Case No. D066237

Exempt from Fees
(Gov. Code, § 6103)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

SAN DIEGO HOUSING COMMISSION,
Plaintiff, Respondent, and Appellant

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Defendant, Appellant, and Respondent,

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 221,
Real Party in Interest.

Appeal from the Superior Court of the County of San Diego
Case No. 37-2012-00087278-CU-WM-CTL, Hon. Ronald L. Styn

PROPOSED BRIEF OF *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PLAINTIFF, RESPONDENT, AND APPELLANT SAN DIEGO HOUSING COMMISSION

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I. INTRODUCTION

This case presents an issue of particular interest to *amici* and their members, 474 California cities and all 58 counties in the state: whether the mandatory factfinding procedures enacted by Assembly Bill 646[1] apply to all issues subject to negotiation or only to negotiations for a full collective bargaining agreement.[2] The trial court correctly ruled that local public agencies may only be compelled to submit to factfinding when they have reached an impasse in negotiations over a full collective bargaining agreement. That ruling is consistent with the statutory language enacted by AB 646, as well as its legislative history. Nothing in the briefs filed by Appellant Public Employment Relations Board (PERB) and Real Party in Interest Service Employees International Union, Local 221 (SEIU), compels a contrary conclusion.

Further, PERB's repeated refrain that "we've always done it this way under other statutes" is unavailing. There are significant differences between AB 646 and statutes that require factfinding for school districts and public universities – differences PERB fails to adequately acknowledge. These

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[1] AB 646 amended several sections of the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. For ease of reference, *amici* use the term "AB 646" to describe the amendments as a whole, while referencing specific Government Code sections within AB 646 as necessary.

[2] This issue is also before this Court in *County of Riverside v. Public Employment Relations Board,* Case No. E060047. That case presents the additional issue of whether AB 646 is unconstitutional as applied to charter cities and counties.

important differences significantly impact the statutory interpretation issue. Consequently, this is a case of first impression – not a case that has already been decided under existing law.

Finally, PERB's reliance on its own recent decisions interpreting the scope of AB 646 is misplaced. Contrary to PERB's plea, those decisions are entitled to *no* deference because they were created for the purpose of assisting PERB in this very litigation.

For the reasons discussed below, as well as those amply briefed by Plaintiff, Respondent, and Appellant San Diego Housing Commission (SDHC), *amici* ask this court to affirm the trial court's ruling that AB 646 applies only to an impasse over a full collective bargaining agreement.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Amici join in and incorporate by reference the Statement of the Case and Statement of the Facts sections found at pages 3-6 of SDHC's Respondent's Brief.

III. ARGUMENT

The trial court correctly ruled that AB 646 applies when there is an impasse over a full collective bargaining agreement, not to impasses over single issues that arise during the term of an agreement. Because the statutory language and legislative history support this narrow reading of AB 646, *amici* urge this Court to affirm the trial court's ruling.

A. This Court should not defer to PERB's recent decisions interpreting the scope of AB 646 factfinding because they were created in response to this litigation.

Before turning to the substantive argument, it is imperative to discuss PERB's plea for deference in light of the unique circumstances of this case. As it always does, PERB asserts the Court should defer to PERB's interpretation of the MMBA. [PERB Opening Brief, pp. 10-13] Ordinarily, deference is appropriate when a case involves a pure issue of labor law under one of the statutes PERB administers. However, this case has a unique procedural backstory that weighs against granting PERB *any* deference.

PERB's construction of a statute under its jurisdiction "will generally be followed unless it is clearly erroneous." (*San Mateo City School Dist. v. Public Employment Relations Bd. (1983)* 33 Cal.3d 850, 856.) Nevertheless, it is "the duty of this court, when ... a question of law is properly presented, to state the true meaning of the statute ... even though this requires the overthrow of an earlier erroneous administrative construction." (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 587.) Thus, this Court is not required to blindly defer to PERB's interpretation of AB 646. Instead, this Court must exercise its independent judgment in construing the statute. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.)

In its briefing, PERB urges this Court to defer to the agency's interpretation of AB 646 in two recent PERB decisions: *County of Contra Costa* (2014) PERB Order No. Ad-410-M [38 PERC ¶ 154] and *County of Fresno* (2014) PERB Order No. Ad-

414-M [39 PERC ¶ 8]. [PERB Opening Brief, pp. 27-28; PERB Reply Brief, pp. 13-15] A brief timeline of events leading up to these decisions demonstrates why deference is not warranted here.

AB 646 took effect on January 1, 2012. PERB's initial regulations implementing AB 646 provided that a decision by PERB's Office of the General Counsel on the sufficiency of a factfinding request was not appealable to the Board itself. (Cal. Reg. Notice Register 2013, No. 17-Z, p. 613.) On December 14, 2012, SDHC filed the petition for writ of mandate in the instant case, challenging the General Counsel's decision to compel SDHC to factfinding over the effects of a layoff.

On April 26, 2013, the California Regulatory Notice Register included a notice of proposed rulemaking stating that PERB sought to delete the regulation exempting a decision on the sufficiency of an AB 646 factfinding request from Board review. (Cal. Reg. Notice Register 2013, No. 17-Z, p. 613.) One of the stated purposes of the amendment was "the development of precedent to further guide parties." (Cal. Reg. Notice Register 2013, No. 17-Z, p. 614.)

PERB's amended appeal regulation took effect October 1, 2013. Since that date, PERB has issued seven precedential decisions concluding that AB 646 factfinding applies to single issue impasses.

From this sequence of events, it is obvious that PERB amended its regulations to serve its own purposes in the ongoing litigation over AB 646 factfinding. PERB's regulatory sleight of hand had two effects.

First, it precluded local agencies from challenging the sufficiency of an AB 646 factfinding request in superior court. This eliminated the potential for future adverse trial court rulings on that issue, ensuring that this case and *County of Riverside* stand alone.

Second, the regulatory change allowed PERB to issue precedential decisions on the scope of AB 646 factfinding that are binding in future PERB proceedings. It also allows PERB to argue, as it does here, that the Court should defer to those decisions because PERB is better suited than the courts to interpret this new law.

PERB likely will respond that it simply followed the proper procedures for amending its regulations. *Amici* do not claim there were procedural irregularities in the rulemaking process. But the timing of the process is suspect.

PERB's original regulations implementing AB 646 could have allowed the sufficiency of a factfinding request to be appealed to the Board itself, but they did not. A little over one year later, PERB amended its regulations to allow the Board to decide appeals of factfinding requests, and thereby issue precedential decisions on the scope of AB 646 factfinding. Between these two rounds of rulemaking, one significant event occurred: SDHC filed the writ petition in this case. The timing of PERB's action strongly suggests that this case was the motivating factor in PERB's rule change.

PERB may also point out that *amici* do not challenge the merits of PERB's precedential decisions themselves. There is no need to do so because this case raises the same issue addressed in

PERB's decisions. In fact, much of PERB's briefing in this case and *County of Riverside* is taken directly from the text of those decisions. Thus, by opposing PERB's interpretation of AB 646 in this case, *amici* necessarily find fault with the analysis in PERB's precedential decisions.

If PERB had issued a precedential decision interpreting the scope of factfinding under EERA or HEERA – or on the scope of AB 646 factfinding *before* SDHC filed suit – there might be a colorable argument for deferring to such a decision in this case. But the decisions PERB urges this court to defer to were manufactured specifically in response to this case and *County of Riverside*. Under these circumstances, PERB's decisions are entitled to no deference at all. (See *Yamaha Corp.*, *supra*, 19 Cal.4th at p. 8, quoting Judicial Review of Agency Action (Feb. 1997) 27 Cal. Law Revision Com. Rep. (1997) p. 81 ["The standard for judicial review of agency interpretation of law is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action."].)

B. Statutory language and legislative history show the Legislature intended factfinding to be available only when there is an impasse over a full collective bargaining agreement.

PERB's arguments on the language and legislative history of AB 646 are permeated with the theme that AB 646 factfinding is exactly the same as factfinding under EERA and HEERA, and thus the three statutes should be treated identically. However, both the statutory language and legislative history demonstrate

important differences that compel a more narrow reading of the scope of AB 646 factfinding.

1. "Differences" has a different meaning under AB 646 than under EERA/HEERA.

PERB relies heavily on the fact that EERA, HEERA, and AB 646 allow parties to submit "differences" to factfinding. [PERB Opening Brief, pp. 28-34] Under EERA, the impasse resolution process starts with the following language:

> Either a public school employer or the exclusive representative may declare that an impasse has been reached between the parties in negotiations over matters within the scope of representation and may request the board to appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable.

(Gov. Code, § 3548.)[3] EERA and HEERA thus define "differences" as an impasse over "matters within the scope of representation." AB 646 contains no similar language.

Where one statute contains particular language but a second similar statute does not, it is presumed "the Legislature intended to omit the concept in the second statute." (*Peoples v. San Diego Unified School Dist.* (2006) 138 Cal.App.4th 463, 472.) Here, the Legislature chose not to define "differences" – as it did in EERA and HEERA – as any dispute over a "matter within the

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[3] HEERA's language is identical except instead of "a public school employer" the statute simply states "an employer." (Gov. Code, § 3590.)

scope of representation." As a result, "differences" must have a different meaning under AB 646 than under EERA and HEERA.

When read in the context of the impasse resolution scheme added by AB 646, it becomes apparent that "differences" refers to those subjects in negotiations over a full collective bargaining agreement on which the parties have not been able to reach agreement. The key to this interpretation is found in Government Code section 3505.7, which sets out the culmination of the factfinding process. That section states in relevant part: "After any applicable mediation and factfinding procedures have been exhausted, . . . a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding."[4]

"Memorandum of understanding" is a term of art in public sector labor relations meaning a full collective bargaining agreement. (E.g., *San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1223 [using "collective bargaining agreement" and "MOU" synonymously].) On the other hand, agreements over a single issue not covered by an MOU are commonly called "side letters." (*Palomar Community College Dist.* (2011) PERB Dec. No. 2213 [36 PERC ¶ 69].) Thus, when parties reach agreement over a single issue they execute a side letter, not a memorandum of understanding. The language of Government Code section 3505.7 therefore contemplates

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[4] Implementation of an MOU would eliminate or impair the union's right to bargain for the duration of the contract. (*Rowland Unified School Dist.* (1994) PERB Dec. No. 1053 [18 PERC ¶ 25126].)

factfinding for a full collective bargaining agreement, not a single subject impasse. PERB's attempt to conflate the two must fail in light of its own precedent distinguishing between them.

Absent the expansive definition of "differences" found in EERA and HEERA, "differences" in AB 646 can only mean a dispute over the terms of a full collective bargaining agreement. Consequently, the plain language of AB 646 does not support PERB's reading of the statute.

2. AB 646's factfinding criteria show that factfinding is available only when there is an impasse over a full collective bargaining agreement.

The factfinding criteria in Government Code section 3505.4, subdivision (d), also support an interpretation that factfinding applies only to an impasse over a full collective bargaining agreement. That subdivision reads, in relevant part: "In arriving at their findings and recommendations, the factfinders *shall* consider, weigh, and be guided by *all* the following criteria." (Emphasis added.)

"[I]f the statutory language is not ambiguous, then we presume the Legislature meant what it said, and the plain meaning of the language governs." (*In re Austin P.* (2004) 118 Cal.App.4th 1124, 1129.) As a general rule, "shall" is mandatory "unless the context requires otherwise." (*Walt Rankin & Assoc. v. City of Murrieta* (2000) 84 Cal.App.4th 605, 614.) Nothing in AB 646 indicates that consideration of the criteria is optional, as PERB claims. [PERB Reply Brief, pp. 19-22] Nor does any "context" in AB 646 indicate that "all" means "some." Accordingly,

"shall" and "all" should be given their plain meaning and the factors should be considered mandatory.

PERB's wishful reading of Government Code section 3505.4, subdivision (d), is based largely on its contention that not all of the criteria may apply in factfinding over a full collective bargaining agreement. [PERB Reply Brief, p. 21] Without conceding the point, these criteria apply even less in many single issue disputes, such as the effects of a layoff in this case, or the background investigations at issue in *County of Riverside*. For example, the "financial ability of the public agency," which includes a comparison of wages, hours, and working conditions of employees in comparable agencies, the consumer price index, and employees' overall compensation, has little relevance to the rehire rights of laid off employees and absolutely no relevance to background investigations. It does, however, have relevance in most negotiations over full collective bargaining agreements. Thus, the criteria the factfinding panel must consider indicates that factfinding applies only to full contract negotiations, not to single issue disputes.

An appellate court may not "rewrite the clear language of [a] statute to broaden the statute's application." (*In re David* (2012) 202 Cal.App.4th 675, 682.) Because Government Code section 3505.4, subdivision (d) clearly provides that the factfinding panel "shall" consider "all" of the listed criteria, this Court must resist PERB's attempt to rewrite the statute.

3. There is no evidence the Legislature intended to import EERA/HEERA's single issue factfinding into AB 646.

PERB also contends the Legislature was aware that factfinding over single issues occurred under EERA and HEERA and that it approved of that practice when enacting AB 646. [PERB Opening Brief, pp. 13-17; PERB Reply Brief, p. 20] "[A] presumption that the Legislature is aware of an administrative construction of a statute should be applied if the agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it. [Citations.]" (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1017-1018.) However, the presumption may be rebutted by evidence to the contrary. (*Environmental Protection Information Center v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1011, 1026.) In this case, the presumption is not supported by the record.

Typically, knowledge is presumed when an agency adopts a regulation implementing the statute and the Legislature later amends the statute without addressing the subject of the regulation. (*Moore, supra*, 2 Cal.4th at pp. 1017-1018.) Knowledge may also be presumed from court decisions or legislative correspondence. (*Id.* at p. 1018.)

None of these bases for applying the presumption is present here. PERB's regulations governing factfinding under EERA and HEERA are silent as to whether factfinding applies to full collective bargaining agreements, single issues, or both. (Cal. Code Regs., tit. 8, §§ 32792-32800.) There is no reported court or administrative decision addressing whether factfinding under

EERA or HEERA applies to single issues. Nor is there any legislative correspondence in the record that would indicate the Legislature was aware prior to enactment of AB 646 that single issues were subject to factfinding under EERA and HEERA. In fact, there is not a single mention of what EERA/HEERA factfinding actually applies to in *any* of the committee bill analyses of AB 646.

Instead of these types of probative evidence, PERB relies on written factfinding panel recommendations issued pursuant to EERA and HEERA that involved single issues. [PERB Opening Brief, pp. 16-17] None of these advisory recommendations addressed whether the scope of factfinding under those statutes includes single issues. Indeed, such a determination is beyond the scope of the factfinding panel's authority. (Gov. Code, §§ 3548.2, 3548.3, subd. (a), 3592, 3593, subd. (a).) Furthermore, PERB has presented no evidence that the Legislature was aware of any of these recommendations at the time it considered AB 646. Without such evidence, there is no basis to apply the presumption of awareness and approval.

PERB may claim there are two EERA cases which show that factfinding applies to single issues. However, both are inapposite because they do not squarely address that issue. (*Vasquez v. State of California* (2008) 45 Cal.4th 243, 254 ["It is axiomatic that cases are not authority for propositions not considered."].)

In *Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191, the school district eliminated positions while engaged in statutory

mediation under EERA. (*Id.* at p. 200.) The court affirmed PERB's conclusion that this violated the duty to participate in good faith in the statutory impasse resolution procedures. (*Ibid.*) The decision did *not* address whether this single issue dispute was subject to factfinding. Thus, *Moreno Valley* does not support PERB's argument.

Redwoods Community College Dist. (1996) PERB Dec. No. 1141 [20 PERC ¶ 27048] had almost identical facts. There, the employer implemented a change in employees' work hours prior to statutory mediation, and PERB held that the district violated its duty to bargain in good faith. Again, whether the single issue in dispute could be submitted to factfinding was *not* addressed in the decision. Because neither decision addressed the issue before this Court, *Moreno Valley* and *Redwoods* simply do not apply in this case.

Additionally, the fact that employers may have acquiesced in PERB's tacit interpretation of the scope of factfinding under EERA and HEERA does not establish that PERB's interpretation is correct. Employers subject to those statutes may have decided not to challenge PERB's interpretation for any number of reasons. Unlike AB 646, EERA and HEERA allow an employer to initiate the impasse resolution process and provide "gatekeeper" functions to weed out disputes that are not appropriate for factfinding. (Gov. Code, §§ 3548, 3548.1, subd. (a), 3590, 3591; Cal. Code Regs., tit. 8, §§ 32792, 32793, § 32797, subd. (a).) Thus, the instances where an employer was compelled to engage in factfinding over its objection likely were much fewer than under the AB 646 system.

Finally, even if the Legislature were presumed to have knowledge of PERB's view of the scope of factfinding under EERA and HEERA, this does not mean the Legislature intended to adopt the same scope in AB 646. In fact, the legislative history shows just the opposite. As introduced, AB 646 contained language virtually identical to the impasse resolution provisions of EERA and HEERA. (Assem. Bill No. 646 (2011-2012 Reg. Sess.) as introduced Feb. 16, 2011.) As the bill made its way through the Legislature, it was amended several times to remove some of that language and insert language unique to AB 646. PERB's position that the Legislature intended to make AB 646 factfinding identical to EERA/HEERA factfinding is therefore not supported by the bill's legislative history. Accordingly, there is no reason to presume the Legislature agreed with PERB's view that EERA/HEERA factfinding applied to single issues and adopted that same scope in AB 646.

IV. CONCLUSION

For all of the foregoing reasons, *amici curiae* League of California Cities and the California State Association of Counties respectfully request that this Court affirm the trial court's ruling that factfinding under AB 646 is only available for an impasse regarding a full collective bargaining agreement, not over single issues that may arise during the term of an agreement.

Dated: November 12, 2015

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 3,424 words, as counted by the Microsoft Word 2013 word processing program used to generate the brief.

Dated: November 12, 2015

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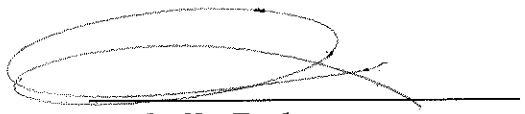
I declare, under penalty of perjury that the foregoing is true and correct. Executed on November 12, 2015, in San Francisco, California.



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