THE PUBLIC SECTOR

December 2018: a bad month for public-sector employers

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The prounion leanings of the California Public Employment Relations Board (PERB) are widely recognized. End-of-year developments at PERB show that trend is intensifying. As a result, HR and labor relations managers need to be especially careful in navigating labor and personnel matters that could result in PERB proceedings.

This time, statistics don't lie

PERB's annual reports are the main way the legislature keeps it accountable—and the board's decision issuance rate is a key "productivity" measure for lawmakers. As is typical, PERB had a flurry of activity at year's end, issuing 24 of its 61 decisions for the year in December.

PERB is typically deferential to the decisions of its administrative law judges (ALJs), upholding their decisions the vast majority of the time. But PERB has proven to be far less deferential when an ALJ decision goes the employer's way. Indeed, 100 percent of the reversals (10 out of 10) this fiscal year to date have involved cases in which the ALJ decided in favor of the employer. Also, of the 24 decisions PERB issued in December, the seven reversals all involved ALJ decisions dismissing the charges against the employer.

PERB puts Johnnie's Poultry on steroids

In *City of Commerce* (2018), PERB Decision No. 2602-M, the issue was whether a city attorney's interview of a witness subpoenaed by the union was illegal because the attorney failed to abide by the rules established by the National Labor Relations Board (NLRB), federal courts, and even a prior PERB decision. In *Johnnie's Poultry Company,* issued in 1964, the NLRB held that employers preparing for an NLRB case who want to interrogate employees about their exercise of the right to engage in protected activity must (1) communicate to the employee the purpose of the questioning, (2) assure him that no reprisal will take place, and (3) obtain voluntary participation. Further, the questioning must not be coercive in nature, must have a legitimate purpose, and must not pry into union matters or union strategy.

A related federal case, *Cook Paint & Varnish Company v. NLRB,* sets a less stringent rule in other situations involving employee interviews (e.g., preparing for arbitration). In those situations, the *Johnnie's Poultry* admonition—while advisable to keep in mind—isn't required, although questioning cannot pry into the employee's union activity or union case strategy (e.g., inquiring why the union is calling the employee as a witness). Instead, the NLRB reviews the "totality of circumstances" to see whether the questioning was coercive.

PERB had previously adopted those standards in *State of California (Department of Corrections).* However, the *City of Commerce* rule discards the nuanced approach of those cases. Instead, PERB's new "per se" rule appears to require a *Johnnie's Poultry* admonition in connection with questioning of witnesses for *any* adversarial hearing. As the lone PERB member with management credentials—Erich Shiners (a former partner in our law firm)—pointed out, the new approach is inconsistent with past NLRB and PERB cases as well as the decisions of the majority of labor boards in other states. And the approach would create liability even for noncoercive questioning.

Perils of denying union representation

PERB was equally active in protecting the representation rights of employees.

The two key cases—*San Bernardino CCD* (2018), PERB Decision No. 2599E, and *County of San Joaquin* (2018), PERB Decision No. 2619M—share a common fact pattern: An employee is questioned in an investigative meeting. A reasonable person in the employee's position would reasonably fear that disciplinary action could result from her statement. The employee asks for union representation. The employer "ends" the meeting but tells the employee to provide written answers to its questions on the spot. The employee refuses and is ultimately disciplined because of her refusal.

In both cases, PERB held that as with investigative *interviews,* an employee has a right to representation when the employer requests a written

statement. If an employee is disciplined in part because he failed to provide a written explanation after he was denied union representation, PERB will order that the discipline be rescinded, all records related to the internal affairs investigation and the ensuing proceedings be expunged, and the employee be compensated for lost earnings.

Neither of these cases makes new law per se—indeed, PERB has *already* substantially expanded employees' right to be represented in meetings, going back to its heavily criticized 2015 decision in *Sonoma County Superior Court* requiring employers to include union representatives in reasonable accommodation discussions upon employees' request. But they do emphasize the perils of refusing employee requests for representation.

Individualized GPS use found unlawful after unilateral change

The *San Bernardino CCD* case presented a second issue: the legality of an employer's use of a GPS device to track the movement of a probationary community services officer (CSO) suspected of leaving his assigned work area. The employee's union asserted that the community college district's use of GPS was an unlawful unilateral change to a mandatory subject of bargaining because the employer failed to notify the union of its intended action and give it the opportunity to request bargaining.

The district explained to PERB that it used GPS because there was no supervisor on the employee's temporary work shift. Despite credible reports that the CSO was leaving his assigned work area, a GPS device was still needed to ascertain the facts. But PERB concluded that the decision to use the tracking device was within the scope of bargaining—steamrolling over the district's assertion of managerial prerogative.

Even though the district's decision to use GPS was individualized, PERB concluded that it had a "sufficiently generalized effect or continuing impact" that required the district to give the union notice and an opportunity to request bargaining. Most astounding, the board ordered the district to rescind any discipline it imposed against the probationary employee, reinstate him, and pay him back wages.

Sub rosa (secret) use of GPS devices on employer-owned vehicles to track the movement of employees during working time often provides valuable information about employee misconduct. By PERB's reasoning, though, an employer is required to give the union notice of its intent to use GPS under these circumstances, removing the cornerstone of the employer's investigative plan and giving rise to massive delay if the union demands to negotiate. The best way around this stumbling block is to have a strong management rights clause in your labor contract or give the union notice and an opportunity to bargain over your prospective use of GPS in investigations.

Bottom line

Before interviewing witnesses for an adversarial proceeding, employers should ordinarily give a *Johnnie's Poultry* admonition. Not doing so, in PERB's view, would constitute automatic interference with employee and union rights under any statute administered by the board. And when you're confronted with an employee's request for a union representative, err on the side of granting it as long as the union representative is available within a reasonable period of time.

Moreover, as the GPS case makes clear, unilateral change law is perhaps the biggest trap for the unwary in all PERB jurisdictions. Even when contemplating the implementation of a measure that appears to clearly fall under management prerogative, public-sector managers need to be aware of the risks and seek advice if they're in doubt about their legal options.

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PERB is infamous for its expansion of employee and union rights. The board's expansions are always accompanied by rationales as to why the California public-sector environment affords employees greater rights than the National Labor Relations Act (NLRA) does—an obvious and understandable effort to "Trump-proof" its decisions in anticipation of a Trump-dominated NLRB.

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