Case No. F071240

IN THE COURT OF APPEAL, STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

COUNTY OF TULARE
Petitioner,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondents.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 521,

Real Parties in Interest.

[PROPOSED] *AMICUS CURIAE* BRIEF OF LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER COUNTY OF TULARE

On Appeal from the Public Employment Relations Board
Decision No. 2414-M (Case No. SA-CE-748-M)

Patrick Whitnell, General Counsel (SBN 184204)
*****Corrie L. Manning, Deputy General Counsel (SBN 278073)
LEAGUE OF CALIFORNIA CITIES®
1400 K Street, Suite 400
Sacramento, CA 95814
Tel: (916) 658-8281
Fax: (916) 658-8240
pwhitnell@cacities.org
*cmanning@cacities.org

Attorneys for *Amici Curiae*, LEAGUE OF CALIFORNIA CITIES and CALIFORNIA STATE ASSOCIATION OF COUNTIES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Statutes

I. INTRODUCTION

The members of the League of California Cities ("League") and the California State Association of Counties ("CSAC") (collectively, the "*amici*") employ thousands of people throughout the state who ensure the provision of necessary services to the public. In establishing compensation and benefits for these thousands of public employees, *amici*'s members must comply with the Meyers-Milias-Brown Act ("MMBA"), Government Code sections 3500 *et seq*.

Pursuant to the MMBA, local public agencies including *amici*'s members must collectively bargain the terms and conditions of their employees' employment with the employee organizations ("unions") that represent them. If a local public agency and union are unable to reach agreement after bargaining in good faith and exhausting any applicable impasse procedures (see Gov. Code, §§ 3505 *et seq*. [e.g., mediation, fact-finding, arbitration]), the agency is expressly authorized by section 3505.7 of the MMBA to implement the terms and conditions of its last, best, and final offer ("LBFO") after holding a public hearing regarding the impasse. In effect, this statutory right to implement serves as a last resort for agencies to set the terms and conditions of their employees' employment – including compensation and benefits – in time to make financial provision for those items in their annual budgets prior to their adoption.

Amici's members are concerned by the Public Employment Relations Board's ("PERB") decision in this case for two reasons. First, PERB's decision suggests that local public agencies might *impliedly* waive their express statutory right to impose their LBFO. This conclusion is contrary to established case law, which holds that statutory rights cannot be waived absent a clear and unmistakable intent to do so. PERB's conclusion is also detrimental to public policy, because it impedes meaningful public

oversight of the collective bargaining process. Finally, PERB's conclusion creates more confusion than certainty for both *amici*'s members and unions when collectively bargaining terms and conditions of employment, thereby undermining the Legislative intent and purpose of the MMBA – to promote uniformity and order.

Second, *Amici*'s members are concerned by PERB's decision because it unnecessarily and erroneously analyzes an issue outside of PERB's statutory authority – namely, whether the employees in this case obtained a vested contractual right that could not be impaired without violating the contracts clauses of the California and United States Constitutions. PERB's imprecise analysis not only went beyond its statutory authority, as explained in the County of Tulare's briefing in this case, but also has the potential to create additional confusion for *amici*'s members and unions as they navigate the collective bargaining process under the MMBA alongside the complex and developing doctrine of constitutionally-protected, vested rights in the public employment context.

For the reasons discussed below, as well as those amply briefed by Petitioner County of Tulare ("County"), *amici* ask this Court to rule that a local public agency's waiver of its statutory right to impose terms and conditions of employment upon impasse must be clear and unmistakable. *Amici* further ask this Court to grant the County's petition for writ of mandate ordering PERB to vacate its decision and issue a new decision based solely on the parties' contract language and extrinsic evidence, with no discussion of constitutional vested rights.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici join in and incorporate by reference the Statement of Facts and Procedural History found at pages 12-19 of the County's Opening Brief.

III. ARGUMENT

A. WAIVER OF A PUBLIC AGENCY'S RIGHT TO IMPLEMENT TERMS AND CONDITIONS OF EMPLOYMENT UNDER GOVERNMENT CODE SECTION 3505.7 MUST BE CLEAR AND UNMISTAKABLE, AND CANNOT BE IMPLIED BY VAGUE TERMS.

PERB concluded that the phrase "will be placed" in addenda B and C was sufficient to provide a contractual right surviving the expiration of the parties' 2009-2011 Memorandum of Understanding ("MOU"). PERB then went on to hold that the same language was sufficient to waive the County's statutory right to impose its LBFO under Government Code section 3505.7. Specifically, PERB stated, "we hold that parties may expressly agree to limit an employer's right to impose terms at impasse, or they may *impliedly* achieve the same result by agreeing to terms that do not mature until after the agreement has expired." (PERB's Decision, p. 34, emphasis added.) PERB's conclusion is contrary to established case law and public policy, and undermines the intent and purpose of the MMBA. This court should rule that a waiver of the County's right to impose its LBFO upon impasse under section 3505.7 cannot be implied, but must be clearly and unmistakably expressed.

1. Established Case Law and Public Policy Dictate that Statutory Rights Cannot Be Waived By Agreement Absent "Clear and Unmistakable" Language.

The courts have long held that statutory rights cannot be waived by agreement unless the waiver language is "clear and unmistakable." (See, e.g., *Wright v. Universal Maritime Service Corp.* (1998) 525 U.S. 70, 77; *Vasquez v. Superior Court* (2000) 80 Cal.App.4th 430, 434.) Courts have expressly applied this rule to alleged waivers of statutory collective bargaining rights. (See *Oakland Unified School Dist. v. Public Employment Relations Bd.* (1981) 120 Cal.App.3d 1007; *Independent Union of Pub.*

Service Employees v. County of Sacramento (1983) 147 Cal.App.3d 482, 488; see also *Choate v. Celite Corporation* (2013) 215 Cal.App.4th 1460 [applying the "clear and unmistakable" waiver rule to conclude that a collective bargaining agreement did not effectively waive employees' statutory rights afforded by the Labor Code].) In *Independent Union of Pub. Service Employees v. County of Sacramento*, *supra*, 147 Cal.App.3d 482, for example, the court applied the "clear and unmistakable" waiver rule to determine whether a union waived its statutory right under Government Code section 3505 to meet and confer over a proposed shift change. The court reasoned that because "California public employees do not have available the remedy of a strike" as do private sector employees, "[i]t would be anomalous to deprive public employees of their only statutory mechanism for presentation of their views … on the basis of less than a clear and unmistakable waiver of such right." (*Id.*, at p. 488.)

It would be similarly anomalous to deprive public employers of their only statutory mechanism for achieving necessary concessions from their employees absent a "clear and unmistakable" waiver. Unlike their private sector counterparts, local public agency employers are subject to stringent mandatory impasse resolution procedures (see Gov. Code, §§ 3505 *et seq*.) that must be completed before they can achieve concessions necessary due to circumstances beyond their control, such as – as in this case – an economic recession, even if those concessions are necessary to ensure the continued provision of critical services to the public. After exhausting those procedures, a public employer's only recourse for achieving necessary concessions is to impose terms and conditions of employee compensation that allow the agency to continue to operate and serve the public within finite budget constraints.

Requiring a waiver of an employer's statutory right under section 3505.7 to be "clear and unmistakable" also serves the important public

policy of ensuring that "[n]either the governing body nor the public [will] be blindsided by unexpected obligations." (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1189 ["*REAOC v. County of Orange*"].) Employee compensation is often a significant component of a public agency's budget, the adoption of which "is a legislative decision, involving independent political, social and economic judgments." (*Carmel Valley Fire Protection Dist. v. California* (2001) 25 Cal.4th 287, 302.) Thus, courts have held that allowing compensation levels to be set by any means other than a formal legislative act "would be … deeply offensive to basic principles of representative democracy." (*County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 344.)

Legislative decisions concerning employee compensation, such as the approval of an MOU, must be made in compliance with state open meeting laws, including the Ralph M. Brown Act (Gov. Code, §§ 54950 *et seq*.). The Brown Act requires all meetings of a local legislative body to be "open and public" so that members of the public may attend and comment. (Gov. Code, § 54953.) The Brown Act also requires local public agencies to provide members of the public access to all documents to be considered – including MOUs to be approved – by the governing body at each meeting. (See Gov. Code, § 54954.1.) These requirements ensure that the public maintains some degree of oversight over the manner in which public funds are spent. The degree of public oversight is strengthened by a rule requiring any waiver of a public employer's ability to impose its LBFO to be "clear and unmistakable." A "clear and unmistakable" waiver, unlike an implied waiver, ensures that both the governing body and the public fully know and understand what right the employer is waiving under the MOU.

2. The MMBA's Purpose is Undermined By PERB's Conclusion that Provisions of the Statute Can Be Impliedly Waived.

The purpose of the MMBA 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." (Gov. Code, § 3500.) The MMBA is also intended to "strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of *uniform and orderly methods* of communication between employees and the public agencies by which they are employed." (*Ibid.*, emphasis added.) Requiring a waiver of the County's right to implement its LBFO to be "clear and unmistakable" promotes uniformity and order under the MMBA. On the other hand, implying a term inconsistent with the MOU's authorizing statute creates confusion, such as that which resulted between the County and the union here.

PERB maintains that "a statute that encouraged the negotiation of agreements, yet permitted the parties to retract their concessions and repudiate their promises whenever they choose, would impede rather than promote good-faith bargaining." (PERB's Decision, p. 29.) But the agreements themselves must necessarily be limited by the statutory strictures that gave rise to them in the first place – in this case, the MMBA – and the MMBA expressly provides that a local public agency may implement its LBFO upon impasse. (Gov. Code, § 3505.7.)

PERB reasoned that "[c]onducting a separate 'waiver' analysis here would potentially lead to the absurd conclusion that a legislative body had clearly intended to bind itself contractually to its employees, but that it could, nonetheless, abrogate the very rights it had promised, because it had not clearly waived its statutory right to act unilaterally at impasse."

(PERB's Decision, p. 34.) But PERB's finding of an implied waiver does not solve the purported problem it has identified.

PERB specifically states that nothing in its decision prohibits the County from imposing new terms and conditions of employment upon impasse, once the County has restored its employees to the merit steps and classifications they would have reached but for the freeze imposed by the 2009-2011 MOU. (PERB's Decision, p. 2.) This effectively means the County, after restoring its employees to the merit steps and classifications earned during the term of the MOU, could then turn around and impose, after impasse, demotions back down to the same merit steps and classifications the employees held prior to the freeze. This would lead to the same "abrogation" PERB claims to have avoided by deciding not to conduct a separate waiver analysis. It also leads to increased inefficiency for the County and cost for the taxpayers without providing any additional protection for employees' economic interests. Such a result could not have been what the Legislature intended when it enacted the MMBA and its impasse provisions to promote uniformity and order.

PERB's conclusion that implied waivers are permissible undermines established case law, public policy, and the intent and purposes of the MMBA. This Court should reject that concept, and rule instead that any waiver of the right to implement after impasse under Government Code section 3505.7 must be clear and unmistakable.

B. PERB'S DECISION SHOULD BE VACATED DUE TO ITS UNNECESSARY AND FLAWED DISCUSSION OF INAPPLICABLE CASE LAW ADDRESSING IMPAIRMENT OF VESTED CONTRACTUAL RIGHTS.

The County's petition for a writ of mandate directing PERB to vacate its decision should further be granted because PERB's decision reached issues unnecessary to decide the controversy at hand. In so doing, PERB has created confusion over an issue of paramount concern to both

local public agencies and their employees: constitutionally-protected, vested rights. PERB's analysis should have ended after its discussion of whether the MOU established rights that survived its expiration. Instead, PERB continued on to reference case law addressing issues of contractual impairment of constitutionally-protected, vested rights – most of which involve public employee pension rights and other benefits not at issue here. PERB's discussion of these cases not only exceeded its statutory authority, as set forth in the County's Opening Brief at pp.43-46, but was also unnecessary and flawed.

The stakes are enormous for *amici*'s members when it comes to administrative and judicial determinations of the circumstances under which public employees may acquire constitutionally-protected, vested rights to compensation and benefits. Most of *amici*'s members collectively bargain terms and conditions of employment with their employees. As at least one court has noted, the concept of vested compensation is inimical to the process of collective bargaining. (*San Bernardino Public Employees Association v. City of Fontana* (1998) 67 Cal.App.4th 1215.) Once a right becomes vested and constitutionally-protected, it cannot be changed except under limited circumstances. And where the vested right involves employee compensation or benefits, the amount of public funds necessary to fulfill those rights can be astronomical. To avoid creating such confusion for *amici*'s members in this complex, important, and developing area of the law, this Court should vacate PERB's decision and direct PERB to issue a new decision without the portion which unnecessarily and incorrectly discusses and applies a constitutional vesting analysis to a straightforward issue of contract interpretation.

1. PERB's Analysis of Case Law Addressing Impairment of Constitutionally-Protected, Vested Contractual Rights Was Not Necessary to Its Decision and Should Have Been Avoided.

PERB concluded the County violated the MMBA by repudiating an express contractual obligation that survived expiration of the parties' 2009-2011 MOU. In reaching this conclusion, it was not necessary for PERB to consider whether the contractual obligation was a constitutionally-protected, vested right. Rather, as PERB acknowledges, to conclude the County was not privileged to alter or repudiate the terms of addenda B and C, PERB merely had to determine whether the rights contained in those addenda *survived expiration* of the MOU. Whether a right survives expiration of an MOU such that it cannot be impaired without violating the MMBA, and whether a right is vested such that it cannot be impaired without violating the federal or California constitutional prohibition against impairment of contracts, are two separate inquiries that require different substantive analyses. Because the latter inquiry has no bearing on whether the County violated the MMBA, it was unnecessary to PERB's decision and should have been avoided. (See *Franco-Gonzales v. Holder* (C.D. Cal. 2010) 767 F.Supp.2d 1034, 1051 [noting that constitutional questions should be avoided in advance of the necessity of deciding them].)

2. PERB's Analysis of Inapplicable Case Law Addressing Impairment of Constitutionally-Protected, Vested Contractual Rights Is Flawed.

Even if it were proper for PERB to address the vested rights issue, this Court should not affirm its erroneous analysis. Courts apply a number of rigorous standards to determine whether public employees have obtained vested, constitutionally-protected contractual rights to compensation, pension, and other benefits. Those standards vary depending on the type of instrument that is alleged to give rise to the contract right (e.g., an MOU, statutory enactment, or a personnel rule or policy), the type of contractual

term that is asserted (e.g., implied or express), and the type of benefit involved (e.g., wages, pension benefit, or health benefit).

Indeed, when the California Supreme Court recently analyzed whether a county ordinance or resolution could give rise to an implied, vested right to health benefits for retired county employees, it carefully articulated a number of rigorous standards based on the type of instrument, contractual term, and benefit involved. Those rigorous standards "ensure that neither the governing body nor the public will be blindsided by unexpected obligations." (*REAOC v. County of Orange*, *supra*, at p. 1189.) Thus, "[a] court charged with deciding whether private contractual rights should be implied from legislation … should 'proceed cautiously both in identifying a contract within the language of a … statute and in defining the contours of any contractual obligation." (*Id.*, at p. 188.) Further, "as with any contractual obligation that would bind one party for a period extending far beyond the term of the contract of employment, implied rights to vested benefits should not be inferred without a clear basis in the contract or convincing extrinsic evidence." (*Id.*, at p. 1191.)

PERB's unnecessary and flawed analysis of whether the contract right in this case was vested and constitutionally-protected ignores this careful reasoning of the courts and replaces it with broad, imprecise statements. For example, on page 37 of its decision, PERB states that "[a] public employer and its employees may expressly *or impliedly* agree to provide for 'future rights' which accrue during the life of an agreement, but which survive or only become enforceable after its termination." (Emphasis added.) PERB also states broadly that "[u]nder California law, an employee acquires an irrevocable or 'vested' interest in a benefit when the employment contract is formed, even if the benefit does not 'mature' until later." (PERB's Decision, p. 39.) This imprecise statement is at odds

with the Supreme Court's cautionary note in *REAOC v. County of Orange, supra*, at 1189, that "[v]esting remains a matter of the parties' intent."

The County sets forth several additional examples in its briefing at pp. 46-55 that *amici* need not repeat here but hereby adopt. The crucial point is that *any* discussion by PERB of these vested rights cases was unnecessary to its conclusion. Rather than allow PERB's decision to confuse public employers and taint future proceedings before the board, this Court should vacate PERB's decision and direct PERB to issue a new decision without the entire flawed and unnecessary analysis addressing whether the contractual right in this case was vested and constitutionally-protected.

IV. CONCLUSION

For all of the foregoing reasons, *amici curiae* League and CSAC respectfully request that this Court rule that a local public agency's waiver of the right to implement the terms of its LBFO under section 3505.7 of the MMBA must be "clear and unmistakable." *Amici curiae* further request that this Court grant the County's petition for writ of mandate ordering PERB to vacate its decision and issue a new decision based solely on the parties' contract language and extrinsic evidence, with no discussion of constitutional vested rights.

DATED: September 18, 2015

Respectfully Submitted,

By: / s /

CORRIE L. MANNING
Attorney for *Amici Curiae*
League of California Cities and
California Association of Counties

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)(1), counsel hereby certifies that the foregoing brief contains 3,105 words exclusive of the tables and signature block, as counted by the Microsoft Word 2010 word processing program used to generate the brief.

DATED: September 18, 2015

Respectfully Submitted,

By: / s /

CORRIE L. MANNING
Attorney for *Amici Curiae*
League of California Cities and
California Association of Counties