and this certificate.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 7, 2009, at San Francisco, California.



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PROOF OF SERVICE

I am over the age of 18 years, employed in the county of San Francisco, and not a party to the within action. My business address is 22 Battery Street, Suite 1000, San Francisco, California 94111-5524.

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I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on May 8, 2009.

Grania Duffy