PERB Signals New Direction; But Will It Last?

By Timothy G. Yeung

Governor Schwarzenegger's appointees to the California Public Employment Relations Board ("PERB" or "Board") have generally adhered to a middle-of-the-road approach to labor relations. While the "Schwarzenegger" Board's decisions have been slightly more pro-employer than those of the Board under Governor Davis, there have been few, if any, drastic changes in direction. Recently, however, the Board issued two decisions that appear to signal a desire to strengthen management rights in the public sector. First, in *Alhambra Firefighters Association v. City of Alhambra*,[1] the Board held that establishing the minimum job requirements for a promotional position within a bargaining unit is not a subject within the scope of bargaining. Second, in *City of San Jose v. Association of Building, Mechanical and Electrical Inspectors*,[2] the Board held that a secondary strike targeted at private construction sites is an unlawful pressure tactic. The *City of San Jose* decision is already the subject of a judicial challenge.[3] But even if that decision survives judicial challenge, it remains to be seen whether the Board's change in direction, as signaled by these two cases, will last under Governor Brown.

Alhambra Firefighters Association, Local 1578 v. City of Alhambra

Background Facts

The City of Alhambra operates under a merit system that requires competitive employment examinations.[4] The city's local employer-employee relations rules provide that the city retains the right to "establish and determine job classifications."[5] Relying on the city's local rules, in approximately 1999, the city amended the class specification for the position of fire captain to require both an Alhambra Fire Department Fire Engineer Certification and Driver/Operator 1A and 1B Certification. The city did not give notice to the Alhambra Firefighters Association, Local 1578, the representative of the affected employees, since it believed that it could make the changes without having to bargain with them pursuant to the city's local rules.[6]

In 2005, the city again amended the class specification for fire captain.[7] This time, the city eliminated the requirement for both an Alhambra Fire Department Fire Engineer Certification and Driver/Operator 1A and 1B Certification for candidates who are existing city fire engineers. The city's goal was to expand the pool of potential applicants for fire captain. The city believed that there were several fire engineers who could be promoted to fire captain but for the requirement of the two certifications.[8] As in 1999, the city did not give notice to the union. Shortly thereafter, the union demanded to bargain over the proposed changes and subsequently filed an unfair practice charge with PERB.[9]

Proposed Decision by ALJ

After a hearing, the administrative law judge ("ALJ") issued a proposed decision finding that the city committed an unfair practice in 2005 by unilaterally changing the class specification for fire captain.[10] The ALJ rejected the city's argument that it had a permissible past practice of unilaterally changing class specifications. Instead, the ALJ held that the changes to the fire captain job classification were within the scope of bargaining and, therefore, the city should have provided the union notice of the proposed changes and an opportunity to bargain over them.[11]

Board Rejects Proposed Decision by ALJ

The Board rejected the ALJ's proposed decision. The key issue before the Board was whether the changes to the fire captain job classification were within the scope of bargaining.[12] In deciding this issue, the Board relied

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1 PERB Dec. No. 2139-M (Oct. 26, 2010).

2 PERB Dec. No. 2141-M (Nov. 10, 2010).

3 Ass'n of Bldg., Mech. & Elec. Inspectors v. PERB (City of San Jose), Sixth District Court of Appeal, Case No. H036362, filed Dec. 10, 2010.

4 *City of Alhambra*, PERB Dec. No. 2139-M, at 2.

5 *Id.*

6 *Id.* at 5.

7 *Id.* at 6.

8 *Id.*

9 *Id.* at 7–8.

10 *Id.* at 8–9.

11 *Id.*

12 *Id.* at 11.

upon the three-part test set forth by the California Supreme Court in *Claremont Police Officers Association v. City of Claremont.*[13] Under *Claremont*, the first inquiry is whether the management action has a significant and adverse effect on the wages, hours or working conditions of the bargaining-unit employees. If so, the second inquiry is whether the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If not, then the bargaining requirement applies. However, if both the first two factors are present, the third inquiry is whether the employer's need for unencumbered decision making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining over the action in question.[14]

With respect to the first inquiry, the Board found that the city's change did not adversely impact wages or hours.[15] The Board noted that the change actually expanded the pool of potential applicants. In reaching this holding, the Board distinguished several prior PERB decisions finding changes to job classifications within the scope of bargaining. The Board concluded that those prior decisions did not directly address whether a change in minimum qualifications is within the scope of bargaining and, thus, were not binding precedent.[16]

Even though it answered the first question in the negative, the Board went on to consider the other two *Claremont* factors. With respect to the second inquiry, the Board held that the establishment of minimum job qualifications is a fundamental managerial or policy decision under the Meyers-Milias-Brown Act[17] ("MMBA").[18] In reaching this conclusion, the Board distinguished between "promotional procedures" and "job qualifications."[19] The Board held that the former were within the scope of bargaining, while the latter are not.

Finally, the Board held that even if the first two factors were present, it would find that the city's need for unencumbered decision making in this situation outweighs the benefit of bargaining over the decision.[20] The Board found that there was no evidence that bargaining over the expansion of the candidate pool for fire captains would outweigh the city's need to determine the qualifications necessary to provide public fire protection services to its citizens. To the contrary, the Board held that the city has a "strong interest in hiring qualified employees to provide fire safety and protection services to the public."[21]

City of San Jose v. Association of Building, Mechanical and Electrical Inspectors

Background Facts

The Association of Building, Mechanical and Electrical Inspectors represents building inspectors employed by the City of San Jose.[22] The city and union were parties to a memorandum of understanding ("MOU") that expired in 2007. The parties entered into negotiations for a successor MOU, but were unable to reach agreement. The parties declared impasse and participated in impasse proceedings.[23] After the completion of impasse proceedings, the union went on strike against the city on November 29, 2007.[24]

Beginning in December 2007, the union began picketing in front of private construction sites in San Jose. On at least five separate occasions, the union's picketing caused all or most of the construction work at the picketed sites to shut down because the private construction workers would not cross the picket line.[25] It was undisputed that the construction projects at the picketed sites were not part of any city construction or public works project.[26] The city filed an unfair practice charge against the union, alleging that its picketing of private construction sites was an unfair practice.

Proposed Decision by ALJ

The ALJ's proposed decision dismissed the city's unfair practice charge, finding that the city failed to demonstrate any unfair practices because nothing in the MMBA prohibits the type of conduct committed by the union.[27] The ALJ specifically rejected the city's

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13 39 Cal. 4th 623 (2006).

14 *Id.* at 638.

15 *City of Alhambra*, PERB Dec. No. 2139-M, at 13–17.

16 *Id.* at 15–17.

17 Cal. Gov't Code § 3500 et seq.

18 *City of Alhambra*, PERB Dec. No. 2139-M, at 18–20.

19 *Id.* at 20.

20 *Id.* at 21.

21 *Id.* at 20.

22 *City of San Jose*, PERB Dec. No. 2141-M, at 2.

23 *Id.* at 4.

24 *Id.*

25 *Id.* at 4–5.

26 *Id.* at 5.

27 *Id.* at 6.

contention that the union engaged in unlawful secondary picketing.[28]

Board Rejects Proposed Decision by ALJ

On exceptions, the Board defined the issue before it as whether the union violated the MMBA by picketing at private construction sites in a manner that caused work at those sites to shut down.[29] The Board began its decision by recognizing that the right to strike is now well established in the public sector.[30] Nevertheless, the Board noted that concerted activities, such as strikes, can still constitute illegal pressure tactics.[31] The Board explained that even where the objective of a strike is lawful, the means by which the strike is conducted may be unlawful.[32] Citing examples of unlawful strikes to include pre-impasse strikes not provoked by unfair practices,[33] intermittent and surprise strikes,[34] and partial work stoppages,[35] the Board found that, similar to these examples, the union's picketing at private construction sites in this case to be an unlawful pressure tactic. Specifically, the Board concluded that:

> Here, the picketing was directed at private employers with the object of inducing private employees to refuse to work, shutting down private construction sites. Such conduct goes far beyond the non-disruptive picketing sanctioned in [prior Board cases], and was an unfair tactic designed to put undue pressure on the City to sign a contract with ABMEI, which it did five days after the construction site picketing commenced.[36]

In reaching its holding, the Board specifically addressed the unique policy issues in the public sector. Because the public sector necessarily involves the public interest, the Board affirmed its duty to consider the impact of protected activities on third parties.[37] Citing to past PERB and court decisions, the Board noted that protected activities in the public sector can, and have, been limited where there is an adverse impact on third parties.[38] In this case, the Board found that the union's picketing enmeshed private employers in a labor dispute between the union and the city. The Board held that disrupting the business of neutral third parties in this manner is "inconsistent with the public interest in promoting harmonious labor relations as well as the efficient delivery of public services."[39]

PERB Signals a New Direction

Together, these two decisions appear to signal a desire of the Board to strengthen management rights. In both decisions the Board rejected the proposed decision of the ALJ. In *City of Alhambra*, the Board devoted a substantial portion of its decision to distinguishing prior PERB decisions. Those prior PERB decisions strongly suggested that establishing minimum job requirements—at least for promotional positions within the bargaining unit—is a subject within the scope of bargaining.[40] Ultimately, the Board's decision in *City of Alhambra* rested on establishing a line between "promotional procedures" and "job qualifications." The Board held that the former subject matter is within the scope of bargaining, but the latter is not. However, the line between these two areas is not always clear.

However, the most significant aspect of *City of Alhambra* is the way the Board analyzed the second and third factors under the *Claremont* test. The Board took a very broad approach to management rights, and gave great weight to the need for public employers to make decisions "unencumbered" by the requirement to bargain.[41] Under the Board's reasoning, other areas of employment currently considered within the scope of bargaining might also be found to be excluded from bargaining.

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28 *Id.*

29 *Id.*

30 *See* County Sanitation Dist. No. 2 v. Los Angeles County Employees' Ass'n, 38 Cal.3d 564, 573 (1985).

31 *City of San Jose*, PERB Dec. No. 2141-M, at 8.

32 *Id.* at 9 (citing to San Ramon Valley Unified Sch. Dist., PERB Dec. No. IR-46 (1984)).

33 Sacramento City Unified Sch. Dist., PERB Dec. No. IR-49 (1987).

34 San Ramon Valley Unified Sch. Dist., PERB Dec. No. IR-46 (1984).

35 Palos Verdes Peninsula Unified Sch. Dist., PERB Dec. No. 195 (1982).

36 *City of San Jose*, PERB Dec. No. 2141-M, at 11.

37 *Id.* at 13.

38 *Id.*

39 *Id.* at 12.

40 *See, e.g.*, City of Riverside, PERB Dec. No. 2027-M (2009) (affirming that "promotion criteria and procedures for filling vacancies are within the scope of representation . . .").

41 *City of Alhambra*, PERB Dec. No. 2139-M, at 12 (quoting Bldg. Material and Constr. Teamsters' Union v. Farrell, 41 Cal. 3d 651, 665 (1986)).

Similarly, in the *City of San Jose* decision the Board gave great weight to the public interest and the need to avoid adversely affecting third parties. The Board seemed particularly concerned that allowing the union to engage in a secondary strike would place the city at an unfair disadvantage. If a public employer is placed in this situation, the Board was worried that it would have no way of responding to the secondary strike other than acceding to the union's demands.

These two decisions, therefore, appear to signal a desire by the Board to strengthen management rights in the public sector. However, whether this change in direction will last is in doubt. The Board is comprised of five members appointed by the Governor.[42] Currently, there are three vacancies on the Board that Governor Brown has the power to fill. Will these new Board members continue the current Board's push towards strengthening management rights? Conventional wisdom suggests that the Board under Governor Brown will once again change direction and begin re-asserting the rights of employee organization—but only time will tell.

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42 Cal. Gov't Code § 3541.