Case No. A156897

Exempt from Fees
(Gov. Code, § 6103)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION TWO

CONTRA COSTA COUNTY FIRE PROTECTION DISTRICT,
Petitioner,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent,

UNITED CHIEF OFFICERS ASSOCIATION,
Real Parties in Interest.

Appeal of Public Employment Relations Board
Decision No. 2632-M
(Case No. SF-CE-693-M)

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER CONTRA COSTA COUNTY FIRE PROTECTION DISTRICT

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APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to Rule 8.200, subdivision (c), of the California Rules of Court, the League of California Cities and the California State Association of Counties hereby respectfully apply for permission to file the attached *amici curiae* brief in support of Petitioner Contra Costa County Fire Protection District.[1] This application is timely made within 14 days after the filing of the final reply brief on the merits.

INTEREST OF *AMICI CURIAE*

The League of California Cities (the "League") is an association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee (the "Committee"), which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered

[1] No party or counsel for a party in the pending appeal authored the proposed *amici* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

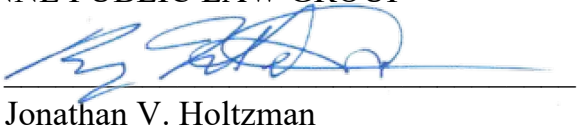
Amici believe their perspective will assist the Court in deciding this matter. Counsel for *amici* has reviewed the briefs filed in this matter to date and *amici* do not seek to duplicate arguments set forth in those briefs. Rather, *amici* seek to assist the Court by demonstrating the far-reaching consequences of the Board's decision for public employers across the state. If left to stand, the Board's decision threatens to frustrate public employers' authority to set employee compensation, chill speech at the bargaining table, undermine the Meyers-Milias-Brown Act, and subject public employers across the state to potentially crippling retroactive contractual obligations in violation of the California Constitution.

Accordingly, the League and CSAC respectfully request that the Court grant this application and accept and file the attached proposed *amici curiae* brief.

Dated: February 7, 2020

Respectfully Submitted,

RENNE PUBLIC LAW GROUP

By: 

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AMICI CURIAE BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES

I. INTRODUCTION

Amici do not dispute the importance of the Meyers-Milias-Brown Act ("MMBA") and the "rights and protections for public employees—including the right to join and participate in union activities and to meet and confer with employer representatives for the purposes of resolving disputed labor-management issues." (*County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564, 576.) The decision issued by the two-member majority of the Public Employment Relations Board (the "Board" or "PERB"), however, "depriv[es] the county entirely of its authority to set employee salaries" (*County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 287) and threatens to undermine the MMBA by discouraging full communication between public employers and their employees, penalizing public employers for stray remarks at the bargaining table, and rewarding bad faith bargaining.

There is no dispute that the Contra Costa County Fire Protection District (the "District") and the United Chief Officers Association (the "UCOA") lived up to the MMBA's primary purpose of "promot[ing] full communication between public employers and their employees." (Gov. Code, § 3500.) In bargaining, the UCOA sought to "restore parity in benefits between employees in its unit and unrepresented management employees of the District and the County," specifically requesting a longevity bonus consisting of a 2.5 percent increase in pay for 15 years of service that had previously been granted to unrepresented management employees of the County. (PERB Decision at p. 6.) The District and the UCOA bargained over this benefit but were unable to reach agreement,

communicating candidly about the District's desire to retain some separation for unrepresented managers that were not entitled to certain benefits (such as overtime) that the UCOA's represented managers enjoyed. They did, however, reach agreement to provide enhanced overtime and other benefits to UCOA represented employees that were not available to unrepresented management employees.

One would think this is exactly the sort of back-and-forth exchange that the Legislature had in mind when it enacted the MMBA. One would apparently be wrong, at least according to two members of the Board, who concluded over a vociferous dissent that the District's candid shorthand for distinguishing between managerial employees at the bargaining table amounted to discrimination/interference even in the absence of bad faith and even though the District's challenged conduct occurred nearly 10 years after the union first organized. As a result, the Board awarded the UCOA what it was unable to obtain through meet and confer as contemplated by the MMBA—a retroactive contractual entitlement to the longevity pay differential—without requiring the union to give up other benefits that are reserved for represented employees.

The Board's contortion of the MMBA both as to the merits of the UCOA's claims and the remedies imposed on the District is simply the latest chapter in a frustrating trend for public employers in which the ALJ decisions that PERB reverses are almost invariably decisions that had dismissed the charges against employers.[2] Because the Board's legal

[2] (See Jeff Sloan & Tim Yeung, "December 2018: a bad month for public-sector employers" (Jan. 28, 2019) *California Employment Law Letter*, Vol. 29, no. 6 [explaining that 100 percent of the reversals that fiscal year "involved cases in which the ALJ decided in favor of the employer"].)

conclusions are clearly erroneous and its remedy a clear abuse of discretion, the Court should vacate the Board's order and dismiss the charges against the District.

II. ARGUMENT

The Board's decision should be vacated for three primary reasons. First, the majority effectively adopted a presumption of parity in violation of longstanding labor-relations jurisprudence. This will prevent public employers from exercising their constitutional authority to set employee compensation, particularly as it pertains to preserving promotional incentives to attract and retain managerial talent. Second, in emphasizing form over substance, the majority's decision will chill speech at the bargaining table and undermine the MMBA's emphasis on encouraging full communication between public sector employers and employees. Third, the majority's retroactive backpay remedy—which entirely deprives the District of its constitutional authority to set employee compensation—will encourage public-sector unions to use interference and/or discrimination claims in the hopes of obtaining retroactive contractual benefits that they are unable to secure through good faith bargaining.

A. THE BOARD'S PRESUMPTION OF PARITY INTRUDES ON PUBLIC EMPLOYERS' AUTHORITY TO SET EMPLOYEE COMPENSATION AND DEPARTS FROM LONGSTANDING LABOR-RELATIONS PRECEDENT

1. Local Public Employers' Constitutional and Statutory Authority to Set Employee Compensation Is Critical to Developing the Managerial Pipeline

The California Constitution gives all counties and charter cities significant authority to control the number, compensation, tenure, and appointment of their employees. (See Cal. Const., art. XI, § 1, subd. (b)

["[t]he governing body [of each county] shall provide for the number, compensation, tenure, and appointment of employees"]; Cal. Const., art. XI, § 5, subds. (a) & (b) [charter cities have "plenary authority" with regard to "the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees"]; Cal. Const., art. XI, § 4, subds. (f) & (g) [charter counties].)[3] Although the Legislature may intrude on that authority on matters of statewide concern in limited circumstances, "*regulating* labor relations is one thing; *depriving* [a] county [or charter city] entirely of its authority to set employee salaries is quite another." (*County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 288.)

That authority is particularly important when it comes to setting compensation for managerial/supervisory employees. The Board's decision implies there is something inherently suspicious or anti-labor when employers provide management with richer and different compensation packages than those provided to rank and file, unionized employees. But, in fact, it is commonplace for employers to do just that. And for good reason. Managers often are further along in their careers, and they may seek benefits that are less desirable to rank and file employees. Such benefits can include discretionary bonuses, longevity bonuses, car allowances, housing allowances, supplemental insurances and financial products that shelter income and lower tax liability.

[3] "Although the District is a separate entity from the County, the County's Board of Supervisors serves as the District's governing body, and the County's Chief Administrative Officer oversees the District's budget." (PERB Decision at p. 3.)

Critically, it is often more difficult to recruit and retain higher level employees, versus entry or lower level employees, because of the significantly higher compensation packages available to managers in the private sector. By contrast, thanks in large part to the MMBA and similar public-sector labor relations statutes, rank-and-file union members are much better compensated than their counterparts in the private sector and in many cases are some of the best compensated employees of public entities. At a time when some of their counterparts in the private sector have seen their bargaining leverage decrease and their middle class hollowed out, rank-and-file public-sector employees in California remain a bright example of how hardworking individuals can earn a dignified living while serving our communities.

As a result, rank-and-file public employees represented by unions in many instances have very little incentive to advance within the ranks of their public employers, particularly to managerial positions that are unrepresented and do not carry certain benefits that the rank-and-file employees have become accustomed to, such as enhanced overtime. (Cf. *Wirth v. State of California* (2006) 142 Cal.App.4th 131, 135 [explaining that in the context of certain state employees, "[i]n some cases, the supervisors actually earned less than the rank-and-file employees they supervised. A promotion to supervisor could actually result in a lesser compensation package, creating recruitment and retention problems"]; *Labor Law - Unfair Labor Practices - Union Discipline of Supervisors Who Are Union Members for Performing Rank-and-File Struck Work Is Not an Unfair Labor Practice* (1973) 87 Harv. L. Rev. 458, 466 ["rank-and-file employees may be unwilling to accept supervisory positions unless employers compensate them for lost benefits"].)

The recruitment process itself is different for managerial employees, covering a wider geographical area, aimed at recruiting employees who provide highly specialized and sought after services. Once hired, these employees are often actively recruited by other public agencies, and so again, a management package is very important in order to retain top level talent. The benefit at issue here—increased compensation for longevity—is precisely the sort of benefit directly targeting this issue, and incentivizes managers to remain employed. The bonus rewards those employees who have worked for the District for 15 years with a 2.5% pay increase. (See PERB Decision at p. 5 & fn. 5.)

There is nothing in this record suggesting that the complainants were subject to a recruitment or retention issue that aligned their interests with those in the management group. On the contrary, as the Board recognized, "[w]hen the Association first proposed the 15-year longevity benefit in March 2007, all but one employee in the [complainants'] Unit had the required 15 years of service." (PERB Decision at p. 6.) The Board's decision effectively flips the burden of proof from the employees who are asserting an unfair labor practice to the employer to justify a different benefit package. This is legally erroneous and unsupportable.

2. The MMBA Does Not Require Parity Between Represented and Unrepresented Employees

The Board concedes that "[a]n employer's desire to create promotional incentives . . . is a legitimate nondiscriminatory reason" for distinguishing between represented and unrepresented employees. (PERB Decision at p. 42.) For good reason. Reading the MMBA to require parity between represented and unrepresented county employees would violate the California Constitution by "depriving the county entirely of its authority to

set employee salaries" (*County of Riverside*, *supra*, 30 Cal.4th at p. 287 [emphasis omitted]) and limiting public agencies' "power to reject or accept any proposal or agreement that may come out of the consultation process." (*City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1299, citing *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 601.)

Moreover, as a matter of basic labor law, it has long been recognized that in the absence of an unlawful motive, "an employer is privileged to give wage increases to his unorganized employees, at a time when his other employees are seeking to bargain collectively through a statutory representative." (*Shell Oil Co.* (1948) 77 NLRB 1306, 1310.)[4] "Likewise, an employer is under no obligation . . . to make such wage increases applicable to union members, in the face of collective bargaining negotiations on their behalf involving much higher stakes." (*Ibid.*; see also *Overnite Transp. Co. v. N.L.R.B.* (4th Cir. 2000) 280 F.3d 417, 431 [stating, in collective bargaining context, "there is no duty to grant to union employees every benefit that is granted to non-union employees"]; *N.L.R.B. v. Curwood Inc.* (7th Cir. 2005) 397 F.3d 548, 557 [same].)

"Indeed, because the employer is prohibited from granting unilateral wage increases to represented employees . . . , when the employer unilaterally grants a wage increase to non-union employees, it *must* treat union employees differently." (*Overnite Transp. Co.*, *supra*, 280 F.3d at p. 431.) "As wage increases cannot be granted to union employees until

[4] "The Meyers-Milias Brown Act (Gov. Code, § 3500 et seq.) parallels the NLRA (29 U.S.C. 151 et seq.) and California courts should look to federal case law in interpreting the act." (*Public Employees Assn. v. Board of Supervisors* (1985) 167 Cal.App.3d 797, 806-807.)

there is a negotiation, the key issue in determining whether there was discrimination is whether the union employees were foreclosed from the opportunity to receive the wage increase through negotiation." (*Ibid.*) And here, there is no claim that the District bargained in bad faith with the UCOA regarding the longevity bonus—as well as a host of other benefits that the UCOA secured for its members. (See PERB Decision at pp. 2, 55 & fn. 24; see also *id.* at p. 68 [Shiners, dissenting].) As negotiators often say, the duty to "meet and confer" is not the duty to agree to everything.

3. The Board's Decision Establishes a Presumption of Parity and Intrudes on Public Employers' Authority to Set Employee Compensation

The Board paid lip service to the above precedent, insisting that its holding "does not create a rule or even a presumption favoring parity between represented and unrepresented employees . . . so long as the employer's conduct is truly motivated by factors unrelated to the exercise of protected rights." (PERB Decision at p. 42.) But a cursory review of the Board's reasoning reveals that the decision will make it very difficult—if not impossible—for public employers to reserve some benefits for unrepresented employees to create promotional incentives.

The Board reasoned that the fact that the "District's high-ranking labor relations officials repeatedly and expressly relied on the distinction between represented and unrepresented employees as the basis for determining eligibility for employment benefits" amounted to "facially or inherently discriminatory conduct sufficient to support a discrimination allegation." (PERB Decision at p. 42.) However, "[t]he granting of 'benefits to unorganized employees but not to represented employees is not, standing alone, prohibited discrimination.'" (*Phelps Dodge Min. Co., Tyrone Branch v. N.L.R.B.* (10th Cir. 1994) 22 F.3d 1493, 1499, quoting

B.F. Goodrich, Co. (1972) 195 NLRB 914, 914; see also *Merck, Sharp & Dohme Corp.* (2019) 367 NLRB No. 122, 2019 WL 2028493, at *4 ["it has long been established that 'the mere fact that different offers are made or that different benefits are provided does not, standing alone, demonstrate unlawful motive'"], quoting *Sun Transport, Inc.* (2003) 340 NLRB 70, 72.) Rather, establishing unlawful motivation turns on whether "the granting of benefits is 'accompanied by statements encouraging the employees to abandon collective representation in order to secure the benefits.'" (*Phelps Dodge*, *supra*, 22 F.3d at p. 1499, quoting *B.F. Goodrich*, *supra*, 195 NLRB at p. 915, fn. 4.)

In *Phelps Dodge*, the "ALJ concluded that the company had an unlawful anti-union animus because it used the words 'union free' to describe [a] 1990 Quarterly Payment program" that provided for "regular, quarterly payments to [the company's] unrepresented day's pay employees based on a formula linked to the current commodity exchange price of copper." (*Phelps Dodge*, *supra*, 22 F.3d at pp. 1495, 1499.) The Court of Appeal, however, disagreed, explaining that the company's "mere use of the two words 'union free' to describe the 1990 Quarterly Payment Program [did] not amount to a statement encouraging the employees to abandon collective representation in order to secure the benefit." (*Ibid.*, quotation marks omitted.) Put another way, the court explained, "[t]he use of the words 'union free' does not provide clear evidence [of] an unlawful motive and does not support a finding of a [discrimination] violation." (*Ibid.*) Nor did the words "union free" support an interference claim because they did not "foreclose [the company's] union-represented employees' collective bargaining agents from bargaining with respect to their eligibility to participate." (*Ibid.*)

So too here. Just like the employer's use of the term "union-free" in *Phelps Dodge* did not "provide clear evidence [of] an unlawful motive," the District's mere use of the terms "represented" and "unrepresented" as a shorthand to distinguish between rank-and-file employees and management-level employees is not adequate evidence of unlawful motivation. Just as the employer's use of the term "union-free" to describe the quarterly payment benefit in *Phelps Dodge* did not foreclose represented employees from seeking the same benefit through bargaining, the District's use of the terms "represented" and "unrepresented" to discuss the longevity pay incentive did not foreclose the UCOA from seeking the same benefit through bargaining. In fact, *it was the UCOA that initially raised the parity issue* between represented and unrepresented employees in bargaining and there is no claim that the District bargained in bad faith. (See PERB Decision at p. 6.) Although the UCOA did not obtain the longevity bonus for its members, it did win a host of other benefits, "such as enhanced overtime, that were not available to unrepresented managers." (PERB Decision at p. 85 [Shiners, dissenting].)

In concluding otherwise, the majority clearly erred. Indeed, the majority's decision is impossible to square with the Board's decision in *Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, where the Board stated that "even if the primary difference between the Judicial Law Clerks and the Research Attorneys had been their represented status, we still do not believe unlawful motive could be presumed." (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C.)[5]

[5] If a decision issued by the Board is "contrary to its own precedent," it is clearly erroneous. (*California Faculty Assn. v. Public Employment Relations Bd.* (2008) 160 Cal.App.4th 609, 617, 620-621 [finding that

In *Los Angeles County Superior Court*, the Board considered whether the superior court's decision to layoff Judicial Law Clerks (who were unrepresented) but not Research Attorneys (who were represented) amounted to discrimination in violation of the MMBA. The Board concluded that the court's layoff was not "facially or inherently discriminatory" "***even if the primary difference between the Judicial Law Clerks and the Research Attorneys had been their represented status***." (*Ibid.* [emphasis added].) The Board further explained that "[i]t cannot be assumed that an employer that treats represented employees better than unrepresented employees does so to punish unrepresented employees and encourage them to organize." (*Ibid.*) Accordingly, the Board concluded, "the mere fact that the Court decided to layoff unrepresented Judicial Law Clerks and not represented Research Attorneys, [did] not bring [the] case within the ambit of *Campbell* [*Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416]" and there were "no grounds for drawing an inference of unlawful motive based solely on the nature of the Court's conduct." (*Ibid.*)

Astonishingly, in its decision below, the Board reached a completely different conclusion based on statements made by the District allegedly showing that it "***distinguished between employee groups mainly based on protected activity***." (PERB Decision at p. 42, emphasis added.) How are public employers supposed to square these decisions moving forward?

Moreover, the Board's decision puts public employers like the District to a Hobson's Choice and ignored the Board's own warning that it "must tread carefully before inferring that different treatment of different

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PERB's "deviat[ion] from its own precedents without explanation" was clear error].)

represented groups is facially or inherently discriminatory." (*City of Yuba City* (2018) PERB Decision No. 2603-M, at p. 12.) Had the District insisted on parity, it would have run the risk of an unfair practice charge because "an employer comes 'perilously close' to bad faith when it insists that it will not under any circumstances agree to different terms for different employee groups." (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 8, fn. 10; see also *Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 808 [cautioning that under certain "circumstances an employer might violate the EERA by entering into a parity agreement"].) Yet, by refusing to cede to the UCOA's parity request, the District faced an entirely different unfair practice charge resulting in a punitive contract remedy (see *infra*). If the Board's decision is allowed to stand, public employers like the District who are seeking to provide promotional incentives to develop the managerial pipeline will increasingly be forced to pick their poison, drastically curbing their constitutional "authority to set employee salaries." (*County of Riverside*, *supra*, 30 Cal.4th at p. 288.)

4. The Board Failed to Give Adequate Consideration to UCOA's Benefits as a Whole

Even if the Board's adoption of a de facto parity presumption were proper (it wasn't), the Board failed to give due consideration to the entire constellation of benefits obtained by represented employees in finding that the District committed unlawful discrimination and interference against represented employees. As a result of the 2007 negotiations, the battalion chiefs represented by UCOA obtained:

- "a 14 percent increase in salary over the course of a four-year proposed MOU";[6]
- a new overtime proposal that would "compensate battalion chiefs at 1.5 times their base pay rate for overtime hours";
- a "Class A dress coat";
- an increase in "employer contribution to the deferred compensation plan from $50 per month to $75 per month, only $10 less than unrepresented managers received";
- an increase in the "annual reimbursement for career training/development to $750, which was also in line with what unrepresented management employees received."

(PERB Decision at pp. 12, 14.)

Although some of the above benefits were common to represented and unrepresented management employees, "[u]nrepresented management employees in the District are not eligible for overtime." (PERB Decision at p. 12.) In some circumstances, as the dissenting member recognized, such employees were "excluded . . . from overtime opportunities at the Association's request." (PERB Decision at p. 81 & fn. 35 [Shiners, dissenting].) The majority did not seriously grapple with whether these benefits were equivalent to the longevity pay bonus and went out of its way to discount the testimony of the *union's own bargaining representative* (Steve Maiero) that the District "had characterized the revised overtime

[6] Notably, this wage increase was "identical to the wage increase for rank-and-file firefighters recently agreed to by United Professional Firefighters Local 1230 (Local 1230)," (PERB Decision at p. 12), thus providing further evidence for the District's challenges in creating incentives for employees to pursue unrepresented managerial roles with promotional opportunities.

proposal as being 'in lieu of all of the Association's other economic proposals.'" (PERB Decision at pp. 12-13.)[7]

The majority thus clearly erred in failing to "consider[] aspects of the policy that continue to leave nonunion employees less well off than their union counterparts." (*Southcoast Hospitals Group, Inc. v. N.L.R.B.* (1st Cir. 2017) 846 F.3d 448, 456; see also *ibid.* ["It is also troubling that the Board concluded that HR 4.06 tipped the playing field too far in favor of nonunion workers without making any attempt to determine how its judgment might be affected by other aspects of the hiring policies that leave union members at a comparative advantage"].)

For the foregoing reasons, the Board's decision should be vacated.

B. THE BOARD'S DECISION THREATENS TO CHILL SPEECH AT THE BARGAINING TABLE AND UNDERMINE THE MMBA

In concluding that the linguistic convention used by the District's bargaining representative during MOU negotiations evinced an unlawful motive giving rise to an actionable discrimination and interference claim, the majority trampled on basic free speech principles and ignored the critical context in which the District's remarks arose. If permitted to stand, the majority's decision will chill public employer speech at the bargaining table and undermine the MMBA's interest in promoting full communication between employers and employees.

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[7] Interestingly, the Board credited Mr. Maiero's testimony numerous times in other contexts at the District's expense. (See PERB Decision at pp. 10-11, 29, 38; see also *id.* at p. 80, fn. 34 [Shiners, dissenting].)

1. The Board's Decision Will Have a Chilling Effect on Bargaining

"[I]f government has a legitimate role to play in the interchange of ideas—as we conclude it does—then government should have some measure of protection in performing that role, at least as to matters of public interest." (*Nadel v. Regents of University of California* (1994) 28 Cal.App.4th 1251, 1266; see also *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1114, 1116 [holding that the word "person" in the anti-SLAPP statute "must be read to include a governmental entity" because "[a] contrary holding would impermissibly chill the exercise of First Amendment rights"].)

"Protecting the parties' freedom of speech is particularly important in negotiations and grievance proceedings, which the Legislature has designated as the preferred alternatives to strikes and other forms of economic warfare for resolving disputes over wages, hours and working conditions." (*City of Oakland* (2014) PERB Decision No. 2387-M.) Courts applying the NLRA have regularly recognized that "the right of free speech" must not be "unequally applied as between employers and labor unions." (*Boaz Spinning Co. v. N.L.R.B.* (6th Cir. 1971) 439 F.2d 876, 878.) Yet that is exactly what happened here. As the dissenting member recognizes, the Board's decision effectively penalizes the District for the "statements of two District representatives—one at the bargaining table, and the other in response to a grievance—that the District rejected the Association's proposal for a longevity salary differential because the District desired to maintain 'separation' of benefits between represented and unrepresented managers." (PERB Decision at p. 70 [Shiners, dissenting].)

Moreover, the Board's decision is "based on nothing more than the facial meaning of the word without regard to how it was used by the parties in the context of bargaining, directly contrary to [PERB's] established precedent for determining whether employer speech interferes with protected rights." (PERB Decision at p. 70 [Shiners, dissenting].) This violates the longstanding rule that the "Board looks to substance rather than to form. It is not the use or nonuse of certain key or 'magic' words that is controlling . . . ." (*Harry Carian Sales v. Agricultural Labor Relations Bd.* (1985) 39 Cal.3d 209, 236, quoting *N.L.R.B. v. Gissel Packing Co.* (1969) 395 U.S. 575, 608, fn. 27.)

The Board's decision not only "elevates form over substance" (PERB Decision at p. 70 [Shiners, dissenting]), it also exacts an asymmetrical punishment on the District for the speech of its bargaining representatives. It was the UCOA—not the District—that first raised the issue of parity between represented and unrepresented members during bargaining. (See PERB Decision at p. 6.) Yet the majority below punished only the District for employing this linguistic convention when continuing to bargain on the issue of parity. (Cf. *Mount San Jacinto Community College District* (2018) PERB Decision No. 2605 [issuance of final warning letter to employee was unfair labor practice even though he had sent an email to colleagues saying, "[t]o employ another metaphor, I am warning you, in advance of the coming judicial proceedings, that I will be taking aim and pulling the trigger on certain individuals. . . . In essence, I am calling out for you to crouch down out of the line of fire lest you yourself become a casualty"].)

Moreover, "[c]ollective bargaining by its very nature is an annealing process hammered out under the most severe and competing forces and

counteracting pressures." (*Chevron Oil Co. v. NLRB* (5th Cir. 1971) 442 F.2d 1067, 1074, quotation marks omitted.) "The process, by its nature, may involve hard negotiation, posturing, brinkmanship, and horse trading over a long period of time." (*Merck*, *supra*, 367 NLRB No. 122, 2019 WL 2028493, at *4; see also *City of Oakland* (2014) PERB Decision No. 2387-M ["Because disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses, the parties are afforded wide latitude to engage in uninhibited, robust, and wide-open debate in the course of those disputes"], citation and quotation marks omitted.)

The Board's decision ignores this reality by failing to appreciate the critical distinction between alleged discrimination in connection with unionization efforts and alleged "discrimination [that] occurred during the course of negotiations over wages." (*Arc Bridges, Inc. v. N.L.R.B.* (D.C. Cir. 2017) 861 F.3d 193, 200, fn. 3.) The "difference is significant because the legal standards that apply to discrimination before and after an election are different." (*Ibid.*) The NLRB, for example, presumes the granting of benefits during an organizational campaign to be objectionable unless the employer can establish that the timing of the action was governed by factors other than the pendency of the election. (*Ibid.*, citing *Noah's N.Y. Bagels, Inc.* (1997) 324 NLRB 266, 272.) By contrast, if the alleged discrimination occurs in connection with active bargaining and there is no evidence of bad faith, no such presumption applies. (See *In re Sun Transport, Inc.* (2003) 340 NLRB 70, 72 [explaining that an employer's "consideration of the Union's bargaining positions does not demonstrate antiunion animus" where there was "no evidence, or even an allegation, that the [employer's] bargaining was in bad faith"].)

The Board's decision in this case reflects none of this nuance and simply punishes the District for speech that is extremely remote from the union's protected activities. Unless this Court vacates the Board's decision, the specter of discrimination and interference claims—carrying the potential for crippling "make whole" remedies that amount to punitive substantive contract terms, *see infra*—will hover over all bargaining sessions, creating a chilling effect on employer speech.

2. PERB's Decision Frustrates Key Tenets of the MMBA

The decision below also ignores the basic principle that provisions of the MMBA "must be read together and harmonized." (*Anderson v. Los Angeles County Employee Relations Com.* (1991) 229 Cal.App.3d 817, 829.)

One of the primary purposes of the MMBA, embodied in Government Code section 3500, is "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (Gov. Code, § 3500, subd. (a); see also *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 62 ["the MMBA has two purposes: (1) to promote full communication between public employers and employees; (2) to improve personnel management and employer-employee relations within the various public agencies"].) This declared purpose of "'promot[ing] full communication between public employers and their employees' cannot be effectuated, if the employer is not also free to speak its mind, without incurring liability for every impulsive act or intemperate remark by one of its managers or representatives." (*City of Oakland* (2014) PERB Decision No. 2387-M.)

The majority below undermined the parties' full and free communication contemplated by section 3500 when it seized on the "facial meaning of the word [represented and unrepresented] without regard to how it was used by the parties in the context of bargaining." (PERB Decision at p. 70 [Shiners, dissenting].) As the dissenting member explained:

> Both the employees represented by the Association and the unrepresented group of employees who were subsequently granted the longevity differential were management employees within the District. Thus, it appears the parties used "represented" and "unrepresented" as shorthand to distinguish between the two management groups during bargaining. This common practice throughout public sector labor relations must now cease, according to the majority, because using these terms to distinguish between the two groups tends to discourage protected activity. Instead, it appears employers must now use another term for their unrepresented employees, such as "higher management group," when discussing that group during negotiations. Indeed, had the District used such a term instead of "unrepresented" in this case, perhaps the majority would find no violation.

(PERB Decision at p. 70 [Shiners, dissenting].) Instead of recognizing that this shorthand had nothing to do with protected activity and everything to do with distinguishing between two managerial groups, the Board punished the District for using the wrong words in communicating with the union.

Moreover, the Board's myopic reading of Government Code section 3506's anti-interference and anti-discrimination provisions also overlooks a critical aspect of section 3502. Section 3506 provides that "[p]ublic agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees *because of their exercise of their rights under Section 3502*." (Gov. Code, § 3506

[emphasis added].) Although section 3502 protects the "right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations," it also protects the "*right to refuse to join or participate in the activities of employee organizations and . . . the right to represent themselves individually in their employment relations with the public agency*." (Gov. Code, § 3502 [emphasis added].) Thus, public employers may not interfere with or discriminate against public employees because of their exercise of rights under section 3502—whether those are the rights to representation or the rights to proceed without representation. (Gov. Code, § 3506.) Yet the Board's decision fixates on only one type of discrimination and interference while overlooking the possibility of discrimination against, or interference with, individual representation rights.

Accordingly, the Board's decision should be vacated. (See *International Assn. of Firefighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 269-270 [courts may "correct a clearly erroneous construction of the MMBA by PERB when that erroneous construction potentially affects a large class of cases and threatens to frustrate an important policy that the MMBA was enacted to further"].)

C. THE BOARD'S PUNITIVE CONTRACT REMEDY EXPOSES PUBLIC EMPLOYERS ACROSS THE STATE TO POTENTIALLY CRIPPLING BACKPAY AWARDS IN THE FUTURE

The Board's remedy in this case further underscores the gravity of its refusal to distinguish alleged discrimination/interference in the context of bargaining from other types of alleged discrimination/interference. The

Board ordered that "in addition to a cease and desist order and [PERB's] customary notice posting requirement, the District shall be ordered to make affected eligible current and former members of the Fire Management Unit whole by paying to them the same 2.5 percent longevity differential for 15 years of service granted to the District's unrepresented management employees, including supplemental retirement contributions or pension distributions." (PERB Decision at p. 63.) The Board further ordered that "[s]uch payments shall be retroactive to May 6, 2008, the effective date of [the resolution] granting this benefit to the District's unrepresented managers, and shall be augmented by interest at the rate of 7 percent per annum." (*Ibid.*) This remedy not only imposes a substantive contract term on the parties in flagrant violation of the California Constitution, but it also exacts a disproportionate and punitive toll on the District, rests on a misreading of the relevant case law, and will encourage bad faith bargaining by employee organizations in the future.

1. The Board's Decision Imposes an Unconstitutional Substantive Contract Term

"The Board is charged with the responsibility of overseeing and refereeing the bargaining process, but is not empowered to compel, either directly or indirectly, concessions or otherwise sit in judgment upon the substantive terms of the agreement." (*Chevron Oil*, *supra*, 442 F.2d at p. 1074.) As the California Supreme Court has explained, "*regulating* labor relations is one thing; *depriving* the county entirely of its authority to set employee salaries is quite another." (*County of Riverside*, *supra*, 30 Cal.4th at p. 288 [holding that law requiring counties and other local agencies to submit to binding arbitration of economic issues that arose during negotiations with unions representing firefighters or law enforcement officers violated California Constitution]; see also *City of Palo*

Alto, *supra*, 5 Cal.App.5th at p. 1299 [PERB may not limit a public agency's "power to reject or accept any proposal or agreement that may come out of the consultation process"].)

Yet that is exactly what the Board's make-whole remedy does here. The Board's remedy forces the District to give the union what it unsuccessfully sought in bargaining—a longevity pay increase of 2.5% for every employee with fifteen years of service retroactive to 2008. Moreover, the Board's decision essentially creates a parity agreement—which the California Supreme Court has called "a contractual budgetary restriction" (*Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 808—between the union and the District. (See also *Los Angeles Unified School District* (1995) PERB Decision No. 1079-E, at p. 5, fn. 2 ["A 'me too' clause is a contractual provision wherein an employer promises a union that it will receive the benefit of any better deal that the employer might later reach with another union"].)

The Board's remedy in this case is therefore "not merely procedural; it is substantive. It permits a body other than the county's governing body to establish local salaries." (*County of Riverside*, *supra*, 30 Cal.4th at p. 289.) That "clearly violates" the California Constitution because it "removes from local jurisdictions, at the option of public safety unions, the authority to set the compensation of public safety employees that is expressly given to them by [article XI,] section 1, subdivision (b)." (*Ibid.*) Because the Board abused its discretion in imposing this unconstitutional binding substantive contract term on the District, its remedy must be vacated.

2. The Board's Disproportionate Backpay Remedy Unfairly Punishes the District

"A remedial order will . . . be annulled if it is fairly classified as punitive and not remedial." (*Superior Farming Co. v. Agricultural Labor Relations Bd.* (1984) 151 Cal.App.3d 100, 123; accord *Boling v. Public Employment Relations Bd.* (2019) 33 Cal.App.5th 376, 388.) The Board's retroactive 12-year backpay remedy is necessarily punitive because it is completely disproportionate to the conduct in this case—stray remarks at the bargaining table and in response to a grievance using a linguistic convention to distinguish between two groups of managerial employees. (See *Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1605 [courts must "insure that the punishment is not disproportionate to the harm suffered"].)

Moreover, the Board's remedy punishes the District for litigating the merits of the union's unfair practice claims *and winning before the ALJ*. The ALJ issued its proposed decision in the District's favor in June 2014. (PERB Decision at p. 3.) Had the District lost before the ALJ and been subjected to a backpay remedy in 2014, it would have only had to account for 6 years of backpay. But *because the District prevailed before the ALJ and the Board did not issue its decision for another five years*, the District is now suddenly on the hook for five more years of retroactive backpay and pension contributions, plus interest. The District should not be punished for successfully invoking its right to defend against the union's unfair practice charges. (See *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1136 [warning of the "concern not to chill the right to petition the courts for redress of grievances"].)

The Board's retroactive backpay remedy also unsettles the District's expectations, raising serious fairness issues and prejudicing the District's

budgetary planning over the last decade. (See *Eastern Enterprises v. Apfel* (1998) 524 U.S. 498, 534 (plurality opn.) ["The distance into the past that the Act reaches back to impose a liability on [the defendant] and the magnitude of that liability raise substantial questions of fairness"]; *id.* at p. 548 (concurring opn. of Kennedy, J.) [explaining that due process is implicated when "retroactive laws change the legal consequences of transactions long closed"]; *Vernon Fire Fighters Assn. v. City of Vernon* (1986) 178 Cal.App.3d 710, 726 ["the requirement that a public agency pay money to the retirement fund could constitute prejudice in and of itself"].)

Thus, the Board's remedy should be vacated because of its punitive nature. But even putting aside the punitive degree of the Board's remedy, it amounts to an abuse of discretion because it rests on faulty legal footing.

3. The Board's Remedy Rests on a Misreading of the Relevant Caselaw

The majority asserted that it was following "the Legislature's directive and controlling judicial interpretations of the MMBA in concluding that where a public employer has interfered with and/or discriminated on the basis of protected rights, PERB may properly order awards of backpay and/or retroactive benefits until the interference and/or discrimination have ceased, or such other affirmative relief as may be necessary to effectuate the policies and purposes of the MMBA." (PERB Decision at p. 61, citing *Campbell*, *supra*, 131 Cal.App.3d at pp. 424-425; *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553, 558; *Santa Monica Community College Dist. v. Public Employment Relations Bd.* (1980) 112 Cal.App.3d 684, 691-692; see also PERB Decision at pp. 55, 57, 61 ["we look to the Board's decision and

remedial order in *Santa Monica CCD* for guidance in fashioning an effective remedy in the present case"].)

The Board places more reliance on these cases than they can bear. The remedies ordered in *Santa Monica CCD*, *San Leandro*, and *Campbell* were only reasonable because of the temporal proximity between the protected activity and the discriminatory conduct at issue, the nexus between the protected activity and the adverse employer action, and the brazen nature of the employer action.

For example, in *Santa Monica CCD*, the discriminatory unfair practice—"granting pay raises to full-time faculty while withholding them from part-time faculty because of the refusal to waive collective bargaining rights"—occurred ***barely over a month after the protected activity*** in which part-time faculty "filed a representation petition to establish a bargaining unit." (*Santa Monica CCD*, *supra*, 112 Cal.App.3d at pp. 687-688 [representation petition filed May 21, 1976; district's offer of a raise in exchange for waiving statutory rights open until June 30, 1976].) Here, by contrast, the UCOA formed in 1998, ***nearly a decade before*** the District's allegedly discriminatory conduct of granting unrepresented managers a longevity incentive pay increase.

Moreover, the school district in *Santa Monica CCD* had expressly conditioned the receipt of the salary increase on waiving protected statutory rights under the EERA: Both full and part-time faculty had the option of "a salary increase of 8 percent to the members of each organization ***on the condition that the organizations agree[d] to waive their collective bargaining rights with respect to compensation for the next school year***." (*Id.* at p. 688 [emphasis added].) Whereas the union representing full-time faculty "accepted the condition and an 8 percent pay increase was awarded

to full-time faculty," the representatives of the part-time faculty rejected the offer, meaning that the representatives of the part-time faculty did not receive the raise. (*Ibid.*) Here, by contrast, the District did not condition the longevity pay raise on any waivers by the UCOA or its members, bargained over that issue, and in fact extended certain benefits to those members that were not available to unrepresented managers (such as overtime). (PERB Decision at p. 85 [Shiners, dissenting].) It is therefore of little surprise—and no moment here—that the Court of Appeal in *Santa Monica CCD* concluded that PERB "was not fashioning a contract for the parties by ordering" an award of retroactive pay where the amount of the raise had "been fixed by the District and the ***only condition to its acceptance [was] an unlawful waiver of statutory rights***." (*Id.* at pp. 691-692, emphasis added.)

Similarly, in *San Leandro*, "the San Leandro city council adopted its civil service rule shortly after the management employees at issue chose to become represented." (PERB Decision at p. 81, fn. 37 [Shiners, dissenting].) Here, by contrast, "the District granted the longevity differential to unrepresented management employees *nine years after* the battalion chiefs became represented by the Association." (*Ibid.*) Thus, "[b]ecause this case has neither the explicit language nor the close temporal proximity present in *San Leandro*, that case is not controlling here." (*Ibid.*) Moreover, unlike the Board's decision here, the court in *San Leandro* explained that the "city council remain[ed] free to extend or eliminate the management incentive program." (*San Leandro*, *supra*, 55 Cal.App.3d at p. 558.)

And in *Campbell*, the protected activity in question—utilizing the city's impasse procedure—occurred only one and a half months before the

city issued a decision withholding certain retroactivity benefits for members of "the only employee organization which negotiated to impasse with the city and utilized the impasse procedures under the [city's] ordinance." (*Campbell*, *supra*, 131 Cal.App.3d at pp. 419-420.) Thus, in the court's view, the make-whole remedy of requiring the city to pay for retroactive salary and insurance premiums for four months was reasonable given that there was little question that "the motivation for [the city's] discrimination was to 'punish' [the union] and its members for utilizing an impasse procedure which the city adopted as part of the meet and confer process and which, . . . is on that account part and parcel of activities protected by the statute." (*Id.* at p. 424.)[8]

Reviewing the facts of the above authorities reveals the stark contrast from this case, where the protected activity occurred *nine years before* the allegedly discriminatory action and was meant to preserve promotional incentives, not punish the union for engaging in protected activity. Because this case deviates so substantially from the facts of those cases, the remedies imposed in those cases cannot reasonably be analogized and applied here.

4. The Board's Remedy Creates a "Heads I Win, Tails You Lose" Blueprint for Future Unfair Practice Charges

As the dissenting opinion below foreshadows, it is not difficult to imagine where employee organizations—armed with the majority's

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[8] Furthermore, the *Campbell* court did not have occasion to consider the constitutional implications of its make-whole remedy, which would appear to run afoul of the California Supreme Court's subsequent decision in *County of Riverside*, *supra*, 30 Cal.4th 278. (See *People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10 ["It is axiomatic that cases are not authority for propositions not considered"].)

decision—will go from here. Public-sector unions across the state will have every incentive to seek "parity" during bargaining as to benefits previously made available only to unrepresented managerial employees, obtain any other concessions in lieu of such benefits (such as enhanced overtime), and then bring an unfair practice charge based on alleged discrimination and interference to obtain such benefits if the employer refuses to extend them to represented employees. Even when the unions cannot demonstrate that the employer engaged in bad faith bargaining, the majority's decision will allow them to pursue a far more appealing remedy through their discrimination/interference claims: make-whole retroactive pay that essentially gives unions the ability to obtain contractual entitlements that they were unable to negotiate in good faith or obtain by way of bad faith bargaining claims. As the dissenting member warned, "[t]he majority has thus guaranteed that future bad faith bargaining charges will be accompanied by discrimination and interference allegations—or perhaps such allegations will supersede bad faith bargaining allegations altogether—in pursuit of benefits the charging party could not obtain in negotiations." (PERB Decision at p. 69 [Shiners, dissenting].)

This one-way ratchet will usher in a new era in public-sector labor relations, preventing public employers from creating promotional incentives and deterring them from offering any benefits to represented employees that exceed the benefits available to unrepresented employees (such as the enhanced overtime in this case), lest they ultimately be ordered to pay both those benefits and any other benefits that had initially been reserved for unrepresented members to maintain promotional incentives. The Board's decision should be vacated to avoid this anomalous result.

III. CONCLUSION

For all of the foregoing reasons, *amici curiae* League of California Cities and California State Association of Counties respectfully request that this Court vacate the decision of the Public Employment Relations Board and direct the Board to dismiss the UCOA's unfair practice charges.

Dated: February 7, 2020

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)(1), counsel certifies that the foregoing brief contains 7,728 words, as counted by the Microsoft Word word-processing program used to prepare the brief, excluding the cover information, tables, and this certificate.

Dated: February 7, 2020

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I, the undersigned, am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 350 Sansome Street, Suite 300, San Francisco, California, 94104. On February 7, 2020, I served the following documents(s) by the method indicated below:

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER CONTRA COSTA COUNTY FIRE PROTECTION DISTRICT

☒ by electronic service via TRUEFILING (to all registered participants) pursuant to Local Rule 16(j).

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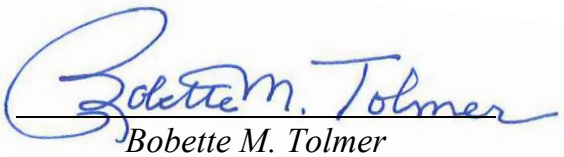
I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 7, 2020, at San Francisco, California.



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