THE PUBLIC SECTOR

Controversial PERB decisions on 'fact-finding' coming to a head

by Jeff Sloan and Elina Tilman
Renne Sloan Holtzman Sakai LLP

Local agency management representatives who deal regularly with the Public Employment Relations Board (PERB)—California's public-sector equivalent of the National Labor Relations Board (NLRB)—uniformly believe that PERB is biased in favor of unions. The board is currently headed by three former union advocates and one neutral chairperson.

Recent evidence of PERB's tilt is its attempt to expand mandatory "fact-finding" to all bargaining disputes between local agencies and unions under the Meyers-Milias-Brown Act (MMBA). Two PERB cases on this point are now coming to a head in the California 4th District Court of Appeal.

Fact-finding and its delays

Under the MMBA, unions can trigger fact-finding after labor and management reach an impasse in bargaining. The process features a three-member panel that holds a hearing, identifies the facts relating to the parties' positions on the impasse, and recommends terms of settlement.

One key problem with fact-finding is that it adds at least two months to the bargaining process. When employers need to act promptly—for example, to implement layoffs or deal with fiscal emergencies—the additional delays are problematic. Requiring fact-finding also has political implications: Delays give unions the opportunity to disrupt a public agency and an elected board, reducing management's resolve and its ability to make needed changes.

A comparison to private-sector negotiations helps explain the dilemma in this area. Under the National Labor Relations Act (NLRA), when parties reach an impasse in bargaining, the process is typically over unless they agree to mediate the dispute. The conclusion of bargaining under signals the employer's right to unilaterally implement its last best offer in negotiations—a powerful weapon that encourages unions to compromise in bargaining. PERB's approach impedes the employer's ability to timely wield this weapon.

Controversy over PERB's interpretation of 'fact-finding'

Notably, in six recent cases, PERB has consistently held that fact-finding isn't limited to impasses in negotiations for a new or successor memorandum of understanding (MOU). Rather, in PERB's view, unions have a right to compel fact-finding anytime an employer wants to implement any decision on a matter within the scope of bargaining, including layoffs, staffing reductions, and other single-issue disputes.

For example, in *County of Fresno v. SEIU,* PERB compelled fact-finding over the county's proposal to increase employees' shifts and add specialized assignments. Similarly, PERB required fact-finding in *City & County of San Francisco v. SEIU* over the Fine Arts Museum's decision to implement biometric timekeeping clocks. Despite PERB's steadfast position, management has continued to contest the validity of its decisions.

Management representatives argue that PERB's position hamstrings local agencies' ability to make needed changes during the term of an MOU and that it is glaringly inconsistent with the language and intent of the MMBA. We hope the appellate cases will result in a reasoned interpretation of the Act that avoids needless cost and delays. Stay tuned!

Bottom line

To date, PERB has issued six decisions indicating that unions can force fact-finding anytime an employer seeks to change a bargainable matter. But two superior courts have already found PERB's analysis legally wrong, instead holding that fact-finding applies only to bargaining disputes reached in the course of negotiating new or successor MOUs. While these two cases are on appeal, PERB's interpretation of fact-finding under the MMBA is giving unions a blank check to demand fact-finding in a myriad of situations.

Tilman

Sloan

At the conclusion of the last legislative session, Governor Jerry Brown vetoed Assembly Bill 2126, which would have required fact-finding in all instances. The governor observed that the question of the breadth of fact-finding was on appeal and that it was preferable to first receive court clarification. Naturally, if the appellate court affirms PERB's expansive interpretation of fact-finding, we can expect that the legislature will revive its efforts to codify this expansion in its next session.

The authors can be reached at Renne Sloan Holtzman Sakai LLP, jsloan@rshslaw.com and etilman@rshslaw.com. ✤