THE PUBLIC SECTOR

PERB decision requires parity between represented and unrepresented personnel

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Any reader of this column over the past few months is aware of the increasing evidence that the Public Employment Relations Board (PERB) lacks evenhandedness. The best evidence to date: In a decision issued in March, PERB required an employer to pay 10 years of back wages and insert a new term in an agreed-on memorandum of understanding (MOU) because of statements the employer made during negotiations.

PERB reverses ALJ's conclusions

The case spent about 10 years in PERB's administrative pipeline. Its genesis was a decision of the Contra Costa County Fire Protection District's (CCCFPD) board of directors in 2009 to confer a longevity premium to unrepresented management personnel. In prior negotiations with a local employee organization representing battalion chiefs, the United Chief Officers Association sought to improve a preexisting "longevity pay" bonus.

The CCCFPD's chief negotiator told the association on multiple occasions that the district wanted to maintain a higher longevity benefit for unrepresented management personnel like the fire chief and assistant fire chief. The district never refused to bargain over the association's demand, and it offered monetary improvements to the association, including a substantially higher wage increase than the association itself had proposed.

PERB's chief administrative law judge (ALJ) conducted the hearing in this case. There was no allegation that the CCCFPD had bargained in bad faith. Dismissing the unfair labor practice charge, the chief ALJ determined the district didn't violate the Meyers-Milias-Brown Act (MMBA) by failing to give association members the same longevity benefit the board gave unrepresented managers. Citing prior PERB decisions, California appellate cases, and National Labor Relations Board (NLRB) precedent, the chief ALJ concluded that expressly differentiating between unrepresented management personnel and unionized personnel wasn't illegal discrimination or "interference" in employee rights under the MMBA.

On appeal, a divided PERB reversed the chief ALJ's decision. In essence, the majority held the expression of a desire to preserve the longevity benefit for unrepresented management was illegal because it showed differential treatment of association members based on the fact they chose to unionize. In PERB's view, the CCCFPD negotiator's statements "inherently discouraged union activity" and constituted a laundry list of wrongs, including being not credible, pretextual, discriminatory, and "inherently destructive of protected rights."

In this writer's view, to reach that conclusion, PERB had to recast the facts, discredit CCCFPD witnesses, disregard the ALJ's implicit credibility findings, overrule precedent, mischaracterize state and federal case law, and disregard the fact that the association and the district had ultimately agreed on and implemented an MOU that didn't include the heightened benefit and gave substantial monetary benefits to bargaining unit personnel.

If the majority's analysis was unsound, the remedy was worse. PERB required the CCCFPD to pay each current and former member of the association bargaining unit with 15 or more years of service a 2.5 percent longevity differential, retroactive almost 10 years (to the date the same differential was granted to unrepresented managers), plus seven percent interest. The Board also ordered the district to augment the retirement benefits of all affected association members.

PERB member Erich Shiners issued a strong dissent. Besides attacking the majority's legal analysis, he observed the opinion could be viewed to create "automatic parity of benefits between represented and unrepresented employees, or at least a strong presumption of such parity, by cloaking what is essentially a bargaining case in the garb of discrimination and interference." He continued, "Unlike my colleagues, I find nothing in the statements made by or attributed to the District showing that its position of maintaining certain benefits for unrepresented managers during the negotiations at issue would hinder future

bargaining." The district has initiated appellate litigation challenging PERB's decision and remedy.

Bottom line

This decision raises the specter of forced "parity" between unrepresented and represented personnel. Word to the wise: When explaining differences in benefits between represented and unrepresented personnel during negotiations, management needs to choose its words carefully.

PERB's condemnation of employer speech in the bargaining environment—where there is and should be a free exchange of views—is analytically inconsistent with its own cases that legally protect employees against discipline for incendiary, vituperative, and even threatening speech as long as it is tied in some way to labor relations.

With public agencies seeing indications of PERB bias and the board's increasing reversal of ALJ dismissals of complaints against public-sector employers, agencies should look for creative, workable settlement options in instances in which the board has issued a complaint after an investigation. Paradoxically, the pursuit of settlement options may emerge as a shared interest with many employee organizations, which are now seeing the cost-saving benefits of settlement.

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