



May 5, 2016

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Honorable Tani Cantil-Sakauye, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *County of San Bernardino v. Public Employment Relations Board*
(*San Bernardino County Public Attorneys Association*), Case No.
S233494 (after a decision by the Fourth District Court of Appeal,
Division Two, Case No. E063736 and PERB Decision No. 2423-M)

Letter of Amici Curiae in Support of Petition for Review (Cal. Rules of
Court, rule 8.500(g)(1))

To the Chief Justice and the Associate Justices of the California Supreme Court:

Pursuant to California Rules of Court, rule 8.500(g), the California State Association of Counties (“CSAC”) and the League of California Cities (“League”) respectfully submit this letter in support of the petition for review filed by the County of San Bernardino on April 4, 2016, asking this Court to review the above-referenced decision of the Fourth District Court of Appeal, Division Two (“appellate court”).

I. Amici’s Interest in Review

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered 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 involves a matter affecting all counties.

The League is an association of 474 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, 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 have statewide or nationwide significance. The Committee has identified this case as having such significance.

Attorneys for amici are familiar with the issues involved and have reviewed the County of San Bernardino's petition for review ("petition") and the answers filed by the the Public Employment Relations Board ("PERB") and the San Bernardino County Public Attorneys Association ("Association"). Amici support the petition and do not restate those arguments herein. Rather, amici write separately to explain that the issues presented in this case are of great importance to local government employers in California. Specifically, PERB's decision effectively upends established case law concluding that the right to a representative may be reasonably regulated by an employer. We focus on PERB's decision because the appellate court's order only pertains to the parties to the case. PERB's decision will likely be deemed by PERB to be precedential¹ and thus it will affect *all* public agencies under PERB's jurisdiction.²

PERB's decision significantly undermines the ability of local government employers to *reasonably* regulate, in a manner consistent with legitimate business needs, investigations of employee misconduct. PERB ruled that, although the Public Defender had a *legitimate business need* to not allow deputy district attorneys to represent deputy public defenders in an interview, the Public Defender nevertheless was limited to either holding the interview with the objectionable representative present or foregoing the interview. Our members are concerned with the precedent that this case sets because it hinders disciplinary efforts of essentially *all* public employers in California. Any regulation adopted by such employer, even if it is reasonable, will be nullified because the employer will have to cancel the interview if the regulation is implemented. It is essential that local government employers maintain the ability to discipline employees when necessary to ensure the effective and efficient use of public resources and the safety of the public workplace. PERB's decision significantly interferes with this effort.

¹ As stated in the petition, PERB's decision will likely be deemed precedential. (Petition, p. 13.) Public agencies treat PERB decisions in the same manner as case law when navigating the contours of their legal obligations and adopting policies or administering discipline. If PERB's decision in this case is allowed to stand, it will affect cities and counties for years to come.

² Almost all public agencies in California are under the jurisdiction of PERB, with the exception of the City of Los Angeles, the County of Los Angeles, and certain public transit districts.

II. Review Should be Granted to Ensure Uniformity of Decision (Cal. R. Ct. 8.500(b)(1))

PERB's decision directly conflicts with established precedents, including *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294 ("*Upland*"), and *Assn. for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625 ("*ALADS*"), which conclude that the right to a representative may be reasonably regulated by the employer.³ This rule is necessary for the proper administration of public agencies and is consistent with *NLRB v. J. Weingarten & Co.* (1974) 420 U.S. 251, 260-261 ("*Weingarten*") ["The union representative...is...safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly."].)

Here, the county's policy prohibiting representation of deputy public defenders by deputy district attorneys, referred to as the blanket ban, is consistent with *Weingarten* and employee rights to representation found in statute. The blanket ban was narrowly tailored only to prevent those representatives that would have created an ethical quandary for the employee and the representative involved. The policy was inherently reasonable.

The PERB decision conflicts with *Upland* and *ALADS*. In *Upland*, the police union wanted a particular attorney, who was not available at the scheduled time of the interview, to represent the police officer in question. The court of appeal said that the police department did not need to reschedule the interview and that the union and officer were obligated to have another representative present if the officer was to be represented during the interview. In *ALADS*, the Second Appellate District held that an anti-huddling policy⁴ "to assure the collection of 'accurate witness accounts before the recollection of witnesses can be influenced by the observation of other witnesses'" was valid because the policy expressly provides that a deputy may meet with an ALADS representative prior to being interviewed. (*ALADS, supra*, 166 Cal.App.4th at pp. 1637 & 1646.)

³ Although *Upland* involves police officer misconduct, the Fourth Appellate District, Division Two, cited *NLRB v. J. Weingarten & Co.* (1974) 420 U.S. 251, in holding "that it is a legitimate employer prerogative to schedule an interrogation in a prompt and timely manner so long as the officer has a reasonable opportunity to obtain representation." (*Upland, supra*, 111 Cal.App.4th at p. 1308)

⁴ This policy prevented multiple deputies meeting at the same time with a single attorney representative prior to a critical incident interview.

The result in *Upland* and *ALADS* would have been entirely different under PERB's new understanding of the right to representation. Accordingly, in *Upland*, since the police officer insisted on being represented by the particular attorney who was not available, the police department would not have been permitted to proceed with the interview but would have had to cancel it and wait for a time convenient for the attorney. Likewise, in *ALADS*, since the deputies insisted on being represented by the particular attorney appointed to simultaneously represent all of them prior to the critical incident review, the sheriff's department would have had no choice, under PERB's new rule, but to either allow the "huddling" or forego the interviews. The exercise of either option would have defeated the legitimate reasons underlying the anti-huddling policy.

Local government employers rely on *Upland* and *ALADS* in adopting reasonable workplace policies pertaining to investigative interviews. But PERB's new rule essentially makes this impossible. Thus, if an employer rejects as a representative a person who is a co-suspect in the matter being investigated, or a person who is disruptive, or person who is not reasonably available, the employer now, under PERB's decision, must either postpone the interview or allow the objectionable representative to be present, or cancel the interview. The legitimate business needs served by any such policies are subverted.

Thus, this Court should grant review to clarify that employers may continue to regulate performance-related interviews, so long as the regulations are reasonable and the employee has a reasonable opportunity to obtain representation.

III. Review Should be Granted to Settle an Important Question of Law Decision (Cal. R. Ct. 8.500(b)(1))

Whether the needs of the county have been properly balanced with the employee rights at issue in this case is still an unsettled matter.⁵ PERB claims that its decision balanced all of the interests involved. It agreed that the San Bernardino Public Defender has valid justifications for prohibiting deputy district attorneys from representing deputy public defenders in performance-related investigations. (Petition, p. 9.) Yet, it found that even if an employer validly objects to a particular representative, the employer is nevertheless obligated to forego an interview to avoid an objectionable representative. (*Id.*) That finding is inconsistent with law governing public employers and, generally, with the duties and obligations of public agencies.

⁵ This court recognized the need to balance employee rights and the operational needs of the county in another case involving attorney ethical obligations, *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 636.

For example, public employers bear the burden to show that their disciplinary decisions are supported by good cause. (See *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 (“*Skelly*”); *Townsel v. San Diego Metropolitan Transit Development Bd.* (1998) 65 Cal.App.4th 940.) Making the decision to forego an interview might prevent the employer from obtaining evidence needed to take disciplinary action and thus, the employer will be precluded from imposing discipline. In addition, obtaining material information during the investigative phase prevents unjustified disciplinary action and the lengthy and expensive process of administering public discipline under *Skelly*. In contrast, under *Weingarten* an employee may choose to forego a performance-related interview and any benefits that might be obtained by participating in the interview,⁶ such as disclosing an alibi, but the employer is not similarly-situated and it must act in accordance with the law and fulfill its duties and obligations as a public employer. For this reason, the option of foregoing an interview is not reasonably available to the employer in the same way that it might be available to the employee.

Local government employers must balance many competing interests and obligations, including protecting the interests of their constituents, managing and supervising public sector employees, providing workplaces that are safe and free from discrimination and harassment and protecting the rights of their employees. As a result of PERB’s decision in this case and the appellate court’s order concluding that it is “in essence correct,” an employer may have to forego an investigative interview with an employee accused of misconduct even if the employer’s rejection of the representative is valid and even if it has provided a reasonable opportunity for the employee to obtain other representation. This interferes with a local government employer’s management of its own affairs and it exposes the employer to liability. (*Mendoza v. Western Medical Center Santa Ana* (2014) 222 Cal.App.4th 1334, 1337 [holding that inadequate investigation of a complaint is evidence of pretext in a retaliation case where the employer did not immediately interview one of the subject employees].) Given the stakes, PERB’s treatment of the county’s interests in this matter was insufficient.

The impact of this case, as it currently stands, will not be limited to just management of the San Bernardino Public Defender’s office. The outcome of this case has wider implications. This case will prevent employers from adopting reasonable policies that are necessary to effectuate the proper balance between an employee’s right to mutual aid and protection and the employer’s right to discipline its employees in order to ensure the government workplace operates safely and efficiently. Thus, we respectfully request that this Court grant review to settle this issue of statewide importance to local government employers.

⁶ *Weingarten, supra*, 420 U.S. at p. 259.

Honorable Tani Cantil-Sakauye, Chief Justice
and the Associate Justices

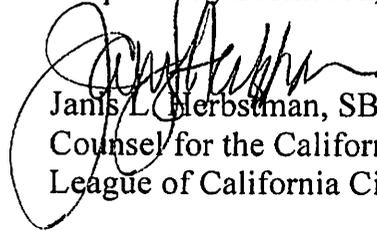
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IV. Conclusion

For the foregoing reasons, CSAC and the League respectfully urge this Court to grant the petition in this case.

Respectfully submitted,



Janis L. Herbstman, SBN 228488

Counsel for the California State Association of Counties and
League of California Cities

Proof of Service Attached

Proof of Service by Mail

County of San Bernardino v. Public Employment Relations Board
(San Bernardino County Public Attorneys Association
Case No. S233494

I, Ashley Rafford, declare:

That I am, and was at the time of the service of the papers herein referred to, over the age of eighteen years, and not a party to the within action; and I am employed in the County of Sacramento, California, within which county the subject mailing occurred. My business address is 1100 K Street, Suite 101, Sacramento, California, 95814. I served the within **LETTER OF AMICI CURIAE IN SUPPORT OF PETITION FOR REVIEW** by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Proof of Service List

Party	Attorney
County of San Bernardino : Petitioner	Kenneth C. Hardy Jean-Rene Basle Office of the County Counsel 385 North Arrowhead Avenue, 4th Floor San Bernardino, CA 92415 Erich W. Shiners Timothy G. Yeung Renne Sloan Holtzman Sakai, LLP 555 Capitol Mall, Suite 600 Sacramento, CA 95814
Public Employment Relations Board : Respondent	Jessica S. Kim Wendi Lynn Ross Public Employment Relations Board 1031 18th Street Sacramento, CA 95811
San Bernardino County Public Attorneys Association : Real Party in Interest	Marianne Reinhold Reich, Adell & Cvitan 2670 North Main Street, Suite 300 Santa Ana, CA 92705

Appellate Court

Court of Appeal
Fourth Appellate District, Division Two
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State of California, Department of Justice
Office of the Attorney General
300 S Spring Street, #1700
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and by placing the envelopes for collection and mailing following our ordinary business practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on 5/5/2016, at Sacramento, California.

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal line extending to the right.

ASHLEY RAFFORD