Supreme Court Copy

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IN THE SUPREME COURT OF CALIFORNIA

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 188, AFL-CIO,

Petitioner and Appellant,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,

Respondent,

and

CITY OF RICHMOND

Real Party in Interest.

Case No. S172377

PERB Decision No. 1720-M

After a Decision by the Court of Appeal, First Appellate District
Case No. A114959

PUBLIC EMPLOYMENT RELATIONS BOARD'S OPENING BRIEF

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STATEMENT OF THE ISSUES

On July 8, 2009, this Court granted review of this case, particularly with respect to the following two issues:

1. Is the decision by the Public Employment Relations Board not to issue an unfair labor practice complaint under the Meyers-Milias-Brown Act subject to judicial review?

2. Is a decision to lay off firefighters for fiscal reasons a matter that is subject to collective bargaining under the Act?

INTRODUCTION

The Public Employment Relations Board (PERB or Board) is the expert labor-relations agency charged with interpreting and administering the Meyers-Milias-Brown Act (MMBA), a comprehensive statutory scheme governing labor relations between California's local government employees and their employers.[1] (Gov. Code, § 3500 et seq.) PERB has "exclusive jurisdiction" over "[t]he initial determination as to whether the

[1] PERB also administers six other statutory schemes governing California public-sector labor relations; i.e., the Educational Employment Relations Act (Gov. Code, § 3540 et seq.) [public schools (K-12) and community colleges]; Ralph C. Dills Act (Gov. Code, § 3512 et seq.) [State government]; Higher Education Employer-Employee Relations Act (Gov. Code, § 3560 et seq.) [CSU System, the UC System, and Hastings College of Law]; Trial Court Employment Protection & Governance Act and Trial Court Interpreter Employment & Labor Relations Act (Gov. Code, §§ 71600 et seq., 71800 et seq.) [trial courts]; and Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (Pub. Util. Code, § 99560 et seq.) [supervisory employees of the transit agency].

charges of unfair practices are justified; and if so, what remedy is necessary to effectuate the purposes of [the MMBA]." (Gov. Code, § 3509.)

California's Legislature specifically precluded judicial review of decisions by PERB not to issue a complaint in unfair practice cases. (Gov. Code, § 3509.5, subd. (a).)[2] The Legislature also clearly entrusted to PERB the exclusive initial jurisdiction to determine whether a subject falls within the scope of mandatory collective bargaining and the responsibility to interpret and apply the MMBA in a manner consistent and in accordance with related judicial interpretations. (Gov. Code, §§ 3504, 3510, subd. (a); see also Gov. Code, § 3509, subd. (b).) The interpretation of the relevant case law in this case was correct: the decision to lay off firefighters is not subject to negotiation, although the effects of that decision, including the workload and safety of the remaining employees, are properly the subject of collective bargaining.

PERB respectfully asks this Court to (1) vacate that portion of the appellate court's opinion that circumvents the Legislature's express language precluding judicial review of a decision by PERB not to issue a complaint in an unfair practice case and (2) affirm the correct

[2] The appellate court in this case, while leaving in tact and in fact agreeing with PERB's decision not to issue a complaint in the underlying unfair practice case, ultimately reviewed PERB's holding de novo and created an avenue of redress deliberately withheld by the Legislature.

interpretation of this Court's 35-year holding that a decision to lay off firefighters for fiscal reasons is not subject to collective bargaining under the MMBA.

STATEMENT OF THE CASE

A. Legislative Background

In 1968, California adopted as law the MMBA. In its original form, alleged violations of the MMBA were adjudicated in the superior courts pursuant to Code of Civil Procedure section 338, subdivision (a).

In 1975, California adopted as law the Educational Employment Relations Act (EERA). (Gov. Code, § 3540 et seq.) The EERA created the Educational Employment Relations Board (EERB), the precursor to PERB. Alleged violations of the EERA were subject to the exclusive initial jurisdiction of EERB for investigation and adjudication under the statutory authority granted therein.

Subsequently, additional collective-bargaining statutory schemes were adopted as law in California and placed under the agency's exclusive initial jurisdiction. PERB's exclusive initial jurisdiction over the MMBA became effective in 2001. In 2002, the Legislature amended the MMBA

to include Government Code section 3509.5, specifying that only "final" decisions or orders of the Board are subject to judicial review.[3]

B. Procedural Background

On January 12, 2004, Plaintiff/Appellant International Association of Fire Fighters, Local 188, AFL-CIO (Local 188) filed with PERB an unfair practice charge against Real Party in Interest City of Richmond (City). The unfair practice charge alleged that the City violated the MMBA, specifically Government Code section 3505, by refusing to meet and confer over a decision to lay off firefighters and by failing to provide Local 188 with necessary and relevant information.

Local 188's charge alleged that following discussions with the City regarding its budget deficit, the City Council voted to lay off 18 firefighters and close one fire station. Local 188 and the City thereafter met to discuss the layoffs on three occasions: November 19, 25, and December 15, 2003. During those meetings, Local 188 did not offer any bargaining proposals regarding firefighter safety or workload issues, but rather sought only to bargain over the decision to lay off firefighters.

On January 1, 2004, the City implemented the layoff of 18 firefighters and instituted a rotating closure of fire stations. Later that

[3] "Final" decisions in unfair practice cases include those where a complaint issues and the Board reviews and decides the matter following a full evidentiary hearing by an administrative law judge.

month, during meetings with the City, Local 188 submitted proposals regarding severance pay, sick-leave balances, and the impact of returning the fire inspector to line duty. Local 188 did not offer any safety or workload proposals.

On April 29, 2004, PERB's General Counsel issued a partial dismissal of Local 188's charge, dismissing the allegation that the City failed to meet and confer over the decision and/or the effects of the decision to lay off firefighters.[4]

On May 20, 2004, Local 188 appealed the partial dismissal to the Board itself. On December 13, 2004, the Board upheld the dismissal in *City of Richmond* (2004) PERB Decision No. 1720-M [29 PERC ¶ 31].

Local 188 filed a petition for writ of mandate with the Court of Appeal, First Appellate District. The appellate court denied Local 188's petition without prejudice on January 28, 2005.

Local 188 subsequently filed a petition for writ of mandate with the Contra Costa County Superior Court. On April 14, 2006, the superior court issued a ruling denying Local 188's petition and finding that PERB properly processed and determined Local 188's unfair practice charge.

Following entry of the superior court's judgment, Local 188 appealed the court's determination to the First Appellate District, arguing

[4] PERB issued a complaint concerning Local 188's request for information.

that the superior court misinterpreted the California Supreme Court's decision in *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 (*Vallejo*). The First Appellate District issued a published opinion on March 18, 2009, affirming the superior court's denial of Local 188's petition for writ of mandate and holding that (1) despite the express statutory exemption in the MMBA, judicial review of decisions by PERB not to issue a complaint is permissible by way of traditional mandamus in accordance with *Belridge Farms v. Agricultural Labor Relations Board* (1978) 21 Cal.3d 551 (*Belridge Farms*)[5] and (2) consistent with this Court's decision in *Vallejo*, *supra*, 12 Cal.3d 608, a decision to lay off firefighters is not subject to collective bargaining. (*International Association of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Board*, review granted July 8, 2009, S172377 (*IAFF*).) This appeal followed.[6]

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[5] *Belridge Farms* held that in limited circumstances equitable review might be appropriate in cases arising under the Agricultural Labor Relations Act where the Agricultural Labor Relations Board refuses to issue a complaint. (*Belridge Farms*, *supra*, 21 Cal.3d 551.)

[6] A Petition for Review was filed both by PERB and Local 188, respectively, in this matter. PERB sought review from this Court on grounds limited to the appropriateness of the type and standard of judicial review undertaken in this case; Local 188 sought review on other grounds. The Court granted each Petition for Review. PERB therefore is a "petitioner" in this matter (as is Local 188), but does not refer to itself as such given its current designation as "respondent" for purposes of this brief.

ARGUMENT

I. DECISIONS BY PERB NOT TO ISSUE AN UNFAIR LABOR PRACTICE COMPLAINT UNDER THE MMBA ARE NOT SUBJECT TO JUDICIAL REVIEW

As with all PERB-administered statutes, when the Legislature entrusted PERB with the exclusive initial jurisdiction to administer the MMBA, it specifically provided for judicial review of certain PERB decisions and specifically precluded judicial review of other PERB decisions. (Gov. Code, § 3509.5; see also Gov. Code, §§ 3520, subd. (b), 3542, subd. (b), 3564, subd. (b), 71639.4, subd. (a), 71825.1, subd. (a), and Pub. Util. Code, § 99562, subd. (b).)

A. Principles of Statutory Construction Leave No Doubt Regarding the Legislature's Intent to Exempt from Judicial Review Decisions by PERB Not to Issue an Unfair Practice Complaint

The first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*Dyna-Med, Inc. v. Fair Employment and Housing Commission* (1987) 43 Cal.3d 1379.) The plain language of a statute is of paramount importance in its interpretation. As noted by this Court:

> [u]nder well-established rules of statutory construction, we must ascertain the intent of the drafters so as to effectuate the purpose of the law. [Citation omitted.] Because the statutory language is generally the most reliable indicator of legislative intent, we first examine the words themselves, giving them their usual and ordinary meaning and construing them in

> context. [Citation omitted.] When statutory language is clear and unambiguous, 'there is no need for construction and courts should not indulge in it.'

(*Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268; see also *Casterson v. Superior Court of Santa Cruz County* (2002) 101 Cal.App.4th 177, 187.)

Further, when ascertaining legislative intent, a court cannot "create exceptions, contravene plain meaning, insert what is omitted, omit what is inserted, or rewrite the statute." (*San Francisco Unified School District v. San Francisco Classroom Teachers Association* (1990) 222 Cal.App.3d 146, 149.)

PERB does not dispute that the ultimate resolution of the construction of a statute belongs to the courts. (*Local 21, International Federation of Professional and Technical Engineers v. Bunch* (1995) 40 Cal.App.4th 670.) Nevertheless, a court's ultimate resolution of statutory construction principles should not negate a clear and unambiguous legislative directive. (*Henning v. Industrial Wage Commission* (1988) 46 Cal.3d 1262.) The courts should not permit indirectly what the Legislature forbade directly. (*Ibid.*)

Judicial review of PERB's decision not to issue a complaint in this case contravened the clear and unambiguous language of Government Code section 3509.5, subdivision (a) and created an avenue of redress deliberately withheld from the express provisions of the MMBA.

B. The MMBA Expressly Precludes Extraordinary Relief When PERB Decides Not to Issue an Unfair Practice Complaint

The Legislature's clear and unambiguous language in the MMBA concerning judicial review of PERB decisions provides:

> 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*, and any party to a final decision or order of the board in a unit determination, representation, recognition, or election matter that is not brought as an unfair practice case, may petition for a writ of extraordinary relief from that decision or order. A board order directing an election may not be stayed pending judicial review.

(Gov. Code, § 3509.5, subd. (a); emphasis added.)

"[T]he Legislature has the power to declare by statute what orders are appealable, and, unless a statute does so declare, the order is not appealable." (*Modern Barber Colleges, Inc. v. California Employment Stabilization Commission* (1948) 31 Cal.2d 720, 728 (*Modern Barber*); see also *City of Irvine v. Southern Calif. Assoc. of Governments* (2009) 175 Cal.App.4th 506, 516-517.)

The Legislature's intent to exempt from extraordinary relief decisions by PERB not to issue a complaint in unfair practice cases could

not be more clear in the MMBA and other PERB-administered statutes.[7] No appellate court has ever, in PERB's 33-year history, affirmed judicial review of a decision by PERB not to issue a complaint, until the First Appellate District did so in this case.

C. The NLRA and ALRA Differ Significantly from the MMBA in Key Areas

While PERB may rely on precedent established under the National Labor Relations Act (NLRA)[8] when interpreting the various collective-bargaining statutes entrusted to its jurisdiction, where the language is substantially different, such reliance is not warranted. (*Union of American Physicians and Dentists v. County of Los Angeles* (1983) 144 Cal.App.3d 236.) Unlike the express provisions in the MMBA precluding judicial review of decisions by PERB not to issue a complaint, the NLRA states: "Any person aggrieved by a final order of the [National Labor Relations Board] granting or denying in whole or in part the relief sought may obtain a review of such order . . . ." (29 U.S.C. § 160, subd. (f).)

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[7] Indeed a legislative amendment could have—but never has—been effectuated to clarify any ambiguity in this area of statutory law.

[8] The NLRA, codified at 29 U.S.C. § 151 et seq., is the federal statutory scheme governing private-sector labor relations; it is administered by the National Labor Relations Board (NLRB).

The language in the Agricultural Labor Relations Act (ALRA)[9] is almost identical to that in the NLRA. (Lab. Code, § 1160.8.) Both the NLRA and ALRA are silent with regard to review of "non-final" decisions, including decisions not to issue a complaint in unfair practice cases.

The United States Supreme Court case of *Leedom v. Kyne* (1958) 358 U.S. 184 frames the basis for judicial review of non-final, non-reviewable decisions under the NLRA and ALRA. In that case, the petitioner sought review of a non-final decision by the NLRB to certify, in contrast to explicit statutory language, a particular bargaining unit comprised of both "professional" and "non-professional" employees. The Court, in reviewing the matter, ultimately reasoned that where Congress grants a "right" (in this case, for the "professional employees" to have their own bargaining unit), it must, absent evidence to the contrary, be held that Congress intended for that right to be enforced. (*Id.* at 189.) And if the administrative agency did not fulfill its duty to enforce that right, the courts should step in to do so. (*Id.* at 189.)

But there exists an important difference, as acknowledged by this Court, between a legislative failure to provide for enforcement of a granted right and a deliberate legislative withholding of a right to judicial

[9] The ALRA, codified at Labor Code section 1140 et seq., is California's statutory scheme governing private-sector labor relations for agricultural workers; it is administered by the Agricultural Labor Relations Board (ALRB).

review. (*Modern Barber*, *supra*, 31 Cal.2d 720.) Specifically, in *Modern Barber*, this Court explained that a petitioner is not entitled to mandamus merely because the normal remedy may be less satisfactory than mandamus. (*Id.* at 724.) The Court stated:

> Except as the Constitution otherwise provides, the Legislature has complete power to determine the rights of individuals. It may create new rights or provide that rights which have previously existed shall no longer arise, and it has full power to regulate and circumscribe the methods and means of enjoying those rights, so long as there is no interference with Constitutional guarantees.

(*Id.* at 726.)

Accordingly, while California courts have approved reliance on precedent established under the NLRA and ALRA to interpret the MMBA, both the NLRA and ALRA are distinguishable from the MMBA when it comes to judicial review of decisions not to issue a complaint. Where the NLRA and ALRA are completely silent, the MMBA and other PERB-administered statutes contain explicit language precluding judicial review in such cases.

The rationale in *Leedom v. Kyne*, *supra*, 358 U.S. 184 is inapplicable to this case for the simple reason that California's Legislature clearly expressed in the MMBA and other PERB-administered statutes that it did not intend for decisions by PERB not to issue unfair practice

complaints to be subject to judicial review. Government Code section 3509.5, subdivision (a) unambiguously provides for judicial review of certain Board decisions. This same section just as unambiguously precludes judicial review of other Board decisions. Applying *Leedom v. Kyne*, *supra*, 358 U.S. 184 to this case directly contradicts the language adopted by the Legislature in the MMBA.

1. The Procedures for Administering the NLRA and ALRA Also Differ Significantly in Key Areas

Generally the parameters for determining whether a complaint should issue in an unfair practice case are substantially similar under the ALRA, NLRA, and MMBA. (Lab. Code, § 1149; 29 U.S.C. § 153, subd. (d); Gov. Code, § 3509, subd. (b).) Nonetheless, important differences exist in the procedural safeguards available through the NLRB and ALRB on the one hand, and PERB on the other.

Administrative decisions by staff at the NLRB and ALRB not to issue a complaint in unfair practice cases may be appealed only to the agency's general counsel. (29 U.S.C. § 153, subd. (d); Lab. Code, § 1149.) Subsequent decisions by the general counsel to sustain the refusal to issue a complaint are non-final and non-reviewable. (29 U.S.C. § 160, subd. (f); Lab. Code, §§ 1160.8, 1160.9; *Belridge Farms*, *supra*, 21 Cal.3d 551, 555, fn. 1, 556, fn. 2; *Baker v. Int'l Alliance of Theatrical Stage Employees* (9th Cir. 1982) 691 F.2d 1291, 1295.) Parties aggrieved by a

PERB decision not to issue a complaint, however, may appeal the decision directly to the Board itself. (Cal. Code. Regs., tit. 8, § 32635.)

These procedural differences are key because, like the statutory distinctions with respect to judicial review under the NLRA and ALRA on the one hand, and the MMBA on the other, they underscore the inapplicability of the holding in *Belridge Farms*, *supra*, 21 Cal.3d 551 to this case.

D. The Holding in *Belridge Farms* Allowing Review of Certain Decisions by the ALRB is Inapplicable to Decisions by PERB Not to Issue a Complaint

In *Belridge Farms*, *supra*, 21 Cal.3d 551, this Court determined that under the ALRA, limited circumstances exist in which equitable review of a decision by the ALRB might be appropriate. (*Ibid.*) The Court affirmed that while a general immunity exists under the ALRA from judicial review of decisions by the ALRB not to issue unfair practice complaints, federal courts interpreting the NLRA have exercised equitable powers to review such decisions when (1) the complaining party raises a colorable claim that the decision violates a constitutional right, (2) the decision exceeds a specific grant of authority, or (3) the decision is based on an erroneous construction of an applicable statute. (*Belridge Farms*, *supra*, 21 Cal.3d 551, 556-557.) These exceptions are very narrow and courts should be cautious in applying them, especially where the legislative policy against judicial intervention is explicitly stated. (*Thomas S. Castle*

Farms v. ALRB (1983) 140 Cal.App.3d 668, 675; *Nishikawa Farms, Inc. v. Mahony* (1977) 66 Cal.App.3d 781, 789.)

This Court acknowledged in *Belridge Farms* the nearly identical language in the NLRA and ALRA, wherein both statutory schemes bestow "final authority" on the agency's general counsel to dismiss charges on behalf of the board. (*Belridge Farms*, *supra*, 21 Cal.3d 551; see also 29 U.S.C. § 153, subd. (d); Lab. Code, § 1149.) This Court also acknowledged that, given the similarities in the language of the NLRA and ALRA, it should be presumed that the Legislature intended its language in the later enactment be given a like interpretation. (*Belridge Farms*, *supra*, 21 Cal.3d 551, 557.) Applying federal precedent to the ALRA was warranted in the circumstances presented in *Belridge Farms*, *supra*, 21 Cal.3d 551.

In contrast, applying the holding in *Belridge Farms* to decisions by PERB not to issue a complaint in unfair practice cases is neither warranted nor proper. Where, as here, the statutory language is substantially different, reliance on interpretations of the statute(s) is unwarranted. (*Union of American Physicians and Dentists v. County of Los Angeles*, *supra*, 144 Cal.App.3d 236.) Indeed in *Cadiz v. ALRB* (1979) 92 Cal.App.3d 365, the appellate court acknowledged that the holding in *Belridge Farms*, *supra*, 21 Cal.3d 551 on this point should be limited to

the interpretation of only those statutory provisions that derive from the NLRA. (*Id.* at 374.)

As discussed above, the MMBA and other PERB-administered statutes contain explicit language precluding judicial review of decisions not to issue a complaint in unfair practice cases, whereas the NLRA and ALRA are silent on the subject. Also, unlike at the NLRB and ALRB, PERB's General Counsel is not the *final* authority when it comes to dismissing unfair practice charges; instead, such decisions by PERB's General Counsel not to issue an unfair practice complaint may be appealed to the Board itself. (Cal. Code. Regs., tit. 8, § 32635.) These significant statutory and procedural differences make the holding in *Belridge Farms*, *supra*, 21 Cal.3d 551 inapplicable to decisions by PERB not to issue a complaint in unfair practice cases.

1. Allowing Review of Such PERB Decisions Under the Guise of Traditional Mandamus Circumvents the MMBA

Like in *Belridge Farms*, *supra*, 21 Cal.3d 551, the decision by PERB giving rise to this litigation (i.e., the decision not to issue a complaint concerning Local 188's allegations that the City committed an unfair labor practice by failing to negotiate its layoff decision) was

judicially reviewed by way of traditional mandamus.[10] Traditional mandamus is used to review non-adjudicatory actions or decisions when the agency is not required by law to hold an evidentiary hearing. (*Personnel Commission v. Board of Education* (1990) 223 Cal.App.3d 1463, 1466;[11] *Vernon Fire Fighters v. Vernon* (1980) 107 Cal.App.3d 802, 808-809.) In conducting review by traditional mandamus, a court is limited to the question of whether the lower tribunal abused its discretion

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[10] Judicial review of most administrative agency decisions is obtained by a proceeding for writ of traditional mandamus (Code Civ. Proc., § 1085) or administrative mandamus (Code Civ. Proc., § 1094.5). The applicable type of mandamus is determined by the nature of the administrative action or decision. (*Ohton v. Board of Trustees of the California State University* (2007) 148 Cal.App.4th 749.) Writs of traditional mandamus are extraordinary in nature. (8 Witkin, Cal. Procedure (4th ed. 1997) Extraordinary Writs, § 1, pp. 782-783; § 6, pp. 785-786.)

[11] In *Personnel Commission v. Board of Education*, *supra*, 223 Cal.App.3d 1463, the appellate court noted as follows with respect to a traditional writ of mandate:

> Code of Civil Procedure section 1085, the 'traditional' mandamus statute, may be invoked when, as here, a party seeks judicial review of non-adjudicatory administrative actions. Judicial intervention is warranted when a public entity adopts a rule or makes a policy decision of general application which is shown to be arbitrary, capricious, contrary to public policy, unlawful, or procedurally unfair. Whether the action is tainted by one or more of these factors is a question of law. With respect to these questions the trial and appellate courts perform essentially the same function, and the determinations of the trial court are not conclusive on appeal. (Citations omitted.)

(*Id.* at 1466.)

in either failing to compel or compelling the performance of the action at issue. (*American Board of Cosmetic Surgery v. Medical Board of California* (2008) 162 Cal.App.4th 534, 547-548.)

As noted above, under the MMBA, a party "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 writ of extraordinary relief from that decision or order." (Gov. Code, § 3509.5, subd. (a); emphasis added.)

A holding that courts have equitable powers to conduct exactly the kind of review the Legislature so clearly withheld—or one that fails to harmonize the overlapping statutory writ of review procedure in the MMBA and the traditional mandamus procedure in the Code of Civil of Procedure—evades the MMBA's express provisions.[12]

[12] A holding of this nature not only subjects every decision by PERB not to issue a complaint in an unfair practice case to judicial review but also subjects the courts to review of each and every such decision.

E. Even if *Belridge Farms* Applies, PERB's Decision in this Case was Not Based on Erroneous Statutory Construction[13]

Local 188 would like this Court to hold that PERB—by way of its interpretation of *Vallejo*, *supra*, 12 Cal.3d 608—erroneously construed the MMBA, in particular Government Code section 3510, subd. (a), which provides in relevant part:

> The provisions of this chapter shall be interpreted and applied by the board in a manner consistent with and in accordance with judicial interpretations of this chapter.

(*Ibid.*; see also Gov. Code, § 3509, subd. (b) ["The Board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter."].) Such a holding would arguably stand for the proposition that every Board decision is subject to judicial review if it cites an existing judicial interpretation of the MMBA.

The origin of the "erroneous construction" exception involved a refusal by an administrative agency to even consider the charges lodged before it, due to the agency's incorrect interpretation of the statute of limitations. (*Southern California District Council of Laborers v. Ordman* (C.D. Cal. 1970) 318 F.Supp. 633.) The federal court cautioned that the

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[13] The other two exceptions delineated in *Belridge Farms*, *supra*, 21 Cal.3d 551 (i.e., where (1) a constitutional right is violated or (2) a specific grant of authority is exceeded) to possibly permit equitable review, are wholly inapplicable in this case. (*IAFF*, *supra*, review granted July 8, 2009, S172377.)

particular circumstances presented in the case were "extreme" and therefore warranted "limited judicial action" to prevent the "obliteration *ab initio*" of rights created by Congress. (*Id.* at 635-636.)

This case does not present the kind of "extreme" circumstances or "obliteration *ab inito*" addressed by *Southern California District Council of Laborers v. Ordman*, *supra*, 318 F.Supp. 633. Here, the Board correctly interpreted the MMBA when assessing Local 188's unfair practice allegations and, in accordance with existing judicial interpretations—i.e., the seminal case on the issue, *Vallejo*, *supra*, 12 Cal.3d 608—concluded that Local 188 did not provide evidence sufficient to warrant issuance of a complaint. Where the unfair practice charge or evidence presented is insufficient to establish a prima facie case of a violation, the Board "shall refuse to issue a complaint . . . ." (Cal. Code. Regs., tit. 8, § 32635.) "Neither the statute nor the Constitution, gives a hearing where there is no issue to decide . . . ." (*Fay v. Douds* (2d Cir. 1949) 172 F.2d 720, 725.)

Likewise, citing to the United States Supreme Court in *Ford Motor Co. v. National Labor Relations Board* (1979) 441 U.S. 488, the First Appellate District long ago held that "the relationship of a reviewing court to an agency such as PERB, whose primary responsibility is to determine the scope of the statutory duty to bargain and resolve charges of unfair refusal to bargain, is generally one of deference." (*Oakland Unified School*

District v. PERB (1981) 120 Cal.App.3d 1007, 1012.) A reasonably defensible construction of the statute should be adopted by the court even if the court may prefer another view. (*Ibid.*)

Not only did PERB not abuse its discretion in this case, but its proper interpretation and application of the MMBA should in fact be afforded due deference.[14]

II. A DECISION TO LAY OFF FIREFIGHTERS IS NOT SUBJECT TO COLLECTIVE BARGAINING

The MMBA expressly exempts the local government employer from any duty to bargain the merits, necessity, or organization of any service or activity provided by law or executive order. (Gov. Code, § 3504.) Both PERB and California's courts have consistently held that a public agency's decision to lay off employees relates to the merits, necessity, and organization of the employer's service or activity and is a matter of managerial prerogative. (*Oakland Unified School District* (1981) PERB Decision No. 178 [5 PERC ¶ 12149]; *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375 [8 PERC ¶ 15021]; *State of*

[14] While this Court did not ask the parties to specifically address the issue raised in PERB's Petition for Review regarding the de novo review undertaken in this case by the appellate court, PERB respectfully reasserts that, when judicial review is authorized, the Board's decisions may not be reviewed using a de novo standard of review. (*Ford Motor Co. v. National Labor Relations Board*, *supra*, 441 U.S. 488; *Baker v. Int'l Alliance of Theatrical Stage Employees*, *supra*, 691 F.2d 1291.)

California (Department of Personnel Administration) (1987) PERB Decision No. 648-S [13 PERC ¶ 20013]; *San Jacinto Unified School District* (1994) PERB Decision No. 1078 [19 PERC ¶ 26036].) Therefore, the layoff decision itself is not subject to mandatory collective bargaining. This position was first adopted in the private sector by the United States Supreme Court and has been consistently applied by PERB since 1982, regardless of the occupation of the employees facing layoffs. (*First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666; *California State University (San Diego)* (2008) PERB Decision No. 1955-H [32 PERC ¶ 74] (San Diego State University faculty); *Regents of the University of California* (1999) PERB Decision No. 1354-H [23 PERC ¶ 30173] (UCLA Medical Center employees); *Regents of the University of California (Lawrence Livermore National Laboratory)* (1997) PERB Decision No. 1221-H [21 PERC ¶ 28161] (protective service officers); *Regents of the University of California* (1997) PERB Decision No. 1189-H [21 PERC ¶ 28066] (UCI Medical Center employees); *State of California (Departments of Personnel Administration and Transportation)* (1997) PERB Decision No. 1227-S [22 PERC ¶ 29007] (California Department of Transportation workers); *State of California (Department of Forestry and Fire Protection)* (1993) PERB Decision No. 999-S [17 PERC ¶ 24112] (firefighters); *State of California (Department of Personnel Administration)*, *supra*, PERB

Decision No. 648-S [13 PERC ¶ 20013] (engineers and architects); *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223 [6 PERC ¶ 13162] (school teachers).)

Nothing exists in this Court's decision in *Vallejo*, *supra*, 12 Cal.3d 608, or the text of the MMBA, to warrant a departure from PERB's now 27-year precedent that a decision to conduct layoffs is a matter of fundamental managerial concern and should be left to the employer's prerogative. (*Newman-Crows Landing Unified School District*, *supra*, PERB Decision No. 223 [6 PERC ¶ 13162].)

A. Decision Bargaining vs. Effects Bargaining

In *Vallejo*, this Court held that an employer does not have an obligation to negotiate the decision to lay off employees, but it must bargain any negotiable effects of the layoff decision.

> Thus cases under the NLRA indicate that an employer has the right unilaterally to decide that a layoff is necessary, although it must bargain about such matters as the *timing* of layoffs and the *number* and *identity* of the employees affected.

(*Vallejo*, *supra*, 12 Cal.3d 608, 621; emphasis in original.)

This rule is consistent with long-standing state and federal precedent that an employer may exercise its managerial prerogative to eliminate or reduce services and lay off employees "free from the constraints of the bargaining process." (*First National Maintenance Corp. v. NLRB*, *supra*,

452 U.S. 666, 678; *NLRB v. Royal Plating and Polishing Co.* (3d Cir. 1965) 350 F.2d 191, 196; *Highland Ranch v. ALRB* (1981) 29 Cal.3d 848, 857.)

In *First National Maintenance Corp. v. NLRB, supra*, 452 U.S. 666, the employer effected a reduction in its workforce when it canceled a contract for maintenance services and laid off employees providing services under the contract. The United States Supreme Court determined the employer had no obligation to negotiate its decision.

> We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, [fn. omitted] and we hold that the decision itself is *not* part of [NLRA] § 8(d)'s "terms and conditions," [fn. omitted] over which Congress has mandated bargaining.

(*Id.* at 686; emphasis in original; see also *NLRB v. Transmarine Navigation Corp.* (9th Cir. 1967) 380 F.2d 933.)

Consistent with its exclusive initial jurisdiction to determine scope-of-bargaining issues,[15] PERB likewise has long held that an employer's decision to lay off employees is not a negotiable term and condition of employment.

> The layoff of employees unquestionably impacts on their wages, hours, and other conditions of employment. It may concurrently

[15] Gov. Code, § 3504.

> impact upon those employees who remain. Nevertheless, the determination that there is insufficient work to justify the existing number of employees or sufficient funds to support the workforce, is a matter of fundamental managerial concern which requires that such decisions be left to the employer's prerogative.

(*Newman-Crows Landing Unified School District*, *supra*, PERB Decision No. 223, pp. 12-13 [6 PERC ¶ 13162]; see also *State of California (Department of Forestry and Fire Protection)*, *supra*, PERB Decision No. 999-S, pp. 15-16 [17 PERC ¶ 24112] [holding that employer's fundamental management prerogative to reduce operations includes the right to designate certain positions in specific locations to be reduced through layoff].)

PERB has also consistently held that parties must negotiate over any foreseeable effects of the decision to implement layoffs. (See e.g., *Mt. Diablo Unified School District* (1983) PERB Decision No. 373 [8 PERC ¶ 15017].) The employer's duty to provide notice and a reasonable opportunity to bargain the effects arises as soon as a firm decision is made, i.e., when the ultimate decision-making authority has formally adopted a course of action. (*Mt. Diablo Unified School District*, *supra*, PERB Decision No. 373 [8 PERC ¶ 15017].) Once the union requests to negotiate the effects of a permissive or non-negotiable change, the employer is obligated to negotiate over all reasonably foreseeable effects thereof.

(*Regents of the University of California (Lawrence Livermore National Laboratory)*, *supra*, PERB Decision No. 1221-H [21 PERC ¶ 28161].) It is in this manner that many of the important considerations of safety, workload, and seniority are negotiated. Often such "effects bargaining" is accomplished even before the decision has been implemented. And with the exception of the decision itself, much of the union's concerns related to workload, safety, shift-staffing levels, and bumping rights can be adequately addressed through effects bargaining.

B. Non-Negotiable Layoff Decisions vs. Negotiable Subcontracting Decisions

Applying the United States Supreme Court's decision in *First National Maintenance Corp. v. National Labor Relations Board*, *supra*, 452 U.S. 666 to the MMBA, this Court has held that "[d]ecisions to close a plant or to reduce the size of an entire workforce . . . are of a different order from a plan to transfer work duties between various employees." (*Building Material & Construction Teamsters' Union, Local 216 v. Farrell* (1986) 41 Cal.3d 651, 663.) This is because decisions to close a plant or to reduce the size of an entire workforce affect the amount of work that can be accomplished or the nature and extent of the services that can be provided. (*Ibid.*) Accordingly, these types of decisions are labeled "fundamental management" decisions. (*Id.* at 664.)

On the other hand, subcontracting involves replacing employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment. (*Fibreboard Paper Products Corp. v. National Labor Relations Board* (1964) 379 U.S. 203 (*Fibreboard*).) Subcontracting is unquestionably a matter within the statutory phrase "other terms and conditions of employment" and is a mandatory subject of bargaining within the scope of the NLRA. (*Id.* at 204-205, 208, 210; see also *Ventura County Community College District* (2003) PERB Decision No. 1547 [27 PERC ¶ 133], citing *Fibreboard, supra*, 379 U.S. 203; *Arcata Elementary School District* (1996) PERB Decision No. 1163 [20 PERC ¶ 27120], citing *Fibreboard, supra*, 379 U.S. 203.)

This Court recognized the distinction between non-negotiable layoffs and negotiable decisions to subcontract bargaining-unit work in *Vallejo, supra*, 12 Cal.3d 608. Specifically, when the layoff decision results from a decision to subcontract bargaining-unit work, the decision to subcontract the work and lay off employees is subject to bargaining. (*Ibid.*)

The crucial difference between an employer's decision to reduce its workforce through layoffs and a decision to subcontract bargaining-unit work is in the effect that mandatory negotiations may have on the employer's course of action. (*First National Maintenance Corp. v. NLRB,*

supra, 452 U.S. 666, 686; *Ventura County Community College District* (2003) PERB Decision No. 1547.) When the employer's decision to subcontract bargaining-unit work is based on financial considerations, mandatory negotiations may result in fiscal concessions likely to alter the employer's course of action, without intruding in areas of managerial prerogative, by requiring the employer to make capital investments or alter its basic operation. (*First National Maintenance Corp. v. NLRB*, *supra*, 452 U.S. 666; *Fibreboard*, *supra*, 379 U.S. 203.)

A careful reading of *Vallejo*, *supra*, 12 Cal.3d 608 makes clear that this Court determined the obligation to negotiate attaches only to the negotiable effects of a layoff decision, not to the decision itself. When discussing the union's proposal to negotiate "personnel reduction," the Court in *Vallejo* correctly applied the rule and stated:

> *To the extent*, therefore, that the decision to lay off some employees affects the workload and safety of the remaining workers, it is subject to bargaining and arbitration for the same reasons indicated in the prior discussion of the manning proposal.

(*Vallejo*, *supra*, 12 Cal.3d 608, 622; emphasis added.)[16]

[16] This Court left no question in *Vallejo*, *supra*, 12 Cal.3d 608 that an employer's decision to lay off employees—irrespective of whether that decision involves a change in shift-staffing levels—need not be negotiated; as stated by the Court, specifically with regard to the "personnel reduction" decision, "an employer has the right unilaterally to decide that a layoff is necessary, although it must bargain about such

Such decisions undeniably impact the terms and conditions of employment for both the departing and remaining employees. Yet, an employer's obligation to bargain attaches only to the effects of the non-negotiable layoff decision. (*NLRB v. Royal Plating and Polishing Co.*, *supra*, 350 F.2d 191.)

> We conclude that an employer faced with the economic necessity of either moving or consolidating the operations of the failing business has no duty to bargain with the union respecting its decision to shut down. [Fn. omitted.]
>
> However, . . . an employer is still under an obligation to notify the Union of its intentions so that the union may be given an opportunity to bargain over the rights of the employees whose employment status will be altered by the managerial decision. [Citations.] Bargainable issues such as severance pay, seniority and pensions, among others, are necessarily of particular relevance and importance.

(*Id.* at 196.)

Local 188 would like this Court to believe that the better rule is one that presumes any decision to lay off firefighters is negotiable. But this argument was considered and rejected by the United States Supreme Court as unworkable and "ill-suited to advance harmonious relations between employer and employee." (*First National Maintenance Corp v. NLRB*,

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matters as the *timing* of the layoffs and the *number* and *identity* of the employees affected." (*Id.* at 621; emphasis in original.)

supra, 452 U.S. 666, 684.) The high Court held in that case that the purposes of the statutory schemes governing collective bargaining were better served if the parties entered into negotiations with a clear understanding of which issues constituted mandatory subjects of bargaining and which were merely permissive. (*Ibid.*)

Local 188 would also like this Court to hold that PERB should interpret *Vallejo*, *supra*, 12 Cal.3d 608 in a manner contrary to long-standing precedent in California. This concept can easily be, and essentially was already, rejected by this Court pursuant to *Vallejo*, *supra*, 12 Cal.3d 608. Indeed the holding in *Vallejo*, *supra*, 12 Cal.3d 608, as interpreted by the appellate court and PERB in this case, promotes labor stability and encourages parties to negotiate expeditiously and with a shared commitment to an early resolution. Both the appellate court and PERB correctly interpreted *Vallejo*, *supra*, 12 Cal.3d 608 to hold that a decision to lay off firefighters is not subject to collective bargaining, although the effects of that decision are negotiable.

C. Layoffs for Fiscal Reasons are Not Unique

Any assertion that a decision for *fiscal reasons* to lay off employees is somehow an exception that transforms an otherwise non-negotiable decision into a negotiable one must be rejected as unsupported by law.

Local 188 will undoubtedly argue that *Building Material & Construction Teamsters Union, Local 216 v. Farrell*, *supra*, 41 Cal.3d 651 supports such an assertion. But in *Building Material & Construction Teamsters Union, Local 216 v. Farrell*, *supra*, 41 Cal.3d 651, where an employer eliminated bargaining-unit positions and reassigned the duties of those positions to employees outside the bargaining unit, this Court found the employer's decision was negotiable because it involved subcontracting bargaining-unit work. (*Ibid.*)

The same holds true for any argument that *Rialto Police Benefit Association v. City of Rialto* (2007) 155 Cal.App.4th 1295 stands for the proposition that a layoff decision made for fiscal reasons must be negotiated. In *Rialto Police Benefit Association v. City of Rialto*, *supra*, 155 Cal.App.4th 1295, where the city contracted with the county to provide policing services, in lieu of maintaining the city's own police force, the appellate court found the city was required to negotiate its decision because it involved transferring bargaining-unit work. (*Ibid.*)

There simply is no basis on which to conclude that fiscal reasons, which are inherent in and intertwined with decisions to lay off employees, serve to transform the non-negotiable decision to lay off employees into a negotiable one. Any notion to the contrary simply seeks to make any and all public-sector layoffs negotiable.

CONCLUSION

The appellate court's acknowledgment in this case that California's Legislature clearly exempted from judicial review a decision by PERB not to issue an unfair practice complaint under the MMBA should have been the end of the discussion. The same is true for the determination by both the appellate court and PERB that the decision to lay off firefighters for fiscal reasons need not be negotiated under the MMBA.

For these reasons, PERB respectfully asks this Court to (1) vacate—as inconsistent with the Legislature's clear and unambiguous intent—that portion of the appellate court's opinion that circumvents the express statutory language precluding judicial review of a decision by PERB not to issue an unfair labor practice complaint and (2) affirm—as consistent with this Court's holding in *Vallejo*—the determination by both the appellate court and PERB that a decision to lay off firefighters for fiscal reasons is not subject to collective bargaining under the MMBA.

Dated: September 8, 2009 Respectfully submitted,

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By _____
ALICIA A. CLEMENT, Regional Attorney

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PUBLIC EMPLOYMENT RELATIONS BOARD

COUNSEL'S CERTIFICATE OF COMPLIANCE

WITH CALIFORNIA RULES OF COURT, RULE 8.504(d)

Counsel of Record hereby certifies that pursuant to rule 8.504(d) of the California Rules of Court, the enclosed brief of Respondent Public Employment Relations Board is produced using 13-point Roman type font including footnotes and contains 7,137 words, which is less than the 8,400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: September 8, 2009

TAMI R. BOGERT
Declarant
PUBLIC EMPLOYMENT RELATIONS BOARD

PROOF OF SERVICE BY MAIL
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COURT NAME: IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

SUPREME COURT CASE NO.: S172377

FIRST APPELLATE DISTRICT/DIVISION THREE CASE NO.: A114959

CONTRA COSTA COUNTY SUPERIOR COURT CASE NO.: N050232

CASE NAME: *INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 188 v. PUBLIC EMPLOYMENT RELATIONS BOARD; CITY OF RICHMOND*

I declare that I am a resident of or employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within entitled cause. I am an employee of the Public Employment Relations Board, 1031 18th Street, Sacramento, California 95811. I am readily familiar with the ordinary practice of the business of collecting, processing and depositing correspondence in the United States Postal Service and that the correspondence will be deposited the same day with postage thereon fully prepaid.

On September 8, 2009, I served PUBLIC EMPLOYMENT RELATIONS BOARD'S OPENING BRIEF regarding the above-referenced case on the parties listed below via United States Postal Service.

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Case No. A114959

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Case No. N050232

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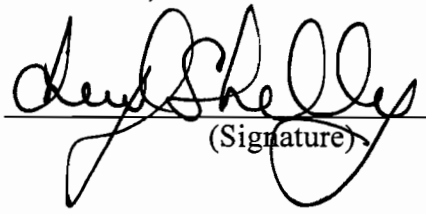
I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on September 8, 2009, at Sacramento, California.

Cheryl Shelly
(Type or print name)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