Case No. S162647

Supreme Court Copy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF SAN JOSE,

Plaintiff/Petitioner,

v.

OPERATING ENGINEERS LOCAL UNION NO. 3, et al.

Defendants/Respondents.

NO. S162647

Sixth Appellate District Case No. H030272

(Santa Clara County Superior Court Case No.: 1-06-CV064707)

REPLY TO ANSWER TO PETITION FOR REVIEW

After a Decision by the Court of Appeal
Sixth Appellate District
[Case No. H030272]

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To the Honorable Chief Justice Ronald M. George and the Honorable Associate Justices of the California Supreme Court:

I. SUMMARY OF REPLY ARGUMENT

Respondent Operating Engineers Local Union No. 3 ("OE#3" or "Union") acknowledges, as it should, that this matter is worthy of Supreme Court review, a point with which Petitioner City of San Jose ("City") obviously agrees. However, the City strongly disagrees with OE#3 to the extent it is seeking to expand the scope of this Court's review beyond the narrow and unsettled issue presented in this case.

The instant case presents a perfect opportunity for this Court to resolve the sole issue for which there is now a clear division among the District Courts of Appeal: whether the Superior Courts or the Public Employment Relations Board ("PERB") have initial jurisdiction over claims that safety-sensitive public employees should be enjoined from participating in a work stoppage. OE#3's attempt to "muddy the waters" by claiming that this Court should also review such issues as whether the Little Norris-LaGuardia Act applies to actions seeking to enjoin public employee strikes – an issue **not** raised by either party in the present case – should be rejected.

For the reasons stated below, this Court should grant review in this case, while declining such review in the *Contra Costa* case, recently decided by the First District Court of Appeal.

II. REPLY ARGUMENT

A. AS OE#3 CONCEDES, THIS CASE IS ESPECIALLY RIPE FOR REVIEW BY THIS COURT

Since the City filed its Petition for Review, the First District Court of Appeal decided *County of Contra Costa v. Public Employees Union Local One*, case number A115095 (attached to the City's Request for Judicial Notice), which specifically disagreed with the Sixth District in this case and

urged this Court to review this matter. In addition, OE#3 – the prevailing party in this case – has conceded the importance and necessity of this Court to grant review to resolve the issue raised. In light of these developments, this case is perfectly postured to be reviewed by this Court.

B. AS THE COURT SHOULD GRANT REVIEW IN THIS CASE, THERE IS NO NEED FOR THE COURT TO REVIEW THE *CONTRA COSTA* CASE AS WELL

As an initial matter, it seems procedurally inappropriate for OE#3, in the context of this case, to be arguing one way or the other whether the *Contra Costa* case should also be reviewed by the Court. The issue raised in this matter is whether the Sixth District's decision in this case is subject to Supreme Court review. Presumably, the parties in the *Contra Costa* case will be able to make their contentions in that case as to whether it too should be subject to similar review.

However, to the extent this Court is willing to consider that argument in this case, the City respectfully urges the Court to limit review to the current case. The current case presents the precise issue that has been unresolved since PERB was legislatively deemed to have jurisdiction over Meyers-Milias-Brown Act ("MMBA") claims in 2001 – whether such jurisdiction also applies to claims made pursuant to *County Sanitation v. Los Angeles County Employees Ass'n,* (1985) 38 Cal.3d 564. While the *Contra Costa* decision handled the same question, it also involved other unrelated issues, so a review of that case would simply be duplicative and allow a greater opportunity to confuse the issues.

For example, OE#3 asserts that the *Contra Costa* case "presents a different set of facts that will begin to demonstrate the range of contexts in which strike injunction cases arise." (Answer to Petition at 2.) OE#3 then points out that in that case, the Superior Court enjoined from striking "an

entire bargaining unit of approximately 500 nurses, deeming each and every nurse to be 'essential,' thereby entirely eviscerating all of the nurses' right to strike." (Answer to Petition at 2-3.)

This "factual difference," however, has nothing to do with whether PERB or the Superior Court has initial jurisdiction to decide whether specific employees are essential to the public health and safety. If anything, such a decision by the Superior Court raises questions about the soundness of its decision – not whether the Court had the initial jurisdiction to render it.[1]

Therefore, it is not necessary for this Court to review both cases as this case presents precisely the issue that everyone involved now agrees requires legal resolution. That the Sixth District's decision takes such an unprecedented leap in expanding the scope of PERB's jurisdiction is yet another reason for reviewing this case, as discussed below.

1. OE#3's Assertion that PERB's Jurisdiction Should Extend to any "Disputes About Strikes," although Supported by the Sixth District's Reasoning in this Case, is Overreaching and Contrary to the Law

As an initial matter, OE#3's contention (which is now supported by the Sixth District's opinion in this case) that PERB has jurisdiction over disputes regarding "strike conduct" should be disavowed. No Court had ever ruled as such. Rather, PERB's jurisdiction is invoked only if the

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[1] OE#3 also claims that *Contra Costa* should be reviewed to allow PERB to be a party to this action. However, PERB has had and will continue to have a voice in this dispute. PERB has filed briefs and made appearances at every stage of this litigation, and surely will continue to do so before the Supreme Court, at least in an *amicus* capacity. Furthermore, PERB may have an opportunity for oral argument if OE#3 grants PERB permission to use some or all of OE#3's argument time. *See* Cal. Rules of Court, Rule 8.524(g).

underlying conduct implicates the MMBA. Even the cases cited by OE#3 confirm this.

Although claiming that, by Legislative dictate, PERB has jurisdiction of any "strike conduct," OE#3 fails even once to quote the pertinent language of the MMBA dealing with the scope of PERB's jurisdiction. The operative language is contained in Government Code Section 3509(b), which reads as follows:

> A complaint alleging **any violation of this chapter or of any rules and regulations adopted by a public agency . . . shall be processed as an unfair practice charge** by [PERB]. **The initial determination as to whether the charge of unfair practice is justified** and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, **shall be a matter within the exclusive jurisdiction of [PERB].** [PERB] shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.
>
> Cal. Gov't Code §3509 (emphasis added).

As can be seen from even a cursory reading of this provision, the wording the Legislature chose to define the scope of PERB's exclusive jurisdiction is narrow, as it only applies to unfair practice violations of "this chapter," meaning the MMBA. To the extent PERB's jurisdiction goes beyond mere violations of the MMBA, it is the result of judicial interpretation, not legislative decree.

Yet even the Courts that seem to have more broadly interpreted the scope of PERB's jurisdiction have not suggested, as OE#3 and the Sixth District have done, that all disputes involving labor issues or "allegations regarding strikes" should perfunctorily be deemed to be within PERB's jurisdiction. Rather, in every instance that PERB was found to have exclusive jurisdiction, the Courts relied on the potential violation of specific provisions of the governing statute (such as the Education Employment Relations Act ["EERA"] or the MMBA). Where no specific provision was

implicated, then no PERB jurisdiction was found, regardless of whether the underlying conduct involves labor disputes.

In those cases where the MMBA (or similar governing statute, such as EERA) is not implicated, courts have consistently been held to maintain their jurisdiction. *See Pittsburg Unified School District v. California School Employees Ass'n,* (1985) 166 Cal.App.3d 875 (court not persuaded that picketing and leafleting activities are either arguably protected or prohibited by EERA); *California Teachers Ass'n v. Livingston Union School District,* (1990) 219 Cal.App.3d 1503, 1519 (finding nothing supportive of the contention that claims which assert only violations of the Education Code be directed to PERB simply because the defendant *contends* the EERA may be implicated in the resolution of the claim); *Wygant v. Victor Valley Joint H.S. District,* (1985) 168 Cal.App.3d 319, 324-325. (**every** employee lawsuit complaining of acts of a public employer arguably raises a question of whether the employer was meeting and negotiating in good faith, "yet PERB's exclusive jurisdiction is not all-inclusive"); *California School Employees Ass'n v. Azusa Unified School Dist.,* (1984) 152 Cal. App. 3d 580, 593 (while an interpretation of any statute adverse to the employee by the employer may be unfair in the lay-sense, such a result does not necessitate a conclusion that it is also an "unfair practice" within the meaning of EERA). As such, there are a series of cases involving labor disputes – including those involving protected activity such as picketing and leafleting – over which PERB has not been deemed to have initial jurisdiction.

The *Contra Costa* decision is consistent with this view, finding that the alleged offending conduct, even if it is strike-related, must be found to implicate the MMBA in order for there to be a finding that PERB has initial

jurisdiction.[2] Unlike the reasoning of the Sixth District in this case, which can be read to expand PERB's jurisdiction over anything involving a strike, *Contra Costa's* interpretation is consistent with the reasoning of prior appellate cases which link such conduct to actual MMBA prohibitions or protections.

Indeed, even in those cases where PERB jurisdiction was found, the Court in each instance rested its determination on the provisions of the governing statute – not simply the idea that all disputes having anything to do with labor or with strikes should fall within PERB's jurisdiction.

For example, in *San Diego Teachers Ass'n v. Superior Court,* (1979) 24 Cal.3d 1, a school district obtained an injunction against a teachers association that precluded the teachers from engaging in a strike.[3] Among

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[2] Contrary to OE#3's contention, the *Contra Costa* case did not "distinguish the MMBA from other labor relations statutes." (Answer to Petition at 6.) Rather, the Court in *Contra Costa* simply observed that employees covered by the MMBA (such as nurses and airport operations specialists) may present a greater public safety issue if they go on strike, as opposed to those covered by the other statutes over which PERB has jurisdiction.

OE#3's contention, therefore, that there is a "threshold" issue regarding whether there is a basis to differentiate PERB's jurisdiction over different public entities is baseless. There is no such threshold issue, as there is no dispute that PERB's jurisdiction over cities and counties is basically the same as its jurisdiction over other public entities, a concept that the *Contra Costa* Court recognized as well. *See Contra Costa* at 16; *see also* Cal. Gov't Code §3509(a); *Coachella Valley Mosquito & Vector Control Dist. v. PERB,* (2005) 35 Cal.4th 1072, 1089-1090. The question, therefore, is not whether PERB's jurisdiction rests on which types of public entities are involved. Rather, the question in determining PERB's jurisdiction is whether the actions alleged in a claim implicate the MMBA – the critical question asked in all cases in which PERB's jurisdiction is analyzed.

[3] As a case decided before *County Sanitation*, the issue of whether the common law prohibited public employee strikes was still unsettled.

other arguments, the school district argued that the strike would EERA in that the association failed to negotiate in good faith and had not declared an impasse. Specifically, the school district alleged that the association's bad faith was evidenced "by its sponsoring work slowdowns and threatening a strike if no contract were negotiated by June 6." *Id.* at 4.

Unlike the position taken by OE#3, the Court did not simply deem all disputes involving strike activity to be covered by PERB. Rather, the Court had to analyze whether PERB could "properly determine the strike was an unfair practice under the EERA." *Id.* at 7. In doing so, the Court relied on specific provisions of EERA which prohibited (1) failures to negotiate in good faith (Cal. Gov't Code §3543.6(c)), and (2) refusals to participate in the impasse procedures (Cal. Gov't Code §3543.6(d)). *Id.* at 8-9. These provisions were implicated under the facts of the *San Diego Teachers* case, thus justifying PERB's initial jurisdiction.

There is no similarity in the present case. The issue of good faith negotiations and impasse procedures are completely irrelevant to the issue of whether a certain limited number of employees are critical to the public health and safety. Even if PERB somehow could conclude that the events leading to the threat of a strike were some sort of PERB violation (something the City has never asserted), the issue of whether public safety requires these employees to continue working would not be affected.

In summary, it is not enough to say simply that PERB was created to handle all labor disputes or strike-related activity. Had that been the case, there would be no need for the Courts to so carefully analyze the facts and theories of liability underlying every labor dispute. Prior to this Sixth District decision, no case had taken the position that OE#3 is advocating: basically that all public employee disputes involving "strike-related

activity" is subject to PERB jurisdiction. Were that the rule, then the cases finding PERB jurisdiction where strike activity is alleged would surely have said so. However, rather than simply sending "strike related cases" to PERB, the Courts in each instance analyzed the facts to determine whether the MMBA or other statute governed by PERB is implicated.

2. The Non-Applicability of Little Norris-LaGuardia Act To Claims Seeking to Enjoin Certain Safety-Sensitive Employees From Striking Is Clear – There is No Need for the Court to Review that Issue

OE#3 claims that the *Contra Costa* case should also be reviewed as it raises an issue not raised in this case; that is, the applicability of the Little Norris-LaGuardia Act (Cal. Labor Code Section 1138, *et seq.*) ("Act") to claims made under *County Sanitation.* There is no reason for this Court to take up that issue as there is no legal uncertainty about the non-applicability of the Act to such claims.

The Act restricts courts from issuing particular injunctions in labor disputes unless certain findings are made, including (1) that substantial and irreparable injury to complainant's property will follow, and (2) that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection. Cal. Lab. Code §1138.1(a). From the language of these required findings as well as the legislative history of the Act, it is clear that the Act was intended to control, under prescribed circumstances, picket line abuses. It clearly has no applicability to claims that there is a public health and safety need to enjoin specific public employees from striking under *County Sanitation*, and no appellate court has ever indicated otherwise.

As the Court in *Contra Costa* logically concluded, it makes no sense to apply the Act to claims made under *County Sanitation*. For example, the

requirement that "substantial and irreparable injury to complainant's property" does not fit in a situation where a public entity is claiming that a work stoppage will damage the public health and safety. *Contra Costa* at 19. Moreover, the requirement regarding the unwillingness of public officers to protect complainant's property "most logically relates to picketing activities conducted on private property," not to claims in which it is the "public officers themselves" that are complainants in a *County Sanitation* case. *Id.* at 19-20.

In short, the applicability of the Act to these types of claims is nothing more than a distraction from the real issue in this case. As such, the Court should review the current case, but let the *Contra Costa* case stand.

C. THIS CASE ALSO RAISES THE "LOCAL CONCERN" EXCEPTION, WHICH WAS NOT DISCUSSED IN THE CONTRA COSTA CASE

OE#3 apparently recognizes the importance of the "local concern" exception to finding PERB to have initial exclusive jurisdiction, as it spends a good portion of its Answer discussing this issue. (See Answer at 25-28.) The Sixth District Court in this case specifically – and, the City believes, imprudently – rejected the applicability of the local concern exception to this case. By granting review to this case, this Court can address that important issue as well. The local concern exception was not discussed at all in the *Contra Costa* case.

The local concern exception is rooted in, as stated by the California Supreme Court, "the principles defining the preemptive reach of the NLRA [National Labor Relations Act] are generally applicable in determining the scope of PERB's preemptive jurisdiction. . ." *El Rancho Unified School District v. Nat'l Education Ass'n,* (1983) 33 Cal.3d 946, 953. "Under the federal model, state courts have been allowed to enforce certain laws of

general applicability even though aspects of the challenged conduct were arguably protected or prohibited by the NLRA." *Pittsburg Unified* 166 Cal.App.3d at 885.

> Thus, for example, the Court has upheld state-court jurisdiction over conduct that touches '**interests so deeply rooted in local feeling and responsibility** that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.' [Citations]. . . . This "local concern exception" rests in part upon principles of federalism but also upon a recognition that, **in certain areas, decisions of local courts do not present substantial danger of interference with administrative adjudication.**
>
> *Id.* (emphasis added, citations omitted.)

California courts have applied this exact same reasoning in determining that PERB should not have jurisdiction over "local concerns," even where the dispute unquestionably involves labor issues that would otherwise be covered. As noted in some courts, there are some issues that are "so deeply rooted in local feeling and responsibility" that pre-emption could not be inferred in the absence of clear evidence of legislative intent. *See Service by Medallion, Inc. v. Clorox Co.,* (1996) 44 Cal.App.4th 1807,1813-14.

For example, in the *Pittsburg Unified* case, the Court held that the Superior Court had the jurisdiction to issue an injunction against a school employee's association for certain leafleting and picketing activities. Although stating that the activity complained of was neither arguably protected nor prohibited by EERA, the Court actually based its opinion on the "local concern" exception as utilized by the federal courts. *See Pittsburg Unified,* 166 Cal.App.3d 875, 886.

As stated by the *Pittsburg Unified* court, "[t]wo factors are considered relevant to application of the local concern exception to the arguably prohibited branch of the preemption doctrine." *Id.* at 885. First, the courts should consider where there is a "significant state interest" in protecting the citizens from the challenged conduct. Second, would the exercise of Superior Court jurisdiction "entail little risk of interference with the regulatory jurisdiction of the administrative agency." *Id.*

The Court in *Pittsburg Unified* considered these factors and ruled that the local concern exception applied. The Court noted that the dispute before the Superior court involved issues of corrupt practices or conflicts of interests involving members of the governing school board. As such, these issues were not "proper subjects of collective bargaining, and these issues are neither of jurisdictional interest to PERB nor within its areas of expertise." *Id.* at 888.

Nor in this case are the public health consequences resulting from the City's inability to provide certain services a "proper subject of collective bargaining." The only issue that would be relevant to a superior court reviewing the City's injunction claim is whether, and the extent to which, the public health and safety would be threatened if certain employees did not perform their job functions. There may not be a more clear example of a "local concern" that should be exempt from PERB's jurisdiction. *See People v. Union Pacific Railroad,* (2006) 141 Cal.App.4th 1228, 1247 (the exercise of the police power to protect the health and welfare of the public and the environment is primarily and historically a matter of local concern).

Despite this, the Sixth District ruled in this case that the local concern exception did not apply, asserting in part, that "excising strike activity from PERB's jurisdiction would risk substantial 'interference with

the regulatory jurisdiction of the administrative agency.'" *See City of San Jose v. Operating Engineers, Local Union No. 3*, (2008) 160 Cal.App.4th 951, 976. By reviewing this case, this Court can deal directly with this local concern issue if necessary.

III. CONCLUSION

There are several reasons justifying Supreme Court review in this case, reasons with which OE#3 now agrees. For this Court to also review the *Contra Costa* case would be unnecessary, and could potentially confuse the issues, especially in light of the more reasoned ruling by the First District. As such, the City respectfully request that the Court grant review in the present case and deny review in the *Contra Costa* case.

Respectfully submitted,

Dated: June 16, 2008

RICHARD DOYLE, City Attorney

By: 

ROBERT FABELA
Sr. Deputy City Attorney

Attorneys for Petitioners

IV. CERTIFICATE REGARDING WORD COUNT

I, Robert Fabela, counsel for Plaintiff/Petitioner City of San Jose, hereby certify, pursuant to California Rules of Court, Rule 8.204(c)(1), that this brief is proportionately spaced, has a typeface of 13 points, and the word count for this REPLY TO ANSWER TO PETITION FOR REVIEW, exclusive of tables, cover sheet, and proof of service, according to my computer program is 4,189 words.

Respectfully submitted,

Dated: June 16, 2008

RICHARD DOYLE, City Attorney

By: _____
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Attorneys for Plaintiff/Petitioner
CITY OF SAN JOSE

PROOF OF SERVICE

CASE NAME: City of San Jose v. Operating Engineers Local Union No. 3

SUPREME COURT CASE NO.: S162647
(Court of Appeals Case No.: H030272)
(Superior Court No.: 1-06-CV064707)

I, the undersigned declare as follows:

I am a citizen of the United States, over 18 years of age, employed in Santa Clara County, and not a party to the within action. My business address is 200 East Santa Clara Street, San Jose, California 95113-1905, and is located in the county where the service described below occurred.

On **June 16, 2008**, I caused to be served the within:

REPLY TO ANSWER TO PETITION FOR REVIEW

☒ by OVERNIGHT DELIVERY, with a copy of this declaration, by depositing them into a sealed envelope/package, with delivery fees fully prepaid/provided for, and

- ☐ causing the envelope/package to be deposited for collection
- ☒ causing the envelope/package to be delivered to an authorized courier or driver to receive the envelope/package

designated by the express service carrier for next day delivery.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for overnight delivery by an express courier service. Such correspondence would be deposited with the express service or delivered to the authorized express service courier/driver to receive an envelope/package for the express service that same day in the ordinary course of business.

☒ by MAIL, with a copy of this declaration, by depositing them into a sealed envelope, with postage fully prepaid, and causing the envelope to be deposited for collection and mailing on the date indicated above.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Said correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **June 16, 2008**, at San Jose, California.

Margarita Martinez

SERVICE LIST

CASE NAME: City of San Jose v. Operating Engineers Local Union No. 3

COURT OF APPEALS CASE NO.: H030272
(Superior Court No.: 1-06-CV064707)

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