PERB Affirms Position on Single-Issue Factfinding; Court of Appeal May Rule Soon

October 20, 2015 California PERB Blog, Tim Yeug

City & County of San Francisco **(2015) PERB Decision No. A429-M (Issued on 10/15/15)**

In this case, the City and County of San Francisco (City) filed an appeal over an order by the Office of the General Counsel to proceed to factfinding on a single-issue dispute. The City urged PERB to reconsider its decision in *County of Contra Costa* (2014) PERB Order No. Ad-410-M (*Contra Costa*), in which it held that MMBA factfinding applies to any dispute, even a single-issue dispute that arises outside of contract negotiations. The Board held that, "None of [the City's] arguments persuade us to abandon our previous determination that both the plain language of the statute and its legislative history indicate that the Legislature intended to make MMBA factfinding available for any "differences" over any matter within the scope of representation, so long as the employee organization's request is timely and the dispute is not subject to one of the statutory exceptions set forth in MMBA ..."

Interestingly, although this case was authored by Board Member Banks, it was joined by Chair Martinez and Board Member Gregersen. The *Contra Costa* decision was joined by all four Board members at that time, but that was before Member Gregersen joined PERB. With this case, all five Board members have now joined in PERB's position on factfinding.

While this case doesn't break any new legal ground, it does provide an opportunity to talk about the status of factfinding at PERB. The fact that PERB is sticking with its decision in *Contra Costa* is not surprise. The real battle is going to be in the courts of appeal. There are currently two appellate cases pending with this issue: 1) *County of Riverside v. PERB* (Court Case No. E060047); and 2) *San Diego Housing Commission v. PERB* (Court Case No. D066237). In the San Diego Housing Commission case, the court recently asked the parties if they wanted oral argument, which usually is a sign that the court is ready to issue a decision. The Commission requested oral argument, but no date has been set.

The County of Riverside case is also fully briefed. Recently, the Supreme Court ordered the Riverside case transferred from Division 2 of the 4th District Court of Appeal, to Division 1 in San Diego. Division 1 is the same division that is hearing the San Diego Housing Commission case. So it looks like there may be movement in one or both of these cases. If so, we may get an appellate decision on this issue soon.

PERB Emphasizes an Expansive Right to Union Representation

07/23/2015 PERB Blog, Tim Yeung

Capistrano Unified School District (2015) PERB Decision No. 2440-E (Issued on 6/30/15)

Facts:

The issue in this case was whether an employee had the right to union representation in a meeting with her supervisor. It was undisputed that the employee and supervisor had a "strained" relationship. During a telephone call in which the supervisor was trying to explain a new program, the employee became argumentative because she felt the new program was unworkable. Before the supervisor could explain the benefits of the new program, the employee hung up the phone. A few days later the supervisor went to visit the employee to make sure the employee understood the protocols for the new program. When the supervisor asked to meet privately with the employee, the employee asked for a union representative if the meeting was "going to be disciplinary." The supervisor assured the employee that the meeting was not disciplinary and continued without responding to the employee's request for union representation.

During the meeting the employee again criticized the new program as unworkable and called it "ridiculous." The employee also yelled that she wanted the supervisor to leave the premises immediately. The supervisor left, but later issued the employee a written reprimand for unprofessionalism and insubordination. One of the incidents mentioned in the written reprimand was the employee's yelling at the supervisor to leave the premises.

Board Decision:

The Board began its decision by noting that EERA provides a right to union representation during an investigatory or disciplinary meeting that is at least as broad as right afforded to private employees under NLRB v. J. Weingarten, Inc. (1975) 420 U.S. 251. However, the Board quickly moved into a discussion about how the right to union representation under EERA is "considerably broader" than the right under Weingarten. Citing to Redwoods Community College Dist. v. PERB, the Board emphasized that California courts have recognized a right to union representation in "highly unusual circumstances." (Redwoods Community College Dist. v. PERB (1984) 159 Cal.App.3d 617.) In support of its position, the Board noted that EERA section 3543.1 provides employee organizations the independent right—a right not present in the language of the NLRA—to represent members in their employment relations with public school employers. Thus, according to the Board, even though PERB has followed Weingarten in the past, "where the California statutes provide for broader or additional rights not found in the federal private-sector law, PERB must follow the intent of the Legislature to effectuate the purpose of the statute."

After setting forth the law, the Board quickly determined that the meeting at issue was "investigatory" and that the employee should have been afforded the right to union representation. In reaching this conclusion, the Board rejected the employer's argument that because the supervisor assured the employee that no discipline was contemplated, the employee could not have had a reasonable belief that the meeting was investigatory. The Board held that a supervisor's stated purpose for a meeting is not dispositive, but that the overall context of the meeting must be considered. Relying on some federal precedent, the Board said that, "Even a government employer's promise of immunity from criminal prosecution will not necessarily negate the reasonableness of an employee's belief that an interview may result in discipline and that union representation is therefore justified at the investigatory interview."

Comments:

1.This decision sets forth PERB's legal justification for an expansive right to union representation. What is interesting is that PERB has already issued a decision setting forth an even broader right to union representation. That case is Sonoma County Superior Court (2015) PERB Decision No. 2409-C ("Sonoma").) I haven't blogged yet about Sonoma because I represent the employer in that case and I was waiting for some things to flesh out first. But in my mind, it would have made sense for PERB to have issued this decision first because it serves as a logical precursor to Sonoma. If you read this decision in full, you'll see that the Board takes every opportunity to remind the reader that the right to representation under EERA does not derive solely from Weingarten. What the Board emphasizes is that unions have an independent right to represent their members, even if the disciplinary element is absent from a meeting. Based on Redwoods, I would concede this point, but only where there are "highly unusual circumstances" that are akin to those present in an investigatory or disciplinary meeting.

2.In my mind, PERB is using this decision to help justify its decision in Sonoma, in which it expands the right to union representation beyond even "highly unusual circumstances." Under Sonoma, an employee arguably has the right to union representation in any meeting involving the terms and conditions of work. It's a drastic—and in my opinion, unjustified and unnecessary—expansion of the right to representation. In support of my position, I would urge readers to take a look at the Redwoods case. Although this decision cites to Redwoods, there are important portions of Redwoods that are not discussed in it. For example, in Redwoods the court noted that, "None of these cases [cited] holds that there would not be a right of representation if the discipline element were absent. But the opinions in Weingarten, Civil Service Assn. and Robinson show that there was a potential for disciplinary action in each case, and that each court considered the discipline element significant." The court went on to state that, "The limitation implicit in the discipline element is sound as a matter of policy" and concluded that, "Although the precedents do not compel a conclusion that the discipline element is invariably essential to a right of representation, under EERA and other California labor statutes representation should be granted, absent the discipline element, only in highly unusual circumstances." Thus, while it is technically true that the right to representation under EERA is not strictly limited to disciplinary situations, the court in Redwoods made it clear that absent a disciplinary situation, the right should only exist in highly unusual circumstances.

3.With respect to the present case, the Board did not decide whether highly unusual circumstances were present because it found the meeting to be investigatory. Based on the facts set forth in the decision, I don't disagree with the Board's ultimate conclusion. However, I would have reached this conclusion differently. In Lake Elsinore Unified School District (2004) PERB Decision No. 1648, PERB held that if a supervisor tells an employee that a meeting will not result in discipline in order to deny the employee a union representative, then no discipline can result from the meeting. Based on the facts set forth in this case, the supervisor promised the employee the meeting would not lead to discipline, but then issued a written reprimand based in part on what happened in the meeting. Under Lake Elsinore Unified School District, that's sufficient to find a denial of the right to union representation.

4.Another part of the decision I found interesting is the Board's discussion about what happens if a supervisor promises the employee that a meeting will not lead to discipline. If I was on the Board, I would hold that if a supervisor promises that a meeting will not lead to discipline, then an employee cannot have a reasonable belief that the meeting is disciplinary, and no right to union representation will exist. I would then hold the employer to its promise and prohibit the employer from disciplining the employee for anything that is said during the meeting. In my mind this is a better rule, but obviously PERB disagrees.

PERB Issues 2014-15 Annual Report

11/02/2015, California PERB Blog, Tim Yeung

PERB has released its annual report for fiscal year 2014-2015. Here is my annual summary of the statistics in the report:

Unfair Practice Charges
695 unfair practice charges (UPCs) were filed in fiscal year 2014-15. In fiscal year 2013-2014, there were 949 UPCs, but 173 of those were filed by the same individual on behalf of himself and/or other employees over agency fee issues. So if you subtract the 172 "duplicate" UPCs, there were 777 UPCs filed in fiscal year 2013-14. That means fiscal year 2014-15 saw a 10.6% decrease in UPCs compared to the year before.
The decrease in filings was seen in all the major acts with the exception of the Dills Act. The largest decrease was under HEERA, which saw a 31.7% decrease in UPCs (71 versus 104 in 2013-14). The MMBA saw a 14.2% decrease in UPCs (260 versus 303 in 2013-14). EERA saw a 6.2% decrease of UPCs (272 versus 290 in 2013-14). Going against this trend was the Dills Act which saw a 35.8% increase in UPCs (72 versus 53 in 2013-14).

Year: # of UPCs
2014-15: 695
2013-14: 949 (777 if duplicates are eliminated)
2012-13: 678
2011-12: 768
2010-11: 744
2009-10: 802
2008-09: 868
2007-08: 816
2006-07: 823
2005-06: 1012
2004-05: 1126
2003-04: 838
2002-03: 802
2001-02: 740

ALJ Proposed Decisions
In 2014-15, the ALJs at PERB issued 70 proposed decisions. This is compared to 76 proposed decisions in both 2012-13 and 2013-14. Because PERB added an 8th ALJ in May 2014, I had thought the number of proposed decisions in 2014-15 would increase. Fortunately, the decrease was relatively slight. Also good news is the fact that the 70 proposed decisions is greater than the 69 formal hearings that were conducted in 2014-15. This means the ALJs continue to make progress on the "backlog."

[Note: The annual report this year again did not state the average number of days it took to issue a proposed decision, so I don't have that number for the last two years]

Year: # of Proposed Decisions (Average # of Days)
2014-15: 70 (Unknown)
2013-14: 76 (Unknown)
2012-13: 76 (128)
2011-12: 61 (102)
2010-11: 38 (122)
2009-10: 57 (86)
2008-09: 52 (94)
2007-08: 44 (94)
2006-07: 41 (85)
2005-06: 46 (100)
2004-05: 49 (63)
2003-04: 47 (53)
2002-03: 52 (53)

Board Decisions
For 2014-15, the Board itself issued 74 decisions and also considered 19 injunctive relief (IR) requests. The 74 decisions is a 14.9% decrease from the 87 decisions issued in 2013-14 while the 19 IR requests is a 24% decrease from the 25 IR requests in 2013-14. With respect to Board decisions, I hope that we will see a substantial increase next year. This is because for the first time in many years, the Board has a full five members. So with the additional Board member(s), presumably there will be some additional decisions issued.

As of today, the Board's docket lists 51 items, including 42 proposed decisions on exceptions before the Board. When I did my review of the annual report last year, the Board's docket had 59 cases on it. So historically, a docket of 51 items is pretty good. If the Board is issuing about 70-80 decisions a year, it should be able to clear its docket in less than a year. However, of the 42 proposed decisions on the docket, 19 are more than a year old. Five are more than two years old. This means that while the Board may doing a good job of getting many decisions out quickly, there are still many "meatier" decisions that have yet to be issued. Those are often the decisions that take the most time to write.

Year: # of Board Decisions/IR Requests/Combined Total
2014-15: 74/19/93
2013-14: 87/25/112
2012-13: 51/17/68
2011-12: 100/21/121
2010-11: 79/16/95
2009-10: 79/13/92
2008-09: 89/19/108
2007-08: 65/28/93
2006-07: 87/16/103
2005-06: 80/23/103
2004-05: 142/14/156
2003-04: 128/13/141

2002-03: 73/14/87
2001-02: 44/23/67

Factfinding Requests
In fiscal year 2014-15, there were 23 requests approved for factfinding under EERA and HEERA. There were 41 factfinding requests filed under the MMBA. Of these 41 requests, 34 were approved. The 34 approved requests under the MMBA represents a 35.8% decrease from the 53 approved requests in 2013-14.

Year: # of Requests
EERA/HEERA
2014-15: 23 (Approved)
2013-14: 26 (Approved)
2012-13: 34 (Approved)
2011-12: 29 (Requested)
MMBA
2014-15: 34 (Approved)
2013-14: 53 (Approved)
2012-13: 62 (Approved)
2011-12: 21 (Requested)