Employees Have Statutory "Right to Strike"

04/23/2015 California PERB Blog, Tim Yeung

Fresno County In-Home Supportive Services Public Authority (2015) PERB Decision No. 2418-M (Issued on 03/30/15)

This case involves bargaining that occurred during the recession in 2009 and 2010. Like many employers during that time period, the employer in this case proposed concessions. The union refused to agree to them. The employer then declared impasse and imposed its last, best, and final offer (LBFO). The union then filed an unfair practice charge alleging that: 1) the employer engaged in bad faith bargaining leading up to impasse; and 2) the employer unlawful imposed a no-strike provision as part of its LBFO. After a hearing, the administrative law judge (ALJ) issued a proposed decision dismissing the charge in its entirety. The union then filed exceptions with the Board.

The Board affirmed the ALJ's dismissal of the bad faith bargaining charge. For anyone interested in reading a case that summarizes the state of the law on bad faith bargaining, this is it. The Board spends a lot of time setting forth all the factors to be considered in a bad faith bargaining case. While this decision contains a lot of good learning points, I found the second half of the decision much more fascinating.

In the second half of the decision, the Board overruled the ALJ and held that the employer's imposition of a no-strike clause at impasse was unlawful. The holding itself is actually not a shock to me, or I suspect, to most experienced practitioners. What was interesting to me was the Board's rationale for its holding; particularly it's discussion about the "right to strike."

The Board begins by noting that the Meyers-Milias-Brown Act (MMBA) is silent on the right to strike. The Board also notes that the MMBA expressly states that it is not intended to make Labor Code 923 applicable to public employees. Labor Code 923 codifies language from the National Labor Relations Act guaranteeing employees the right to engage in "concerted activities." The Board then reviews past PERB and Court decisions to conclude that, "while not absolute, the right to strike falls within the statutorily-protected right of public-sector employees to participate in union activities." In reaching this conclusion, the Board expressly overruled the maddeningly confusing Compton case, PERB Decision No. IR-50, to the extent it holds to the contrary. In Compton, Member Porter famously argued that the absence of the phrase "concerted activities" from the statutes administered by PERB signaled a Legislative intent to prohibit public sector strikes.

After concluding that the MMBA contains a right to strike, the Board had little trouble holding that an employer cannot waive or limit such a right when it imposes its LBFO. The Board held that, "Because the right to strike is fundamental to the federal scheme of collective bargaining, it cannot be relinquished by employees, except by consent, in the form of specific contractual language."