



THE PUBLIC SECTOR

Decision imminent on PERB's ability to impede local ballot measures

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California's Public Employment Relations Board (PERB) typically sways in favor of labor unions since three of its five members spent part of their careers working for public-sector unions. Over the last several years, PERB has displayed a penchant for impeding local ballot initiatives that unions oppose—tearing the very fabric of democracy at the local level. A case currently before the 6th District Court of Appeal challenges PERB's efforts to continue this troubling trend.

Union sits on its hands

The Palo Alto city charter included a relatively unique process for resolving labor relations impasses known as "interest arbitration." If the city and its firefighters' union reached an impasse in negotiations, an unelected arbitrator would hold hearings and decide the final terms of the parties' new collective bargaining agreement (CBA). Under this mandatory process, the city's budget and fiscal priorities were held hostage to the arbitrator's decision, which was binding and not subject to court review.

In 2010, the city's elected leaders began to consider submitting to the electorate a charter amendment repealing interest arbitration. During six public meetings at which the subject was debated and seven bargaining sessions within the same time period, the firefighters' union did not ask the city to discuss the initiative. Only minutes before the city council was set to vote on placing the measure on the ballot did the union try to stop the action by demanding that the city consult with it over the measure.

When the city declined, the union filed an unfair practice charge with PERB. The electorate later repealed the interest arbitration provision.

PERB sides with the union

PERB's chief administrative law judge (ALJ) found that by failing to demand to meet with the city until the last minute, the union had waived its right to consult on the measure. On appeal, however, PERB reversed the ALJ, faulting the city for not inviting the union to consult over the measure and concluding that the city had operated in bad faith.

Thumbing its nose at the electorate, PERB ordered the city council to rescind the resolution that placed the repeal measure on the ballot. The city appealed PERB's order, and a decision from the 6th District is expected soon.

Significance of the case

This case is important on many levels. First, Palo Alto maintains that charter agencies shouldn't be required to meet with affected unions at all before putting a measure to repeal interest arbitration on the ballot. PERB counters that local agencies can't put interest arbitration repeal measures on the ballot unless they first consult in good faith (tantamount to bargaining) with affected unions. If PERB's decision is upheld, local unions could use the consultation process to delay or prevent important ballot measures from going to a vote. For the approximately 20 California cities that still have interest arbitration, that's bad news.

Second, the way PERB let the union off the hook creates bad precedent. For months, the union remained mute, preferring to wait until the city council was poised to vote before demanding that the city sit down with union leaders for consultation. Overruling its chief ALJ, PERB decided that the union's conduct was not a waiver of its consultation right. If upheld, that decision will give unions license to lie in wait once they have knowledge of potential changes in working conditions rather than coming forward promptly and demanding to meet.

Third, there is a chance the court will use this case to decide whether interest arbitration is constitutional. Management-side lawyers maintain that because interest arbitration allows a private arbitrator who is publicly unaccountable to wield the legislative authority to fix employee compensation, it's unconstitutional. If interest arbitration is unconstitutional, it is a "prohibited" subject of bargaining, and the city could not be required to meet with the union over a measure to repeal interest arbitration. A holding against PERB on this point would affect all cities that have charter provisions calling for interest arbitration.

Fourth, the remedy PERB imposed is ominous. PERB's order directed the city council to rescind the resolution that put the measure on the ballot. While

the order did not purport to nullify the election (which PERB would have no authority to do), a decision in PERB's favor could lead to litigation seeking to overturn the will of the voters. *City of Palo Alto v. PERB* (California Court of Appeal, 6th Appellate District).

Bottom line

PERB's decision is dangerous not only because it requires negotiations with unions over the fundamental democratic issue of who—elected officials or an arbitrator—sets labor relations policy, but also because it would make it difficult for any ballot measure

related to labor relations to be placed on the ballot at an election of a city council's choosing. The decision is also dangerous because it relieves unions of their historical burden to affirmatively and promptly come forward and demand to meet and confer once they know of an employer's intent to change the status quo in labor relations.



Full disclosure: Our firm represents the city of Palo Alto in this litigation.

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