IN THE SUPREME COURT OF CALIFORNIA

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 188, AFL-CIO, Plaintiff and Appellant, [redacted] v. PUBLIC EMPLOYMENT RELATIONS BOARD, Defendant and Respondent; [redacted] CITY OF RICHMOND, Real Party in Interest and Respondent.	Case No. S172377 PERB Decision No. 1720-M

After a Decision by the Court of Appeal, First Appellate District
Case No. A114959

PUBLIC EMPLOYMENT RELATIONS BOARD'S REPLY BRIEF ON THE MERITS

TAMI R. BOGERT, Bar No. 206561
General Counsel
WENDI L. ROSS, Bar No. 141030
Deputy General Counsel
ALICIA A. CLEMENT, Bar No. 224253
Regional Attorney
PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, California 95811-4124
Telephone: (916) 322-3198
Facsimile: (916) 327-6377

Attorneys for Respondent

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PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, California 95811-4124
Telephone: (916) 322-3198
Facsimile: (916) 327-6377

Attorneys for Respondent

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INTRODUCTION

The International Association of Fire Fighters, Local 188, AFL-CIO (Local 188) seeks a ruling from this Court that the decision issued by the Public Employment Relations Board (PERB or Board) in *City of Richmond* (2004) PERB Decision No. 1720-M was "clearly erroneous." In its efforts, Local 188 asserts and would have this Court believe that: (1) PERB previously "conceded" to the courts' jurisdiction in this case; (2) the Meyers-Milias-Brown Act[1] (MMBA) neither "expressly precludes mandamus proceedings to review a PERB refusal to issue a complaint in an unfair practice case" nor provides "any reasonable basis upon which it may be concluded that the MMBA precludes such review by implication"[2]; and (3) interpreting the MMBA in this way would violate the principles of separation of powers embodied in the California Constitution. Local 188's assertions are incorrect, for the reasons discussed below, and therefore should be rejected by this Court.

ARGUMENT

I. NOTWITHSTANDING LOCAL 188'S NEW ASSERTION, PERB DID NOT "CONCEDE" THAT THE COURTS HAVE EQUITABLE JURISDICTION TO REVIEW PERB'S DECISION IN THIS CASE

Local 188 asserts that PERB "conceded" in one of its superior

[1] Government Code section 3500 et seq.

[2] Local 188's Answer Brief, p. 3.

court briefs that the courts have equitable jurisdiction to review a decision by PERB not to issue a complaint. (Answer Brief, pp. 4-5.) Local 188's selective use of one narrow statement by PERB at the superior court stage of this litigation is, at best, a mischaracterization of PERB's position in this matter. Unlike the case of *Horn v. Atchison, Topeka & Santa Fe Ry. Co.* (1964) 61 Cal.2d 602, 605-606, where this Court affirmed that the defendant was bound by its counsel's repeated statements inviting the jury to find in favor of the plaintiff, PERB has made clear throughout this litigation its position that California's Legislature precluded judicial review of PERB's decision not to issue an unfair practice complaint.

First, PERB did not "concede," and has not "conceded," any such point in response to the Petition for Writ of Mandate filed by Local 188 with the Contra Costa County Superior Court. Local 188's Petition for Writ of Mandate states in relevant part as follows:

> 19. Local 188 has no adequate remedy by way of appeal of the Board's decision because the MMBA provides that a decision of the Board not to issue a complaint is not subject to appeal. (Gov. Code, § 3509.5.)
>
> 22. This Court has authority and jurisdiction under section 1085 of the Code of Civil Procedure to issue a writ of mandate compelling PERB to perform a mandatory, ministerial duty imposed upon it by law. Local 188 has no other means under the law of requiring PERB to perform the mandatory, ministerial duty imposed upon it by Sections 3509(b) and 3510(a) of the California

> Government Code to "apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter" – and in particular to apply and interpret Petitioner Local 188's first amended unfair practice charge consistent with the decision of our Supreme Court in *Vallejo Fire Fighters Union v. City of Vallejo* [1974] 12 Cal.3d 608, 621-622 – except by this petition for a writ of mandate.

(Appellant's Appendix (App.) Volume (Vol.) I, Tab. 1, pp. 013-014.)

PERB's Answer to Local 188's Petition for Writ of Mandate explicitly states in pertinent part:

> 19. Admits that Gov. Code section 3509.5(a) prohibits judicial review of a PERB decision not to issue a complaint. Denies each and every other allegation set forth in paragraph 19.
>
> 22. Denies each and every allegation set forth in paragraph 22.

(App. Vol. III, Tab. 9, pp. 735-736.) Further, PERB's Answer asserted as PERB's First Affirmative Defense: "This Court lacks jurisdiction over this matter. The petition is therefore fatally defective as a matter of law and should be denied with prejudice. (Gov. Code[,] § 3509.5(a).)" (*Id.* at p. 736.)

Second, PERB's Points & Authorities in Opposition to Petition for Writ of Mandate specifically states as follows in the "Introduction" section:

> This court is without jurisdiction to review the merits of the Board's decision because section 3509.5(a) of the MMBA specifically prohibits a party from seeking judicial review of a Board decision not to issue a complaint. Nor has Local 188 demonstrated that PERB exceeded its delegated authority in dismissing Local 188's unfair practice charge. Even assuming *arguendo* that this court does have jurisdiction to entertain the instant mandamus action, Local 188 has completely failed to allege sufficient grounds to establish that the requested writ should issue. PERB requests that this court summarily deny the instant petition. (*Wine v. Council of the City of Los Angeles* (1960) 177 Cal.App.2d 157, 164 [2 Cal.Rptr. 94].)

(App. Vol. III, Tab. 10, p. 743; emphasis in original.) Further, the first argument that PERB makes in its Points & Authorities in Opposition to Petition for Writ of Mandate asserts that the superior court has no jurisdiction in this matter and states in pertinent part as follows:

> I. LOCAL 188 HAS NO RIGHT TO JUDICIAL REVIEW OF A PERB DECISION REFUSING TO ISSUE AN UNFAIR PRACTICE COMPLAINT
>
> A. MMBA Section 3509.5(a) Prohibits Judicial Review and Divests the Superior Court of Jurisdiction
>
> Local 188 seeks judicial review and, effectively, reversal of PERB's decision not to issue an unfair practice complaint in *City of Richmond*, [2004], PERB Decision No. 1720-M. MMBA section 3509.5(a), specifically precludes judicial review of a decision not to issue a complaint. . . .

> The statute is clear that a petition for writ of mandate will not lie to review a Board decision refusing to issue an unfair practice complaint.
>
> Under the MMBA, a PERB Regional Attorney investigates a charge to determine whether it states a prima facie case and, if so, issues a complaint. A Regional Attorney's decision not to issue a complaint may be appealed to the Board itself. The decision of the PERB Board upholding a refusal to issue a complaint is final and nonreviewable. (MMBA § 3509.5(a)) . . . .
>
> To ensure uniformity and consistent application of labor statutes, the Legislature determined that such basic policy decisions are best left to the sound discretion and special expertise of PERB. (*Banning Teachers Association, CTA/NEA v. PERB* (1988) 44 Cal.3d 799, 804 [750 P.2d 313, 244 Cal.Rptr. 671]; *San Diego Teachers Assn. v. Superior Court*, [1979], 24 Cal.3d 1, 12-13.) Therefore, the Legislature specifically prohibited judicial review of the Board's decision not to issue a complaint in MMBA section 3509.5(a). Accordingly, the petition should be denied.

(*Id.* at pp. 746-748.)

On December 19, 2005, the Honorable Steven K. Austin, Judge of the Contra Costa County Superior Court, issued an "Unreported Minute Order" in this matter that sought from the parties supplemental briefing with respect to, in part, the following: "As a matter of constitutional law, does the Legislature have the power to exempt from ***any*** form of appellate review PERB's decision not to issue an unfair labor practices complaint?

(See, *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 110.). . . ." (App. Vol. IV, Tab. 23, pp. 962-963; emphasis in original.)

In PERB's Supplemental Brief in Opposition to Petition for Writ of Mandate, PERB reiterated throughout its brief that the superior court does not have jurisdiction over the matter and expressly stated:

> Under its authority to determine the mode of appeal, if any, the Legislature has established the extent of a party's right of appeal under the MMBA. The Legislature specifically authorized appeals of a final decision or order of the Board in an unfair practice case by petition for a writ of extraordinary relief, but expressly exempted from judicial review a decision not to issue a complaint. . . .
>
> The statute is clear, the decision of the PERB Board refusing to issue a complaint is final and nonreviewable. The Legislature specifically exempted from judicial review the Board's decision not to issue a complaint. Accordingly, the petition for writ of mandate should be denied.

(App. Vol. IV, Tab 24, pp. 972-973.) Likewise, PERB stated the following:

> The Legislature has the authority to establish that there is no right to appeal a PERB decision refusing to issue a complaint. The court is without jurisdiction to entertain the petition for writ of mandate filed by Local 188.
>
> Assuming *arguendo* this court does have jurisdiction under an equitable review theory, PERB properly exercised its discretion to determine Local 188's unfair practice charge did not state a prima facie case, thus,

> precluding the issuance of a complaint. PERB respectfully requests the petition for writ of mandate be dismissed with prejudice and that PERB be afforded such further relief as the court deems appropriate.

(*Id.* at p. 981; emphasis in original.)

Local 188's attempt to now—when never before seeking to do so in this litigation—ascribe to PERB the position of "conceding" that the superior court has equitable jurisdiction to review PERB's decision not to issue a complaint, is without merit. PERB has asserted time and time again in this litigation that the superior court does *not* have jurisdiction to make such a determination. Only when "assuming *arguendo*," for purposes of preserving any and all of PERB's legal arguments, has PERB argued the full spectrum of this assertion. Local 188's attempt to raise at this stage of litigation a new and meritless argument should be rejected by this Court.

II. CLEAR AND UNAMBIGUOUS LANGUAGE IN THE MMBA LEAVES NO DOUBT THAT EXTRAORDINARY RELIEF IS UNAVAILABLE TO PARTIES AGGRIEVED BY PERB'S DECISION NOT TO ISSUE A COMPLAINT

As noted in PERB's Opening Brief to this Court, *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 268 states that "[w]hen statutory language is clear and unambiguous, 'there is no need for construction and courts should not indulge in it.'" (See PERB's Opening Brief (OB), pp. 7-8.) Local 188's argument that this Court should disregard the express

language of Government Code section 3509.5 and instead adopt a new procedure for reviewing a decision by PERB not to issue a complaint—a result contradictory to the clear and unambiguous language of the statute—is specious and must be rejected.

A. The MMBA Expressly Precludes Extraordinary Relief When PERB Decides Not to Issue an Unfair Practice Complaint

Government Code section 3509.5, subdivision (a) specifically describes the circumstances in which judicial review of PERB decisions may be sought. It states:

> Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case, *except a decision of the board not to issue a complaint in such a case*, and any party to a final decision or order of the board in a unit determination representation, recognition, or election matter that is not brought as an unfair practice case, may petition for a writ of extraordinary relief from that decision or order. A board order directing an election may not be stayed pending judicial review.

(*Ibid.*; emphasis added.)

Local 188 asserts that mandamus is available to parties aggrieved by PERB's decision not to issue a complaint simply because appellate review is not. This assertion, however, applies to the usual circumstance where mandamus has not been withheld by the Legislature expressly under the statute. (*Modern Barber Colleges, Inc. v. California*

Employment Stabilization Commission (1948) 31 Cal.2d 720.) Because the Legislature has expressly precluded all forms of extraordinary relief in the circumstance where PERB decides not to issue an unfair practice complaint, Local 188's argument must be rejected.

B. The Phrase "Extraordinary Relief" Includes Writs of Mandamus

Article VI, section 10 of the California Constitution states:

> The Supreme Court, courts of appeal, superior courts and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for *extraordinary relief in the nature of mandamus*, certiorari, and prohibition. The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in causes subject to its appellate jurisdiction.

(*Ibid.*; emphasis added.)

Thus, the Constitution itself includes writs of mandamus among the forms of "extraordinary relief." This fact has not gone unmentioned by the courts. For example, this Court acknowledged in *Powers v. City of Richmond* (1995) 10 Cal.4th 85 that "extraordinary relief" *presumably* includes a writ of mandamus. (*Id.* at 112.) Furthermore, as acknowledged by the Court of Appeal in *Henneberque v. City of Culver City* (1985) 172 Cal.App.3d 837, when the Legislature uses the phrase "extraordinary

relief," absent further explanation, its use may be understood to include all forms of extraordinary relief. (*Id.* at 843.)

The Legislature's deliberate use of the phrase "extraordinary relief" in Government Code section 3509.5, subdivision (a) was clearly intended to encompass a writ of mandamus.

C. Given the Statutory Differences, No Justification Exists for Interpreting the MMBA to Mandate Compliance with Judicial Interpretations of the ALRA and NLRA

As noted in PERB's Opening Brief to this Court, the Court's adoption of certain exceptional remedies under *Belridge Farms v. Agricultural Labor Relations Board* (1978) 21 Cal.3d 551 (*Belridge Farms*) arose from the need to interpret the Agricultural Labor Relations Act (ALRA) and National Labor Relations Act (NLRA) where those statutes were silent. (See OB, pp. 11-12.) In the present case, the Legislature made explicit its intention to preclude extraordinary relief—including writs of mandamus—in cases where PERB decides not to issue an unfair practice complaint. Whereas the Court was called upon in *Belridge Farms*, *supra*, 21 Cal.3d 551 to clarify a legislative omission under the ALRA, no such omission exists under the MMBA or any other PERB-administered statute. Therefore, neither the same need for statutory construction nor a rationale for applying the same reasoning exists in this case.

Based on the above, the following conclusions are certain: (1) the Legislature expressly denied all forms of extraordinary relief to parties aggrieved by PERB's decision not to issue an unfair practice complaint; (2) the phrase "extraordinary relief" in Government Code section 3509.5, subdivision (a) encompasses a writ of mandamus; and (3) applying the rationale in *Belridge Farms*, *supra*, 21 Cal.3d 551, which arose from the Court's interpretation of different, ambiguous statutes, is unwarranted here.

III. THE SEPARATION OF POWERS PRESCRIBED BY THE CONSTITUTION IS NEITHER IMPLICATED NOR AT ISSUE IN THIS CASE

Local 188's new assertion to this Court that "PERB's interpretation of the MMBA as precluding writ of mandamus review of such refusals [to issue a complaint in unfair practice cases] would violate constitutional separation of powers principles"[3] is both ill-timed and without any merit. Nevertheless, for the sake of responding to Local 188's new assertion, PERB will address this issue briefly below.

A. There is No Constitutional Right of Appeal

Except in cases involving enforcement of a right that is guaranteed by the text of the Constitution, the Legislature is free to create a new statutory scheme, or revise an existing one, in a way that defines rights

[3] Local 188's Answer Brief, p. 22.

and the method by which litigants may seek to vindicate those rights under the statutory scheme. (*Powers v. City of Richmond*, *supra*, 10 Cal.4th 85.) Indeed, this Court has long held that there exists no constitutional right of appeal. (*Agricultural Labor Relations Board v. Tex-Cal Land Management* (1987) 43 Cal.3d 696, 705; *Trede v. Superior Court* (1943) 21 Cal.2d 630, 634; see also *City of Irvine v. Southern California Association of Governments* (2009) 175 Cal.App.4th 506, 516; *Steen v. Fremont Cemetery* (1992) 9 Cal.App.4th 1221, 1226; *County of Monterey v. Mahabir* (1991) 231 Cal.App.3d 1650, 1653; *In re Eli F.* (1989) 212 Cal.App.3d 228, 232; *State Farm v. Hardin* (1989) 211 Cal.App.3d 501, 505; *Uptain v. Duarte* (1988) 206 Cal.App.3d 1258, 1261; *In re T.M.* (1988) 206 Cal.App.3d 314, 316; *Reisman v. Shahverdian* (1984) 153 Cal.App.3d 1074, 1088; *Redevelopment Agency v. Goodman* (1975) 53 Cal.App.3d 424, 432; *Draus v. Alfred M. Lewis, Inc.* (1968) 261 Cal.App.2d 485, 489; *Woodman v. Ackerman* (1967) 249 Cal.App.2d 644, 649.)

B. Precluding Judicial Review of Decisions by PERB Not to Issue an Unfair Practice Complaint Neither Impairs Nor Defeats the Constitutional Powers of the Courts

It must be acknowledged that there exists an important qualification to the Legislature's authority to control the right to appeal: in exercising its right, the Legislature may not restrict appellate review in

a manner that would "substantially impair the constitutional powers of the courts, or practically defeat their exercise." (*Leone v. Medical Board of California* (2000) 22 Cal.4th 660, 668.) Latching on to this qualification, Local 188 now argues that the Legislature somehow violated the Constitution's separation of powers by denying extraordinary relief to parties aggrieved by PERB's decision not to issue an unfair practice complaint. Local 188's argument is based on a fundamental misunderstanding of the difference between the courts' "right to review" and the parties' "right to a remedy." (See, e.g., *Leone v. Medical Board of California*, *supra*, 22 Cal.4th 660.)

In *Modern Barber Colleges, Inc. v. California Employment Stabilization Commission*, *supra*, 31 Cal.2d 720, this Court provided examples of circumstances where it might be found that the Legislature impaired the constitutional powers of the courts. One example was if the Legislature repealed sections of the Code of Civil Procedure and other statutes addressing mandamus and substituted them with a statute providing that no ministerial action by court officers could be compelled. (*Id.* at 731.) Conversely, if the Legislature sought to direct that a writ of mandamus might lie to compel a judicial act of a court, such as a particular decision on the merits in a particular litigated action, that would constitute an unconstitutional enlargement of the nature, function, and

scope of mandamus. (*Ibid.*) Clearly then, in the absence of an alleged violation of a constitutional right, the impairment of the courts' constitutional powers turns on the manner in which the courts may exercise their right of review, not whether the courts may indeed exercise their right of review.

Government Code section 3509.5, subdivision (a) represents neither an enlargement nor any limitation or impairment of the courts' powers of mandamus. The Legislature simply precluded a party's ability to obtain relief by seeking judicial review of decisions by PERB not to issue a complaint in unfair practice cases. As noted above, it is completely within the Legislature's power to deny or even revoke a party's ability to seek judicial review. (*Powers v. City of Richmond*, *supra*, 10 Cal.4th 85; *Tex-Cal Land Management v. ALRB* (1979) 24 Cal.3d 335; *Modern Barber Colleges, Inc. v. California Employment Stabilization Commission*, *supra*, 31 Cal.2d 720; *City of Irvine v. Southern California Association of Government*, *supra*, 175 Cal.App.4th 506.)

CONCLUSION

For the foregoing reasons, PERB respectfully asks this Court to reject Local 188's arguments and to ultimately (1) vacate—as inconsistent with the Legislature's clear and unambiguous intent—that portion of the appellate court's opinion that circumvents the express statutory language precluding judicial review of a decision by PERB not to issue an unfair

practice complaint and (2) affirm—as consistent with this Court's holding in *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608—the underlying determination that a decision to lay off firefighters for fiscal reasons is not subject to collective bargaining under the MMBA. Assuming *arguendo* that this Court determines that PERB's decision not to issue a complaint is subject to judicial review, PERB asks this Court to (1) leave undisturbed *City of Richmond* (2004) PERB Decision No.1720-M and (2) clarify that the proper standard of review in such case is the deferential "abuse of discretion" standard.

Dated: October 28, 2009

Respectfully submitted,

TAMI R. BOGERT, General Counsel
WENDI L. ROSS, Deputy General Counsel

By 
ALICIA A. CLEMENT, Regional Attorney

Attorneys for Respondent
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNSEL'S CERTIFICATE OF COMPLIANCE

WITH CALIFORNIA RULES OF COURT, RULE 8.504(d)

Counsel of Record hereby certifies that pursuant to rule 8.504(d) of the California Rules of Court, the enclosed brief of Respondent Public Employment Relations Board is produced using 13-point Roman type font including footnotes and contains 3,270 words, which is less than the 8,400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: October 28, 2009

TAMI R. BOGERT
Declarant
PUBLIC EMPLOYMENT RELATIONS BOARD

PROOF OF SERVICE BY MAIL
C.C.P. 1013a

COURT NAME: IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

SUPREME COURT CASE NO.: S172377

FIRST APPELLATE DISTRICT/DIVISION THREE CASE NO.: A114959

CONTRA COSTA COUNTY SUPERIOR COURT CASE NO.: N050232

CASE NAME: *INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 188 v. PUBLIC EMPLOYMENT RELATIONS BOARD; CITY OF RICHMOND*

I declare that I am a resident of or employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within entitled cause. I am an employee of the Public Employment Relations Board, 1031 18th Street, Sacramento, California 95811. I am readily familiar with the ordinary practice of the business of collecting, processing and depositing correspondence in the United States Postal Service and that the correspondence will be deposited the same day with postage thereon fully prepaid.

On October 28, 2009, I served PUBLIC EMPLOYMENT RELATIONS BOARD'S REPLY BRIEF ON THE MERITS regarding the above-referenced case on the parties listed below via United States Postal Service.

Duane Reno, Attorney
Davis & Reno
22 Battery Street, Suite 1000
San Francisco, CA 94111-5524
Attorneys for Petitioner and Appellant

Jeffrey Sloan, Attorney
Renne, Sloan, Holtzman & Sakai
350 Sansome Street, Suite 300
San Francisco, CA 94104
Attorneys for Real Party in Interest and Respondent

1 copy to each party listed below

First District Court of Appeal
350 McAllister Street
San Francisco, CA 94102
Case No. A114959

Contra Costa County Superior Court
725 Court Street, Room 103
Martinez, CA 94553
Case No. N050232

Office of the California Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on October 28, 2009, at Sacramento, California.

Cheryl Shelly
(Type or print name)


(Signature)