No. S172377

IN THE SUPREME COURT OF CALIFORNIA

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

PETITIONER IAFF LOCAL 188'S REPLY BRIEF IN RESPONSE TO RESPONDENT PERB'S ANSWER BRIEF ON THE MERITS

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

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I. INTRODUCTION

On October 3, 2007, after Respondent Public Employment Relations Board ("PERB") had issued its decision herein but before this case was briefed in the First Appellate District Court of Appeal,[1] the Fourth Appellate District Court of Appeal issued its opinion in *Rialto Police Benefit Association v. City of Rialto* (2007) 155 Cal.App.4th 1295 that a city's decision to reduce labor costs by laying off its entire police force and contracting with the county sheriff for law enforcement services was a mandatory subject of bargaining under the Meyers-Milias-Brown Act (Gov't Code §§ 3500 et seq.) ("MMBA") because the layoff decision met the three-part balancing test which *Building Material and Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651 held to be determinative of whether a management action is within the scope of representation under the MMBA.

Rialto is manifestly at odds with Respondent PERB's position that layoff decisions for economic reasons are categorically excluded from the scope of representation under the MMBA, and at odds with PERB's ruling herein that, on this basis, firefighters have no right to bargain over layoff decisions even when the layoffs will affect the remaining employees' workload and safety.

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[1] Local 188 filed its opening brief in the First Appellate District Court of Appeal on October 26, 2007.

Thus, *Rialto* held that the legal standard for determination of whether police officer layoff decisions for economic reasons are mandatory subjects of bargaining under the MMBA (the three-part *Building Material* balancing test) is different from the legal standard that PERB used in this case for a firefighter layoff decision (layoff decisions for economic reasons are categorically not subject to bargaining).

Until *Rialto*, Petitioner/Appellant IAFF Local 188 had contended in this case that *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 621-622, and the many appellate opinions that have cited *Vallejo* establish that a decision to lay off firefighters is a mandatory subject of bargaining under the MMBA when, as here, the layoffs are shown to affect the remaining employees' workload and safety. (See *Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 655-656; *Sullivan v. State Bd. of Control* (1985) 176 Cal.App.3d 1059, 1065; *Long Beach Police Officer Ass'n v. City of Long Beach* (1984) 156 Cal.App.3d 996, 1005-06; *Solano County Employees' Assn. v. County of Solano* (1982) 136 Cal.App.3d 256, 264; *San Jose Peace Officer's Assn. v. City of San Jose* (1978) 78 Cal.App.3d 935, 944-45; and *Public Employees of Riverside County, Inc. v. County of Riverside* (1977) 75 Cal.App.3d 882, 886.)

In light of *Rialto*, Local 188 expanded the basis for its contention that a decision to lay off firefighters is a mandatory

subject of bargaining under the MMBA. Local 188 contended after *Rialto* that a decision to lay off firefighters is not only a mandatory subject of bargaining when the layoffs affect the remaining employees' workload and safety but also when the layoff decision meets the three-part *Building Material* balancing test.

Thus it is true, as Respondent PERB states at pp. 13-15 of its Answer to Petitioner's Opening Brief, that Respondent PERB has not had the opportunity in this case to consider the holding of *Rialto* that layoff decisions are mandatory subjects of bargaining under the MMBA when those decisions meet the three-part *Building Material* balancing test.

However, this is not a sufficient reason in and of itself for the Court to uphold Respondent PERB's decision herein.

In this regard, the Court held in *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal. 3d 850, 867, that when, as here, a subsequent evolution of the law has made clear that a PERB decision applied the wrong legal standard in determining whether a management action is a mandatory subject of bargaining, the Court should (1) annul the PERB decision, (2) direct PERB to the correct legal standard, and (3) remand the case to PERB for enforcement of the legislative policy committed to its charge.

PERB clearly applied the wrong legal standard when it ruled herein that layoff decisions for economic reasons are categorically

excluded from the scope of representation under the MMBA. The 2000 MMBA amendments impose the duty on PERB to interpret unfair labor practices consistent with existing judicial interpretations of the MMBA. The *Building Material* decision enunciating the three-part balancing test as the proper legal standard for determining whether a management action is a mandatory subject of bargaining under the MMBA was issued in 1986, hence this legal standard was an existing judicial interpretation of the MMBA in 2000. PERB has itself applied the three-part *Building Material* balancing test to determine whether a management action is a mandatory subject of bargaining. (*San Mateo City School Dist. v. Public Employment Relations Bd., supra*, 33 Cal. 3d 850, 857-858.)

PERB's contention that PERB precedent in cases arising under other laws administered by PERB is applicable in cases arising under the MMBA, and that layoff decisions for economic reasons are therefore exceptions from this legal standard in cases arising under the MMBA as well as cases arising under other laws administered by PERB, is wrong because:

(1) the National Labor Relations Board and the United States Circuit Courts of Appeals have held that the same three-part balancing test is to be used to determine whether an employer's decision to lay off employees is within the scope of representation under the National Labor Relations Act ("NLRA"), and

(2) unlike other laws administered by PERB, the MMBA has no provision that operates to exclude layoff decisions for economic reasons from the general rule that federal precedents under the NLRA reflect the same interests as those underlying the laws administered by PERB and furnish reliable authority in the proper construction of those laws.

PERB's contention that its decision herein is subject to an extremely deferential "abuse of discretion" standard of judicial review is also wrong. PERB has no discretion to adopt and enforce an erroneous construction of the MMBA. The MMBA cannot reasonably be construed as imposing a different legal standard for determining whether a police officer layoff decision is a mandatory subjects of bargaining (under *Rialto*, layoff decisions are measured against the three-part *Building Material* balancing test) than for determining whether a firefighter layoff decision is a mandatory subject of bargaining (under PERB's decision herein, layoff decisions for economic reasons are categorically excluded from the scope of representation).

Inasmuch as PERB has itself applied the three-part *Building Material* balancing test to determine whether management actions other than layoffs are mandatory subjects of bargaining, and inasmuch as PERB has failed to offer a convincing explanation of its position that firefighter layoff decisions should be an exception to the three-part *Building Material* balancing test, it must therefore

be concluded that PERB has applied the wrong legal standard in determining whether the management action at issue in this case (firefighter layoffs) is a mandatory subject of bargaining.

PERB has thus not performed the duties imposed on it by the Legislature to (1) interpret unfair labor practices consistent with existing judicial interpretations of the MMBA and (2) apply the correct legal standard for determining whether a firefighter layoff decision is a mandatory subject of bargaining under the MMBA.

The writ of mandamus "may be issued by any court, except a municipal or justice court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station; . . . ." (Code Civ. Proc., § 1085.)

Judicial review of PERB's decision herein is therefore proper in equity and PERB may be directed by way of a writ of mandamus to enforce the correct legal standard as enunciated by this Court for determining whether a firefighter layoff decision is a mandatory subject of bargaining under the MMBA.

For these reasons and all of the other reasons set forth below, the Court should annul PERB's decision herein and remand this case for further proceedings consistent with the principles that:

A. The 2000 MMBA amendments require that PERB apply and interpret unfair labor practices consistent with existing judicial interpretations of the MMBA. (See Petitioner IAFF Local 188's Opening Brief on the Merits, pp. 21-24).

B. In 2000, existing judicial interpretations of the MMBA were that federal court decisions and National Labor Relations Board decisions construing the scope of representation under the National Labor Relations Act provide reliable authority for construction of the scope of representation under the MMBA. (See Local 188's Opening Brief, p. 24.)

C. The National Labor Relations Board and the United States Circuit Courts of Appeals have uniformly and consistently held that an employer's decision to lay off employees for economic reasons is within the scope of representation under the NLRA. (See Local 188's Opening Brief, pp. 24-36.)

D. The conclusion by the NLRB and the United States Circuit Courts of Appeals that an employer's decision to lay off employees for economic reasons is within the scope of representation under the National Labor Relations Act resulted from the application of a three-part balancing test derived from *Fibreboard Corp. v.*

NLRB (1964) 379 U.S. 203 and *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666. (See Local 188's Opening Brief, pp. 36-38.)

E. This Court held in *Building Material and Construction Teamsters' Union v. Farrell* that the same three-part balancing test determines whether a management action is within the scope of representation under the MMBA. (See Local 188's Opening Brief, pp. 38-40.)

D. Previous PERB decisions have also applied the three-part *Building Material* balancing test to determine whether management actions are mandatory subjects of bargaining. (See Local 188's Opening Brief, pp. 40-41.)

E. PERB's decision in this case was clearly erroneous and should be vacated because PERB failed to apply the three-part *Building Material* balancing test to the city's layoff decision and because PERB's position that layoff decisions for economic reasons are categorically never mandatory subjects of bargaining under the MMBA is contrary to the relevant federal precedent under the NLRA. (See Local 188's Opening Brief, pp. 41-44.)

F. Application of the three-part *Building Material* balancing test compels the conclusion that the city's decision to reduce minimum firefighter shift staffing

levels and lay off 18 firefighters was subject to the MMBA's meet-and-confer requirement. (See Local 188's Opening Brief, pp. 44-46.)

G. *Firefighters Union v. City of Vallejo* also compels the conclusion that the city's layoff decision was within the scope of representation under the MMBA. (See Local 188's Opening Brief, pp. 46-52.)

II. PERB'S CONSTRUCTION HEREIN OF THE MMBA IS NOT ENTITLED TO THE DEFERENCE WHICH THE COURT NORMALLY GIVES TO PERB DECISIONS INTERPRETING LAWS THAT PERB HAS JURISDICTION TO ADMINISTER

PERB's initial contention in its Answer Brief to Local 188's Opening Brief is that an extremely deferential "abuse of discretion" standard of judicial review should be applied to PERB decision's not to issue a complaint in this case. (Public Employment Relations Board's Answer to Petitioner's Opening Brief, pp. 5-11.)

"Abuse of discretion" is the appropriate standard of judicial review when an administrative agency has issued a decision after an evidentiary hearing. Section 1094.5, subd. (a) of the Code of Civil Procedure provides in this regard that a writ of mandamus may be issued " for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal." Section 1094.5, subd. (b) provides that "[t]he inquiry in such a case shall

extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

However, PERB's decision in this case was not based on factual determinations made by PERB after an evidentiary hearing.

Instead, PERB's decision in this case was based on a construction of the MMBA by PERB that layoff decisions for economic reasons are categorically never mandatory subjects of bargaining.

Accordingly, this case was not brought under section 1094.5 of the Code of Civil Procedure. This case was brought instead under section 1085 of the Code of Civil Procedure which, as noted above, provides that the writ of mandamus may be issued to compel performance of a duty imposed by law.

The basis upon which Local 188 seeks a writ of mandamus is that PERB had no discretion to adopt and enforce an erroneous construction of the MMBA, and that PERB failed to perform the duties imposed on it by law to (1) interpret unfair labor practices consistent with existing judicial interpretations of the MMBA and (2) apply the correct legal standard for determining whether a

firefighter layoff decision is a mandatory subject of bargaining under the MMBA.

Accordingly, the appropriate standard of judicial review of PERB's decision herein is not the section 1094.5 "abuse of discretion" standard.

The appropriate standard of judicial review of PERB decisions interpreting a law that PERB has jurisdiction to administer is normally that PERB's construction of that law "is to be regarded with deference by a court performing the judicial function of statutory construction, and will generally be followed unless it is clearly erroneous." (*San Mateo City School Dist. v. Public Employment Relations Bd., supra*, 33 Cal. 3d 850.)

> Interpretation of the statutory provision defining scope of representation thus falls squarely within PERB's legislatively designated field of expertise. Under established principles PERB's construction is to be regarded with deference by a court performing the judicial function of statutory construction, and will generally be followed unless it is clearly erroneous. (*Highland Ranch v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 848, 859 [176 Cal.Rptr. 753, 633 P.2d 949]; *J.R. Norton Co. v. Agricultural Labor Relations* Bd. (1979) 26 Cal.3d 1, 29 [160 Cal.Rptr. 710, 603 P.2d 1306]; *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 325 [109 P.2d 935].)

(*Id.*, p. 856.)

A PERB decision that a management action is not a mandatory subject of bargaining will be set aside as clearly erroneous where the PERB decision is contrary to relevant federal precedent under the NLRA and PERB has not provided a

reasonable explanation for the departure from federal precedent. (See *California Faculty Assn. v. Public Employment Relations Bd.* (2008) 160 Cal. App. 4th 609, 619-20.)

However, the rule of deference to PERB decisions construing statutes that PERB has the duty to administer does not apply where PERB's construction is inconsistent with the construction of those same statutes in a previous PERB decision. In such a case, the Court may adopt whichever construction it determines to be better reasoned. (*United Public Employees v. Public Employment Relations Board* (1989) 213 Cal.App.3d 1119, 1125-27.)

As noted above, PERB has itself applied the three-part *Building Material* balancing test to determine whether a management action is a mandatory subject of bargaining. (*San Mateo City School Dist. v. Public Employment Relations Bd., supra,* 33 Cal. 3d 850, 857-858.)

As shown below, PERB fails to offer a convincing explanation of its position that firefighter layoff decisions for economic reasons should be an exception to the three-part *Building Material* balancing test for determining whether a management action is a mandatory subject of bargaining.

PERB'S construction herein of the MMBA that layoff decisions for economic reasons are categorically excluded from the scope of representation is therefore not subject to review under an "abuse of discretion" standard nor entitled to the deference which

the court normally gives to PERB decisions interpreting laws that PERB has jurisdiction to administer.

III. PERB'S INTERPRETATION OF THE MMBA WAS CLEARLY ERRONEOUS

PERB's other contention in its Answer Brief to Local 188's Opening Brief is that its decision herein should be upheld because its interpretation of the MMBA that layoff decisions for economic reasons are categorically excluded from the scope of representation is the correct interpretation of that law.

PERB erroneously relies on *State Assn. Of Real Property Agents v. State Personnel Board* (1978) 83 Cal.App.3d 206 as an "existing judicial interpretation" supporting its decision herein that layoff decisions for economic reasons are categorically excluded from the scope of representation. This case is clearly inapposite. It did not involve meet-and-confer rights rights established by the MMBA. Instead, this case involved meet-and-confer rights established by the Bill of Rights for State Excluded Employees (Gov. Code §§ 3525-3539.5). Moreover, the holding of this case was not that the Department of Transportation had no duty to meet and confer over a layoff decision for economic reasons. Instead, the holding of this case was that the Department of Transportation had satisfied its obligation to meet and confer in good faith over the layoff decision at issue therein and, because the parties had been unable to reach agreement notwithstanding those good faith negotiations, the Department acted within its rights when it proceeded afterwards to

unilaterally implement the layoffs that had been the subject of those negotiations.[2]

> It is true that the trial court in fact found that prior to August 4, 1975, the department had arrived at a plan of action irrespective of further meet and confer sessions. Thus, finding of fact 18:
>
> > "Prior to August 4, 1975, the Department arrived at the following determinations of policy and of a course of action in connection with the reduction of the Department staff: (1) that the Department staff would be reduced by 3,300 employees by July 1, 1976; (2) that the reduction would take place in two stages; (3) that during the first stage; which would be completed by January 1, 1976, one-half of the total reduction would take place; (4) the remaining reduction would take place by July 1, 1976; and (5) that if the reductions could not be accomplished within these time periods by attrition, then they would be accomplished by the layoff of Department personnel."
>
> It does not follow from this, however, that the court found that its decision was frozen and irrevocable: to the contrary, as finding 20 shows, material changes in the plan were made subsequently as a result of ongoing discussion:
>
> > "On August 11 and August 15, 1975, the Department held separate meet-and-confer sessions with Sarpa, Cleate, Pegg and Csea. The

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[2] Gov. Code section 3533 provides in pertinent part: "The final determination of policy or course of action shall be the sole responsibility of the state employer." See also *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25 ("Although there is provision for a written memorandum of understanding by employee organizations and representatives of a negotiating public agency, the act expressly provides that the memorandum "shall not be binding" but shall be presented to the governing body of the agency or its statutory representative for determination, thus reflecting the legislative decision that the ultimate determinations are to be made by the governing body itself or its statutory representative and not by others.")

> meetings were devoted to an explanation and discussion of the size of the Department's proposed personnel reduction, the Department's layoff timetable and the identify [sic] of the classes to be affected by the layoff."
>
> The obligation to "meet and confer" includes the implied element of "good faith." (*Lipow v. Regents of University of California* (1975) 54 Cal.App.3d 215, 219 [126 Cal.Rptr. 515].) As noted in that case: "The question of good or bad faith on the part of the union or employer is primarily a factual one. *(N. L. R. B. v. Reisman Bros., Inc.* (2d Cir. 1968) 401 F.2d 770, 771.) Resolution of the question of good faith necessarily involves consideration of all the facts of a particular case. (*N. L. R. B. v. Newberry Equipment Company* (8th Cir. 1968) 401 F.2d 604, 606.) In the instant case the court found that respondent at all times met and conferred in good faith.

(*Id.*, pp. 210-211.)

> Here the financial necessity of making some layoffs was manifest but the actual plan implementing the department's decision was the result of serious productive "meet and confer" discussions.

(*Id.*, p. 213.)

PERB's reliance on *Fire Fighters Union v. City of Vallejo, supra,* 12 Cal.3d 608 is also misplaced. After the Court stated in *Vallejo* that the bargaining requirements of the National Labor Relations Act and cases interpreting them are to be treated as precedent in cases interpreting the scope of representation under the MMBA (*Id.*, p. 617), the Court expressly recognized in *Vallejo* that some layoff decisions are subject to bargaining under the NLRA.

> In some situations, such as that in which a layoff results from a decision to subcontract out bargaining unit work, the decision to subcontract and lay off employees is subject to bargaining.

(*Id.*, p. 621, citing *Fibreboard Corp. v. Labor Board* (1964) 379 U.S. 203.)

It is evident from the Court's use of the term "such as" in this sentence that the Court did not interpret federal precedent under the NLRA to mean that layoff decisions are not subject to bargaining except for layoff decisions associated with transfers of work from bargaining unit members to persons outside of the bargaining unit.

The Court's use of the term "such as" in this sentence also makes clear that the Court's statement at the beginning of the same paragraph that "cases under the NLRA indicate that an employer has the right to unilaterally decide that a layoff is necessary" cannot reasonably be interpreted to mean that as far as layoff decisions are concerned, the scope of representation under the MMBA is to be interpreted differently than the scope of representation under the NLRA.

Such an interpretation would be manifestly unreasonable because it directly contravenes the Court's earlier statement that the bargaining requirements of the National Labor Relations Act and cases interpreting them are to be treated as precedent in cases interpreting the scope of representation under the MMBA. (*Id.*, p. 617.)

As shown in Local 188's Opening Brief at pp. 24-36, federal decisions interpreting the scope of representation under the NLRA

have uniformly and consistently held that (1) employer decisions to lay off employees for economic reasons are always within the scope of representation, and (2) employer decisions to lay off employees for other reasons may also be subject to collective bargaining under the NLRA if those decisions meet the same three-part balancing test that was enunciated in *Building Material & Construction Teamsters' Union v. Farrell, supra,* 41 Cal.3d 651.

PERB apparently now recognizes that its decision herein is contrary to federal precedent under the NLRA. PERB thus contends at pp. 16-18 of its Opening Brief that PERB is not statutorily required to apply the NLRB's interpretation of its statutes to the MMBA and that the differences between public and private sector employment justify PERB's decision not to depart in this case arising under the MMBA from PERB's well-established rule in cases arising under other laws administered by PERB that layoff decisions for economic reasons are categorically excluded from the scope of representation.

Vallejo is again dispositive. *Vallejo* states in this regard that the reason federal precedent under the NLRA serves as reliable authority for the interpretation of the MMBA's bargaining requirements is that the Legislature found public sector and private sector employment relations sufficiently similar that it deliberately included bargaining provisions in the MMBA similar to those in the NLRA.

> The City of Vallejo objects to the use of NLRA precedents because of the alleged differences between employment relations in the public and private sectors. Although we recognize that there are certain basic differences between employment in the public and private sectors, the adoption of legislation providing for public employment negotiation on wages, hours and working conditions just as in the private sector demonstrates that the Legislature found public sector and private sector employment relations sufficiently similar to warrant similar bargaining provisions. We therefore conclude that the bargaining requirements of the National Labor Relations Act and cases interpreting them may properly be referred to for such enlightenment as they may render in our interpretation of the scope of bargaining under the Vallejo charter.

(*Id.*, p. 617.)

Moreover, because of significant differences in the laws applicable to employees of various types of governmental entities in this State, it was wrong in this layoff decision case arising under the MMBA for PERB to rely on layoff decision cases arising under the Ralph C. Dills Act (Gov. Code, § 3512 et seq.), the Higher Education Employer-Employee Relations Act (Gov Code, § 3560 et seq.) ("HEERA") and the Educational Employment Relations Act (Gov. Code, § 3540, et seq.) ("EERA") rather than apply the three-part *Building Material* balancing test to the layoff decision.

In this regard, as PERB explained in *California Department of Forestry and Fire Prevention* (1993) PERB Decision No. 999-S, Government Code section 19997 provides the State with the authority to lay off employees "because of lack of work or funds, or whenever it is advisable in the interests of economy." The Dills Act does not make section 19997 supersedable by a collective

bargaining agreement. (Gov. Code, § 3512.) PERB's decision that layoff decisions for economic reasons are not subject to bargaining under the Dills Act thus was not based on an application of the three-part *Building Material* bargaining test. Instead, it was based on a statute providing that the State has unfettered authority to lay off employees for lack of work or lack of funds. (*California Department of Forestry and Fire Prevention, supra*, PERB Decision No. 999-S, at p. 17.)

Similarly, PERB explained in *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223-E, at pp. 12-14, that its holding that layoff decisions are not subject to bargaining under EERA was based on the provision of Education Code section 45308 that classified school district employees "shall be subject to layoff for lack of work or lack of funds," and on the decision in *CSEA v. Pasadena Unified School District* (1977) 71 Cal.App.3d 318 rejecting CSEA's arguments that a school district's discretion to lay off because of a "lack of funds" should be limited.

Classified higher education employees subject to HEERA are also subject to similar state laws providing their employers with authority to lay them off for lack of work or lack of funds. (Ed. Code, §§ 88014, 88117.)

However, there are no similar state laws granting unfettered layoff authority to local government agencies subject to the MMBA. It necessarily follows that PERB should apply the three-part

Building Material balancing test in layoff decision cases arising under the MMBA rather than relying on PERB precedent under the Dills Act, EERA, and HEERA, and that PERB's decision in this case was therefore clearly erroneous.

IV. LOCAL GOVERNMENT LAYOFF DECISIONS ARE EMINENTLY SUITABLE FOR RESOLUTION THROUGH COLLECTIVE BARGAINING

Finally, PERB's decision herein should be annulled because it disserves the public interest.

In order to alleviate the impact which the nation's current economic distress would otherwise have on essential public services, and in order to preserve jobs for the employees who provide those essential public services, local governments throughout California have bargained with the organizations which represent their employees over layoffs and actions intended to avert layoffs such as reductions in wages, increases in workweeks, and other concessions that reduce labor costs. See, e.g., a Recordnet.com article dated July 16, 2009, titled"Stockton Police OK Deal to Halt Layoffs, Officers Agree to Millions in Concessions" by David Siders, that is available at http://www.recordnet.com/apps/pbcs.dll/article?AID=/20090716/A_NEWS/307169967#STS=g1ba5tws.ogy:

> STOCKTON - Stockton police officers late Wednesday ratified a tentative labor deal involving millions of dollars in concessions, canceling police layoffs and appearing to resolve a year-old feud between police and City Hall, a union official said.

> Eighty-seven percent of the 307 officers who voted favored the agreement, Officer Lon Hudson said.
>
> "This really works out good for the community, because it keeps the officers on the streets," said Hudson, chairman of the union's political action committee. "They took it upon themselves to vote this in so they could help the community out."
>
> The agreement is significant not only for its canceling of police layoffs but also for City Hall's ability in its financial crisis to negotiate concessions from other unions.
>
> Stockton Professional Firefighters Local 456 has said it was waiting for police to make concessions before making further concessions of its own, and the City of Stockton Management B&C Employees Association said it would discuss concessions only once the administration's negotiations with the police and fire unions had been resolved.

The benefit to employer-employee relations of bargaining over layoffs of public safety employees, and the benefit of such bargaining to the public interest in general, thus clearly outweighs any impact of such bargaining on the employer's need for unencumbered decisionmaking in managing its operations. PERB does not advance any argument to the contrary.

V. CONCLUSION

For all of the reasons previously stated, (1) PERB's decision herein should be annulled, (2) PERB should be directed to apply the correct legal standard for determination of whether management actions in general (the three-part *Building Material* balancing test), and layoff decisions for economic reasons in particular, are mandatory subjects of bargaining under the MMBA,

and (3) this case should be remanded to PERB for further proceedings consistent with these directions.

Dated: October 28, 2009

DAVIS & RENO

By _____
Duane W. Reno

By _____
Alan C. Davis

Attorneys for Local 188

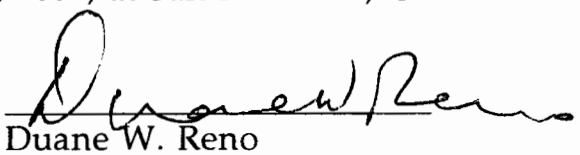
CERTIFICATE OF COUNSEL RE: WORD COUNT

I, Duane W. Reno, am one of the attorneys of record for the petitioner/appellant in this action.

This brief was prepared using Wordperfect X3 and the Palamino 13 point font. The word count of the brief, as determined by the Wordperfect program, is 4,925, 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 October 28, 2009, at San Francisco, California.



Duane W. Reno

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.

On October 28, 2009, I caused the following document(s) **PETITION IAFF LOCAL 188'S REPLY BRIEF IN RESPONSE TO RESPONDENT PERB'S ANSWER BRIEF ON THE MERITS to** be served as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on October 28, 2009.

Grania Duffy