THE PUBLIC SECTOR

Two significant public-sector case developments

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Three recent cases—one before the U.S. Supreme Court and two before the California Court of Appeal—have been a boon for public-sector unions. An unexpected event beyond the courthouse has led to the preservation of "agency shop" in public-sector workplaces, while a court's interpretation of the Meyers-Milias-Brown Act (MMBA) permits unions to compel fact-finding for any bargainable issue.

Public-sector unions avoid catastrophic loss

The sudden death of Justice Antonin Scalia in February 2016 might well alter the conservative bent of the U.S. Supreme Court—depending, of course, on who is elected president in November and on the outcome of efforts by Senate Republicans to block consideration of Chief Judge Merrick Garland of the D.C. Circuit Court of Appeals to replace him on the Court. On the labor law front, the Supreme Court's action on March 29 in *Friedrichs v. California Teachers Association* provides an immediate and dramatic example of the impact of Justice Scalia's death.

One of the most controversial labor law cases in recent years, *Friedrichs* sought to invalidate agency shop in public-sector workplaces nationwide. Agency shop is an arrangement under which union-represented employees can be required—as a condition of continued employment—to either join the union or pay the virtual equivalent of membership dues, assessments, and initiation fees.

In *Abood v. Detroit Board of Education,* the Supreme Court held that agency shop in the public sector does not violate employees' First Amendment freedom of association rights, but objecting nonmembers are entitled to receive rebates for expenditures for objectionable "political" activities. After the underpinnings of *Abood* were seriously questioned in a decision issued by the Court during its 2015 term (see "U.S. Supreme Court poised to decide whether public-sector 'agency shop' is constitutional" on pg. 6 of our August 24, 2015, issue), labor and management practitioners thought the conservative majority on the Court might use *Friedrichs* as the vehicle to overrule *Abood.* Justice Scalia eliminated any doubt about his intentions when, in questioning during oral argument he said, "The problem is that everything that is collectively bargained with the government is within the political sphere, almost by definition." That one sentence confirmed his desire to repudiate *Abood.*

Following Justice Scalia's death, the Supreme Court's March 29 opinion announced that the Court was "equally divided." Given that split, the 9th Circuit's decision rejecting Friedrich's case and upholding *Abood* was affirmed on a nonprecedential basis.

California court rejects challenge to PERB's stance on fact-finding

The inherent delays occasioned by public-sector collective bargaining make it difficult for local agencies to operate effectively and make needed changes efficiently. Before 2011, local agencies had the option to use a "fact-finding" process to help resolve impasses in bargaining—if they chose to adopt such a procedure. In 2011, however, Governor Jerry Brown signed Assembly Bill (AB) 646, which enabled unions to request that impasses in negotiations be submitted to a fact-finding panel. If a union so requests, management is required to engage in a fact-finding process—a multi-monthlong process.

A key question unaddressed in AB 646 was whether its fact-finding provisions apply only to impasses arising from the negotiation of a comprehensive memorandum of understanding (MOU) or whether they also apply to any situation in which a local agency seeks a change on a bargainable issue. Public-sector management has forcefully maintained that the law applies only to the former types of impasses. They maintain that a broader interpretation would substantially extend the time period for resolving bargaining issues, contributing to inefficiencies and enabling public-sector unions to exercise political gamesmanship. Not surprisingly, since the enactment of AB 646, the Public Employment Relations Board (PERB) has taken the position that fact-finding is available for any dispute over a negotiable matter.

On March 30, the 4th Appellate District of the California Court of Appeal published two decisions in which it held that the fact-finding procedures under the MMBA apply to negotiations of any bargainable matter, including disputes over the negotiable effects of a management decision. The court found that fact-finding procedures apply to a public employer's

decision to lay off represented employees in *San Diego Housing Commission v. PERB* and the decision to implement a new background check policy that provides grounds for discharging employees in *County of Riverside v. PERB.* The court of appeal also rejected constitutional challenges to the MMBA's fact-finding provisions.

Bottom line

Friedrichs was a major win for public-sector unions. A loss would have required public-sector unions to revise their spending priorities nationally. For one thing, their massive ability to support Democratic candidates in national elections might well have been dissipated—demonstrating how U.S. Supreme Court decisions can be broad-ranging and inherently political.

Because the Supreme Court's 4-4 decision isn't precedential, another *Friedrichs*-type case could emerge in a later term. But if Justice Scalia is replaced by a less conservative judge, the odds of *Abood* being revisited are low. The issue does not affect the private sector because only public-sector employees enjoy First Amendment protections.

The two PERB cases before the California Court of Appeal were also a win for public-sector unions and a strike for public-sector management. It's one thing to have a fact-finding process in connection with negotiating a new collective bargaining agreement. To require that any dispute having bargainable consequences be subject to a lengthy fact-finding process, however, impedes management's ability to make needed changes in a timely and efficient way.

In sustaining PERB's approach, the court of appeal did not take practical realities into account, especially with regard to the implementation of management prerogatives like the decision to lay off workers. When management announces a layoff, the union has a right to request to bargain over the impact. Ordinarily, layoffs cannot be implemented until the bargaining process is complete. By requiring that any bargaining dispute be subject to fact-finding, PERB's approach could impede the implementation of necessary layoffs for months. Further, unions can wait for a month after impasse before even requesting fact-finding, which only adds to the delays inherent in fact-finding.

After these two court of appeal decisions, public agencies that resist fact-finding will be hard-pressed to find any relief from the courts. Unless another Appellate District reaches a contrary decision or the California Supreme Court decides to consider and overrule the 4th District's findings, its decision regarding the scope of AB 646 fact-finding will remain binding on local agencies in California.

Full disclosure: *Renne Sloan Holtzman Sakai LLP authored the friend-of-the-court briefs that the League of California Cities and California State Association of Counties submitted in the two challenges to PERB's interpretation of AB 646.*


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