No. S172377

IN THE SUPREME COURT OF CALIFORNIA

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 188, Plaintiff Petitioner and Appellant,	Court of Appeal No. A114959
v.	Contra Costa County Superior Court No. N050232
PUBLIC EMPLOYMENT RELATIONS BOARD OF THE STATE OF CALIFORNIA, Defendant and Respondent,	
CITY OF RICHMOND, Real Party in Interest and Respondent.	

REPLY BRIEF OF PETITIONER IAFF LOCAL 188 IN RESPONSE TO REAL PARTY IN INTEREST AND RESPONDENT CITY OF RICHMOND'S CONSOLIDATED ANSWER BRIEF

After a Decision of the Court of Appeal
First Appellate District, Division Three

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I. INTRODUCTION

Real Party in Interest/Respondent City of Richmond stated at pp. 1-3 of its Answer to Appellant IAFF Local 188's Petition for Review herein that the City laid off 78 municipal employees, including 18 firefighters represented by Local 188, in late 2003 and early 2004, to meet a budget shortfall of $9.5 million.

The City thus acknowledged that the reason it laid off 18 firefighters represented by Local 188 in late 2003 and early 2004 was to reduce its labor costs, and that there was no other reason.

The City contended it had no duty under the Meyers-Milias-Brown Act (Gov. Code, §§ 3500-3511) ("MMBA") to engage in collective bargaining with Local 188 over the decision to lay off 18 firefighters because, according to the City, federal precedent interpreting the National Labor Relations Act ("NLRA") holds that employers are not required to engage in collective bargaining over layoff decisions that are made for economic reasons. ([City of Richmond's] Answer to Appellant Local 188's Petition for Review, pp. 7-10.)

Now, however, having belatedly realized that federal precedent interpreting the NLRA holds instead that a layoff decision made for economic reasons may be a mandatory subject of bargaining unless labor costs were not a factor in the employer's decision, the City attempts to change its tune.

The City now claims its decision to lay off 18 firefighters was exempt from bargaining because it was a decision to change the scope or level of municipal services. (Real Party in Interest/ Respondent City of Richmond's Consolidated Answer Brief, pp. 25-27.)

However, the fact remains that the reason for this decision was to reduce the City's labor costs in order to meet a budget shortfall of $9.5 million.

As shown below, it does not matter whether the City's decision is characterized as a layoff decision or a decision to change the scope of level of municipal services. Under federal precedent interpreting the National Labor Relations Act, any management decision affecting the continuity of employment may be a mandatory subject of bargaining when the decision is driven by a desire to reduce labor costs.

As further shown below, there is no valid reason why a decision of Respondent Public Employment Relations Board ("PERB") should not be subject to judicial review in writ of mandamus proceedings to the same extent that decisions of the Agricultural Labor Relations Board were held subject to such review in *Yamada Brothers v. Agricultural Labor Relations Bd.* (1979) 99 Cal.App.3d 112, 119-120, and *Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 556.

For these reasons and all of the other reasons previously set forth by Local 188 and the reasons that are set forth below, the Court should annul PERB's decision herein and remand this case to PERB for further proceedings consistent with the principles that a layoff decision or other management decision affecting the continuity of employment may be a mandatory subject of bargaining under the MMBA when the decision is driven by a desire to reduce labor costs, and that in unfair practice proceedings arising under the MMBA, PERB is to apply the three-part balancing test set forth in *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651 (*"Building Material"*) to determine whether a layoff decision or other management decision affecting the continuity of employment is within the scope of representation under the MMBA.

II. UNDER FEDERAL PRECEDENT INTERPRETING THE NLRA, LAYOFF DECISIONS AND OTHER MANAGEMENT DECISIONS AFFECTING THE CONTINUITY OF EMPLOYMENT MAY BE MANDATORY SUBJECTS OF BARGAINING WHEN THE DECISIONS ARE DRIVEN BY A DESIRE TO REDUCE LABOR COSTS

The City's argument on the merits in this case is based on the faulty premise that federal case law under the NLRA has established a *per se* rule that economically-motivated layoff decisions are not mandatory subjects of collective bargaining. (See City's Answer Brief, pp. 21-25.)

The City cites *First National Maintenance Corp. v. NLRB* (1981) 425 U.S. 666 ("*First National*") as the genesis of federal case law which, according to the City, supports this premise. (City's Answer Brief, p. 25.)

However, the National Labor Relations Board and the United States Circuit Courts of Appeals have not interpreted *First National* as establishing a *per se* rule that economically-motivated layoff decisions are exempt from bargaining.

Instead, as shown by the decisions cited below and other decisions cited in Local 188's Opening Brief on the Merits, the Board and the Circuit Courts of Appeals have interpreted *First National* as prescribing a balancing test for the determination of whether a layoff decision or other management decision affecting the continuity of employment is exempt from bargaining.

Under this balancing test, a layoff decision or other management decision that has a substantial impact on the continued availability of employment is a mandatory subject of bargaining if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.

When a layoff or other management decision affecting the continuity of employment is driven primarily by labor costs, the decision is a mandatory subject of bargaining because the benefit for labor-management relations and the collective-bargaining

process always outweighs the burden placed on the conduct of the business.

The City's contrary premise – that federal case law under the NLRA has established a *per se* rule that economically-motivated layoff decisions are not mandatory subjects of collective bargaining – is faulty because, in *First National*, labor costs were not a factor in the employer's decision to terminate a contract with one of its customers and lay off the employees who had been providing services under the contract.

In this regard, the *First National* employer's contract with its customer contained a pass-through clause that the customer would pay all of the employer's labor costs plus a fixed fee as the employer's profit. (See *Local 2179, United Steelworkers of America v. NLRB* (5th Cir. 1987) 822 F.2d 559.)

> *First National Maintenance* involved a firm (FNM) that provided contract cleaning, maintenance, housekeeping, and related services for various commercial customers. A specific staff of FNM employees serviced each account, and employees were not transferred between locations. Customers agreed to furnish all tools, equipment, and supplies and to reimburse FNM for all its labor costs respecting its employees working at the customer's location, plus a set fee for FNM's management and supervision.
>
> Shortly after FNM's employees voted to form a bargaining unit as part of a national union, FNM began to serve a nursing home, Greenpark, under an agreement providing that, inter alia, FNM would receive a $ 500 weekly fee. FNM employed approximately thirty-five employees to service the account. At some point, FNM's fee was reduced to $ 250. FNM later determined it was losing money on

> the contract and notified Greenpark that the agreement would be terminated unless the $ 500 fee were reinstated, an offer that apparently did not stir Greenpark's interest. About one week thereafter, and without consulting the union, FNM notified its Greenpark employees that they would be discharged three days later, on the final day FNM was obliged to service the Greenpark account.

(*Id.*, pp. 569-570.)

Inasmuch as labor costs were not a factor in the employer's decision, it was therefore unlikely that mandating bargaining with a union over the decision would be productive. Hence, the outcome of *First National* was that the employer's decision was exempt from bargaining. (See *Pan Am. Grain Co. v. NLRB* (1st Cir. 2009) 558 F.3d 22.)

> Under the Act, an employer must bargain collectively with the representative of its employees over decisions affecting "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d); *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349, 78 S. Ct. 718, 2 L. Ed. 2d 823 (1958). An employer violates this duty when he changes a mandatory term or condition of employment without giving the employees' representative adequate notice and an opportunity to bargain. *N.L.R.B. v. Katz*, 369 U.S. 736, 745-46, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962); see 29 U.S.C. § 158(d).
>
> Evaluating the scope of mandatory subjects of bargaining, the Supreme Court identified three categories of management decisions in *First National Maintenance Corp.*, 452 U.S. 666, 101 S. Ct. 2573, 69 L. Ed. 2d 318. Decisions that affect the employment relationship only tangentially, such as advertising and product design, are not mandatory subjects of bargaining. *Id.* at 676-77. Decisions directly affecting the relationship -- wages, working conditions, and the like -- are mandatory subjects of bargaining. *Id.* at 677. This requirement ensures that when an employer

> aims to reduce labor costs, employees are presented with the opportunity to negotiate concessions that reduce overall costs and thus spare jobs. *Fibreboard Paper Prod. Corp. v. N.L.R.B.*, 379 U.S. 203, 213-14, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964). Finally, some management decisions have a direct impact on employment but focus on economic profitability rather than the employment relationship. *First Nat'l Maint. Corp.*, 452 U.S. at 677. An employer need not bargain over a decision "involving a change in the scope and direction of the enterprise" and not "'primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.'" *Id.* (quoting *Fibreboard Paper Prod. Corp.*, 379 U.S. at 223 (Stewart, J., concurring)). To determine the central thrust of decisions in this third category for mandatory bargaining purposes, the Court prescribed a balancing analysis -- "bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." *Id.* at 679. The Court employed the balancing test to determine that bargaining was not required in the case before it but expressly noted that its analysis did not preclude different outcomes in other cases. *Id.* at 686, n.22.

(*Id.*, pp. 26-27.)

See also *Local 2179, United Steelworkers of America v. NLRB*, *supra*, 822 F.2d 559.

> We note that commentators discuss *First National Maintenance* as though it created a per se rule for all partial closings, without indicating whether this "per se rule" reaches an employer decision motivated in part by labor-cost considerations.

(*Id.*, p. 570 n. 16.)

See also *NLRB v. 1199, National Union of Hospital and Health Care Employees, AFL-CIO* (4th Cir. 1987) 824 F.2d 318.

We cannot accept the employer's related contention that the decision to lay off was not a mandatory subject of bargaining under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 69 L. Ed. 2d 318, 101 S. Ct. 2573 (1981).

Section 8(d) of the Act defines the duty to bargain under section 8(a)(5). It requires the employer to bargain over wages, hours and other terms and conditions of employment. 29 U.S.C. § 158(d). Bargaining is mandatory for these subjects; an employer may not make changes in such matters unilaterally. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 425, 17 L. Ed. 2d 486, 87 S. Ct. 559 (1967). In *First National Maintenance v. NLRB*, the Supreme Court made clear that the detrimental impact of a managerial decision upon continued employment will not alone bring that decision within Section 8(d). 452 U.S. at 677. It held further that the employer had no duty to bargain over a management decision "involving a change in the scope and direction of the enterprise," a decision akin to the decision to stay in business itself. The Board has subsequently held *First National Maintenance* to apply to a corporate decision to close down one of its facilities as part of a consolidation effort. *Otis Elevator*, 269 N.L.R.B. 891 (1984). It has distinguished such fundamental managerial decisions, however, from those intended to reduce labor costs, concluding that a reduction of labor costs must be pursued through the collective bargaining process. Compare *First National Maintenance, supra*, with *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 13 L. Ed. 2d 233, 85 S. Ct. 398 (1964), and *Otis Elevator, supra*, with *Nurminco, Inc.*, 274 NLRB 264 (1984).

In this case, the employer failed to establish that the layoff represented a fundamental decision to close down any part of its business or to change its nature or scope. After the layoff, which involved but six of eighty-five unit employees, the employer continued to operate much as before, pursuing the same business, in the same manner, at the same locations. As its decision reflected more "a desire to reduce labor costs," *First National Maintenance*, 452 U.S. at 680, than an exercise of entrepreneurial prerogative or control, we agree with the Board that it was amenable to

> resolution through the collective bargaining process. The line may admittedly be a fine one in some cases, but it has been drawn by the Supreme Court to accommodate management's interest under the NLRA in the essential conduct of an enterprise and a union's interest in more secure employment for those it represents.

(*Id.*, pp. 321-22.)

See also *IBEW, Local 21 v. NLRB* (9th Cir. 2009) 563 F.3d 418.

> Because the Board's factual finding that the merger decision was based primarily on considerations other than labor costs is supported by "substantial evidence," we must take that finding as conclusive. 29 U.S.C. § 160(e). We conclude that the burden placed on the conduct of the business by forcing bargaining in this case would outweigh any potential benefit to the bargaining process, and that Lucent's decision to merge was exempt from bargaining. See *First Nat'l*, 452 U.S. at 679.

(*Id.*, p. 423.)

III. LAYOFF DECISIONS MAY ALSO BE MANDATORY SUBJECTS OF BARGAINING UNDER CALIFORNIA PRECEDENT INTERPRETING THE MEYERS-MILIAS-BROWN ACT

There is no merit to the City's contention at p. 20 of its Answer Brief that the foregoing federal precedent is irrelevant and should be disregarded because it has been well-established by *Building Material, Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 ("*Vallejo*"), and *Los Angeles County Civil Service Commission v. Superior Court* (1978) 23 Cal.3d 55 ("*Los Angeles*") that "a decision to eliminate or reduce services and lay off employees falls squarely within a public employer's managerial prerogative and is not subject to negotiation under the MMBA."

Although *Building Material, Vallejo,* and *Los Angeles* cite *First National* and other federal precedent that under some circumstances layoff decisions are not subject to bargaining under the NLRA, these cases cannot reasonably be interpreted as establishing a *per se* rule that all layoff decisions, regardless of the reasons for those decisions, are exempt from bargaining under the MMBA.

As shown above, federal precedent has not established any such *per se* rule that all layoff decisions, regardless of the reasons for those decisions, are exempt from bargaining under the NLRA.

Instead, as shown above, federal precedent has established a balancing test for the determination of whether a layoff decision or other management decision affecting the continuity of employment is exempt from bargaining.

Depending on the outcome of this balancing test, some layoff decisions may be mandatory subjects of bargaining (see, e.g., *NLRB v. 1199, National Union of Hospital and Health Care Employees, AFL-CIO, supra,* 824 F.2d 318) while other layoff decisions may be exempt from bargaining. (See, e.g., *IBEW, Local 21 v. NLRB, supra,* 563 F.3d 418.)

The City's contention that the Court acknowledged in *Building Material* that this balancing test does not apply to an employer's decision that layoffs are necessary because of budget reductions (City's Answer Brief, p. 30) is manifestly without merit.

Building Material expressly states that a balancing test is to be applied in determining whether a fundamental management decision that significantly affects the wages, hours, or working conditions of bargaining unit employees is a mandatory subject of bargaining under the MMBA.

> When an employer makes a fundamental management decision that significantly affects the wages, hours, or working conditions of its employees, a balancing test applies: the employer's need for unfettered authority in making decisions that strongly affect a firm's profitability is weighed against the benefits to employer-employee relations of bargaining about such decisions. (*Ibid.*)

(*Building Material*, 41 Cal.3d at p. 663.)

The City's contention that the Court held in *Vallejo* that a city's decision to lay off firefighters is not a mandatory subject of bargaining (City's Answer Brief at p. 20) is equally without merit. The issue in *Vallejo* was not whether a decision to lay off employees for economic reasons may be a mandatory subject of bargaining. The issue instead was whether a decision to lay off employees would be a mandatory subject of bargaining if the personnel reduction had an adverse impact on employee workload and safety. The Court again expressly stated that a balancing test is to be used to determine whether the decision would be a mandatory subject of bargaining or not.

> On the other hand, because of the nature of fire fighting, a reduction of personnel may affect the fire fighters' working conditions by increasing their workload and endangering their safety in the same

> way that general manning provisions affect workload and safety. To the extent, therefore, that the decision to lay off some employees affects the workload and safety of the remaining workers, it is subject to bargaining and arbitration for the same reasons indicated in the prior discussion of the manning proposal.

(*Id.*, p. 622.)

Until *Rialto Police Benefit Association v. City of Rialto* (2007) 155 Cal.App.4th 1295 ("*Rialto*"), there was no California precedent squarely on the issue of whether a layoff decision driven by a desire to reduce labor costs is a mandatory subject of bargaining under the MMBA.

Rialto held that, "[i]n sum, as stated in the City's own staff report, the City's decision was motivated by the desire to reduce costs as well as issues involving employee morale, level of service, and management conflicts. These issues are eminently suitable for resolution through collective bargaining." (*Rialto*, 155 Cal.App.4th at p. 1309.)

The City offers no convincing reason in support of its contention at pp. 31-32 of its Answer Brief that *Rialto's* holding should not apply to all layoff decisions but instead should be confined to subcontracting cases.

This contention and the City's contention at pp. 23-24 and 27-28 of its Answer Brief that private sector precedent should not be applied to public sector layoff decisions are contrary to the well-established rule that federal precedent under the NLRA

serves as reliable authority for the interpretation of the MMBA's bargaining requirements. (See *Vallejo, supra*, 12 Cal.3d 608.)

> The City of Vallejo objects to the use of NLRA precedents because of the alleged differences between employment relations in the public and private sectors. Although we recognize that there are certain basic differences between employment in the public and private sectors, the adoption of legislation providing for public employment negotiation on wages, hours and working conditions just as in the private sector demonstrates that the Legislature found public sector and private sector employment relations sufficiently similar to warrant similar bargaining provisions. We therefore conclude that the bargaining requirements of the National Labor Relations Act and cases interpreting them may properly be referred to for such enlightenment as they may render in our interpretation of the scope of bargaining under the Vallejo charter.

(*Id.*, p. 617.)

Moreover, as held in *Rialto*, decisions to reduce essential public services and lay off the employees who provide those services are eminently suitable for resolution through collective bargaining. Agreements on issues such as reductions in wages, increases in workweeks, and other concessions that reduce labor costs may preserve jobs for the employees who provide those essential public services. The benefit to employer-employee relations of bargaining over layoffs of public safety employees, and the benefit of such bargaining to the public interest in general, thus clearly outweighs any impact of such bargaining on the employer's need for unencumbered decisionmaking in managing its operations.

IV. THIS CASE SHOULD BE REMANDED TO PERB WITH INSTRUCTIONS TO APPLY THE THREE-PART *BUILDING MATERIAL* BALANCING TEST TO THE CITY'S DECISION TO REDUCE FIREFIGHTER SHIFT STAFFING LEVELS AND LAY OFF 18 FIREFIGHTERS

Another meritless City contention is that the Court should uphold PERB's decision not to issue a complaint in this case because the City's decision to reduce firefighter shift staffing levels and lay off 18 firefighters constituted a change in the scope or direction of the City's fire protection services and was therefore exempt from bargaining. (City's Answer Brief at pp. 25-27.) Local 188 does not agree for the reasons stated above that if these were the facts, they would have been a valid ground upon which PERB could conclude that the City's decision was exempt from bargaining. However, there is no valid basis in any event upon which a factual finding can be made at this stage in the proceedings herein that the City's decision to reduce firefighter shift staffing levels and lay off 18 firefighters constituted a change in the scope or direction of the City's fire protection services, inasmuch as there has been no hearing before an administrative law judge and there is no evidentiary record on this issue or any other issue presented by the parties because PERB did not issue a complaint.

PERB has jurisdiction to decide a factual issue of this nature in the first instance. (See Gov. Code, § 3509). This City contention must therefore also be rejected.

For this reason and the reasons stated at pp. 1-9 of Local 188's Reply Brief in Response to Respondent PERB's Answer Brief on the Merits, the proper disposition of this case is to annul PERB's decision herein and remand the case to PERB with directions to apply the correct legal standard (the three-part *Building Material* balancing test) for determination of whether a layoff decision or other management decision affecting the continuity of employment is a mandatory subject of bargaining under the MMBA when the decision is driven by a desire to reduce labor costs.

V. THE SUPERIOR COURT CORRECTLY CONCLUDED THAT THE CALIFORNIA CONSTITUTION GRANTS AUTHORITY TO THE COURTS TO REVIEW ERRONEOUS ADMINISTRATIVE AGENCY DECISIONS THROUGH WRIT OF MANDAMUS PROCEEDINGS WHEN THERE IS NO STATUTE AUTHORIZING JUDICIAL REVIEW OF THOSE DECISIONS

Finally, the City also contends again – as it did unsuccessfully in the superior court and the Court of Appeal – that the MMBA prohibits judicial review of a PERB decision not to issue a complaint on the basis that an unfair practice charge fails to state a prima facie violation of the MMBA, and that the superior court therefore had no jurisdiction to grant Local 188's petition for a writ of mandate.[1]

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[1] Gov. Code, § 3509.5 provides in pertinent part as follows:

(a) 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

Local 188 addressed this issue extensively in its Opening Brief to the Court of Appeal at pp. 24-31 as follows:

The superior court concluded to the contrary on the basis of *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 110. (App. Tab 30, p. 1387.) This conclusion was correct. *Powers* and the other cases cited below establish that, as a matter of constitutional law, the Legislature lacks the authority to entirely preclude judicial review of PERB decisions not to issue unfair practices complaints.

Powers addressed the constitutional powers granted to the courts of appeal by Article VI, section 11 of the California Constitution.[2] However, the principles established by that decision are equally applicable to the constitutional powers granted to the superior courts.

The pertinent provision of Article VI, section 11 is the provision that except for cases in which judgment of death has been pronounced, "courts of appeal have appellate jurisdiction when superior courts have original jurisdiction in causes of a type

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complaint in such a case, ... may petition for a writ of extraordinary relief from that decision or order. . . .

[2] Article VI, section 11 provides in pertinent part:

(a) The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995, and in other causes prescribed by statute. . . .

within the appellate jurisdiction of the courts of appeal on June 30, 1995, and in other causes prescribed by statute." According to *Powers*, although the Legislature has the authority to determine that the appellate authority of the courts of appeal over decisions of the superior courts must be exercised in certain kinds of cases by extraordinary writ petition rather than by direct appeal, the Legislature may not substantially impair the constitutional powers of the courts, or practically defeat their exercise. (*Id.*, at p. 100.) Furthermore, according to *Powers*, inasmuch as the Constitution imposes the authority upon the courts of appeal to remedy errors in the decisions of the superior courts, the courts of appeal do not have the discretion to deny apparently meritorious writ petitions for review of decisions of the superior court that the Legislature has excluded from direct appeal. (*Id.*, at pp. 113-14.)

Article VI, section 10 is closely similar to Article VI, section 11, in that it explicitly grants judicial authority to the superior courts to conduct proceedings for extraordinary relief in the nature of mandamus.

Article VI, section 10 thus provides as follows:

> SEC. 10. 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. . . .

Mandamus proceedings in the superior court are the traditional means of remedying errors in the decisions of administrative agencies. (See *Bixby v. Pierno* (1971) 4 Cal.3d 130, 137-40.) Judicial review of administrative agency decisions is a fundamental component of the doctrine of separation of powers under the California Constitution. (*Id.*, at pp. 141-44.) The judicial authority granted to the superior courts by Article VI, section 10 to conduct proceedings for extraordinary relief in the nature of mandamus is therefore analogous to the appellate jurisdiction which Article VI, section 11 grants to the courts of appeal to remedy errors by the superior courts. (*Leone v. Medical Board* (2000) 22 Cal.4th 660, 673-75 (George, C.J., concurring).)

Because a mandamus proceeding in the superior court to remedy errors in an administrative decision is closely similar to a direct appeal from the administrative decision, and because Article VI, section 10 of the California Constitution expressly grants judicial authority to the superior courts to conduct proceedings for extraordinary relief in the nature of mandamus, *Powers* compels the conclusions that (1) the Legislature may not substantially impair the constitutional powers of the superior courts to remedy errors in an administrative decision through a mandamus proceeding, or practically defeat their exercise, and (2) the superior courts do not have the discretion to deny an apparently meritorious writ petition for review of an administrative agency

decision notwithstanding the absence of a statute authorizing judicial review of the decision.

See also *Bixby v. Pierno, supra*, 4 Cal.3d 130, 138, and *Drummey v. State Board of Funeral Directors* (1939) 13 Cal.2d 75.

> . . . . in the absence of a proper statutory method of review, mandate is the only possible remedy available to those aggrieved by administrative rulings of the nature here involved. This was pointed out in the *Whitten* case, *supra*. The conclusion therein stated is sound. Historically, the writ of mandate was invented to provide a remedy where no other remedy existed. As stated in 9 Halsbury's Laws of England, 744, section 1269, in speaking of the writ of *mandamus*:
>
> > "Its purpose is to supply defects of justice; and accordingly it will issue, to the end that justice will be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing such right." [Citation omitted.]

(*Id.*, at p. 82.)

Substantial precedent requires application of this principle to the facts presented here. Where, as here, an administrative agency similar to PERB has refused to issue a complaint based on an erroneous construction of a labor relations statute – in particular, a construction of the statute that is not consistent with "existing judicial interpretations" of the statute – the refusal has been held to be reviewable by the superior court in a mandamus proceeding. (*Belridge Farms v. Agricultural Labor Relations Board, supra*, 21 Cal.3d 551, 557.)

Cadiz v. Agricultural Labor Relations Board, supra, 92 Cal.App.3d 365 is another example of the application of this

principle. The Agricultural Labor Relations Board ("ALRB") had issued an order dismissing as untimely a petition for decertification of the United Farm Workers of America ("UFW") as the collective bargaining representative of the agricultural employees of M. Caratan, Inc. (*Ibid.*, p. 369.) The employer and one of its employees sought a writ of mandate from the court of appeal directing the ALRB to set aside the order and count the ballots that had been cast in the decertification election. The ALRB and the UFW contended that the court of appeal had no jurisdiction to issue a writ of mandate. The ALRB and the UFW contended that review of ALRB orders in the court of appeal is exclusively by the procedural provisions of Labor Code section 1160.8. The ALRB's order did not come within those provisions because it was not a final order and did not either dismiss an unfair labor practice complaint nor direct a remedy for an unfair labor practice complaint. (*Ibid.*, pp. 380-81.) The court of appeal rejected this contention and issued the writ of mandate sought by the petition. The court of appeal stated that the ALRB's order was based on an erroneous construction of Labor Code section 1156.7, subdivision (c) (*ibid.*, pp. 370-79), and was therefore reviewable pursuant to *Belridge* and other cases recognizing that a petition for direct review of administrative agency decisions is permissible when the basis for decision is an erroneous construction of an applicable statute, notwithstanding the fact that the decision did

not come within the provisions of the statute defining appealable orders. (*Ibid.*, pp. 381-82.)

Thus, in accordance with well-established principles of California constitutional law, when a PERB decision erroneously construes an applicable labor relations statute, the decision may be reviewed by the courts through a writ of mandamus proceeding even though the statute may lack any provision authorizing judicial review of the decision.

VI. THE CITY FAILS TO CITE ANY AUTHORITY WHICH ACTUALLY SUPPORTS ITS PROPOSITION THAT THE LEGISLATURE MAY PROHIBIT THE COURTS FROM EXERCISING THE JURISDICTION GRANTED TO THEM BY THE CALIFORNIA CONSTITUTION TO REVIEW ERRONEOUS ADMINISTRATIVE AGENCY DECISIONS THROUGH WRIT OF MANDAMUS PROCEEDINGS

The City cites *Modern Barber Colleges v. California Employment Stabilization Commission* (1948) 31 Cal.2d 720 (*"Modern Barber Colleges"*) for the proposition that the Legislature may prohibit the courts from reviewing a PERB decision not to issue a complaint in an unfair practice proceeding. (City's Answer Brief at pp. 8-11.) In *Modern Barber Colleges* the San Francisco Superior Court denied a writ of mandamus to compel the California Employment Stabilization Commission to vacate its findings that certain persons, including the owner, part-time bookkeeper, and student barbers, were employees of a barber college for purposes of the Unemployment Insurance Act. Because the barber college had a statutory method for judicial review of the Commission's decision,

namely, the remedy of a lawsuit to recover taxes paid, the Court of Appeal upheld the superior court's decision that the Legislature can prohibit, as was done in Unemployment Insurance Act, § 45.11(d), the use of mandamus in advance of payment of unemployment contributions.

The holding of *Modern Barber Colleges* was thus that the Legislature had the authority to prohibit the issuance of a writ of mandamus because the petitioner had another method of judicial review of the Commission's alleged error in determining that certain persons were employees within the meaning of the law. Accordingly, the statute prohibiting the issuance of mandamus was not an interference with the jurisdiction over such remedies vested in the courts by the California Constitution.

The other cases cited by the City are similar. These cases hold, generally, that the Legislature may prohibit the issuance of a writ of mandamus for review of an administrative agency's erroneous interpretation of an applicable statute when the party aggrieved by the agency's decision has another method of judicial review of the error.

Local 188, on the other hand, has no judicial remedy other than a writ of mandate for PERB's erroneous interpretation of the MMBA in this unfair practice case.

In this regard, Gov. Code, § 3509.5 provides in pertinent part as follows:

> (a) 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, ... may petition for a writ of extraordinary relief from that decision or order. . . .

Because this is an unfair practice case, a writ of extraordinary relief as prescribed in Government Code secton 3509.5 is the only method of judicial review which the MMBA makes available to Local 188 for PERB's erroneous interpretation of the MMBA in this case. However, inasmuch as the final decision in this case was a decision of the Board not to issue a complaint, the MMBA provides no method at all by which Local 188 can obtain judicial review of PERB's erroneous interpretation of the MMBA.

But, as held in *Modern Barber Colleges*, the Legislature may prohibit the courts from reviewing an administrative agency's interpretation of applicable statutes by way of a writ of mandamus proceeding only when the Legislature has provided a different method for judicial review of the agency's ruling.

And inasmuch as the Legislature has not provided any method at all for Local 188 to obtain judicial review of PERB's erroneous interpretation of the MMBA, it necessarily follows that the courts may review PERB's erroneous interpretation by way of a writ of mandamus proceeding notwithstanding the provision of Government Code section 3509.5 that writs of extraordinary relief

as prescribed therein are not available to charging parties for review of a decision of the Board not to issue a complaint in an unfair practice case.

The City contends at page 16 of its Answer Brief that writ of mandamus proceedings should not be available to review a PERB decision not to issue a complaint in an unfair practice case because PERB and the courts will otherwise be burdened by an deluge of new work. However, the decision in *Belridge Farms v. Agricultural Labor Relations Board, supra,* 21 Cal.3d 551 does not appear to have precipitated an deluge of appellate court opinions reviewing decisions of the ALRB General Counsel not to issue unfair labor practice complaints under the Agricultural Labor Relations Act.

But even if this were a valid concern on the part of the City and PERB, it is not a satisfactory answer to the question of whether an administrative agency decision should be entirely immune from judicial review when the decision is clearly erroneous and wrongly deprives employees of their statutory collective bargaining rights.

Where the Legislature has granted collective bargaining rights to employees, as in the MMBA, it is more reasonable to presume that the Legislature intended those rights to be enforced by the courts, rather than to presume that the Legislature intended for those rights to be unsupported by any legal sanction. (See *Leedon v. Kyne* (1958) 358 U.S. 184, 190.)

Moreover, the City fails to provide any convincing reason why the courts should have jurisdiction to correct an erroneous PERB interpretation of the MMBA in a case in which PERB issued a complaint but not have jurisdiction to correct an erroneous PERB interpretation of the MMBA in a case in which PERB refused to issue a complaint. Whether PERB has issued a complaint or refused to issue a complaint in an unfair practice proceeding should not be determinative of whether the courts may review and set aside a PERB decision that deprives employees of their statutory collective bargaining rights. Otherwise, issues of procedure will preempt the collective bargaining rights which the Legislature intended to create. Accordingly, when a PERB decision deprives employees of those collective bargaining rights and judicial review of the PERB decision is not available by way of the statutorily-provided writ of extraordinary relief, judicial review of the PERB decision should then be available by the constitutionally-authorized writ of mandamus.

VII. CONCLUSION

For all of the reasons previously stated, the Court should affirm the decision of the Court of Appeal that the superior court had jurisdiction in writ of mandamus proceedings to review PERB's refusal to issue a complaint in this case but should reverse the decision of the Court of Appeal that the City of Richmond's decision to reduce firefighter shift staffing levels in the Richmond

Fire Department from a minimum of twenty-four (24) fire suppression personnel on duty at all times to a minimum of eighteen (18) fire suppression personnel on duty at all times and lay off 18 firefighters on January 1, 2004, was not a mandatory subject of bargaining under the MMBA.

Dated: November 30, 2009

DAVIS & RENO

By _____
Duane W. Reno

By _____
Alan C. Davis

Attorneys for Local 188

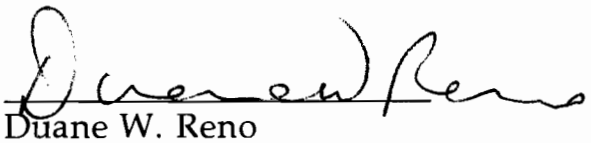
CERTIFICATE OF COUNSEL RE: WORD COUNT

I, Duane W. Reno, am one of the attorneys of record for the petitioner/appellant in this action.

This brief was prepared using Wordperfect X3 and the Palamino 13 point font. The word count of the brief, as determined by the Wordperfect program, is 6,204, including footnotes but excluding the tables and this certificate.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 30, 2009, at San Francisco, California.



Duane W. Reno

PROOF OF SERVICE

I am over the age of 18 years, employed in the county of San Francisco, and not a party to the within action. My business address is 22 Battery Street, Suite 1000, San Francisco, California 94111-5524.

On November 30, 2009, I caused the following document(s) **REPLY BRIEF OF PETITIONER IAFF LOCAL 188 IN RESPONSE TO REAL PARTY IN INTEREST AND RESPONDENT CITY OF RICHMOND'S CONSOLIDATED ANSWER BRIEF** to be served as follows:

by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 4:00 p.m.

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by causing the personal delivery of the document(s) listed above to the person(s) at the address(es) set forth below.

by placing the documents in an envelope or package provided by an overnight delivery carrier and addressed to the person(s) listed below and by placing the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on November 30, 2009.

Grania Duffy