2nd Petn.

S172377

No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

PETITION FOR REVIEW

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

DUANE W. RENO, SBN 67262
ALAN C. DAVIS, SBN 38762
DAVIS & RENO
22 Battery Street, Suite 1000
San Francisco, CA 94111
(415) 274-8700
(415) 274-8770 (Facsimile)

Attorneys for Petitioner IAFF Local 188

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I. THE ISSUE PRESENTED FOR REVIEW

The issue in this case is whether the Meyers-Milias-Brown Act ("MMBA", Gov. Code §§ 3500 et seq.) requirement that the California Public Employment Relations Board ("PERB") "apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter" (Gov. Code §§ 3509(b), 3510(a), added Stats 2000 ch 901 § 8 (SB 739), operative July 1, 2001), imposed a duty on PERB to issue a complaint alleging that the City of Richmond violated the MMBA by failing and refusing to meet and confer in good faith with Plaintiff/Appellant International Association of Fire Fighters, Local 188, AFL-CIO, over a decision to reduce firefighter shift staffing levels in the Richmond Fire Department on January 1, 2004, 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.

The "existing judicial interpretations" of the MMBA to be considered in this case are *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 and *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651.

As shown below, PERB's decision not to issue a complaint in this case was inconsistent with these "existing judicial interpretations." PERB's decision should therefore not be upheld but instead should be vacated and set aside.

II. THE DECISION PRESENTED FOR REVIEW

The decision presented for review was issued on March 18, 2009, by the Court of Appeal for the First Appellate District, Division Three. A copy of the decision showing its filing date is attached hereto at the back. The Court of Appeal issued an order on April 8, 2009, modifying its opinion and denying rehearing. A copy of this order is also attached hereto at the back.

III. WHY REVIEW SHOULD BE GRANTED

A. Review Should be Granted to Resolve a Conflict in Decisions of the Courts of Appeal over the Interpretation and Application of *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608

Review should be granted in this case because the Court of Appeal's and PERB's application and interpretation in this case of *Fire Fighters Union v. City of Vallejo, supra,* 12 Cal.3d 608, is squarely in conflict with the interpretations and applications of *Vallejo* by other Courts of Appeal.

Unless this Court grants review and resolves this conflict, PERB will apply and interpret *Vallejo* in other cases as it had done in this case. PERB's decisions in those other cases are likely to be vacated and set aside in the event they are reviewed by Courts of Appeal which have previously interpreted and applied *Vallejo* differently than it has been interpreted and applied in this case. Review is thus necessary to eliminate uncertainty in the law that will inevitably lead to disputes and confusion among public

agencies and employee organizations throughout the State and spawn further litigation over the issue of whether minimum firefighter shift staffing level and personnel reduction decisions are mandatory subjects of collective bargaining under the MMBA.

1. The PERB Decision Not to Issue a Complaint

Plaintiff/Appellant International Association of Fire Fighters, Local 188, AFL-CIO, initiated this proceeding when it filed an unfair practice charge with PERB on January 12, 2004. (App. Tab 2, p. 19.)[1]

The unfair practice charge alleged that the City violated the MMBA by failing to meet and confer with Local 188 over a decision to reduce minimum shift staffing levels in the Richmond Fire Department on January 1, 2004, 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.[2] (App. Tab 2, pp. 21-25.)

The unfair practice charge alleged further that as the result of the reduction in minimum shift staffing levels, working

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[1] "App." refers to Appellant's Appendix as permitted by Rule 5.1 of the California Rules of Court in lieu of a clerk's transcript on appeal.

[2] The unfair practice charge also included allegations that the City had failed to provide timely responses to Local 188's requests for relevant financial information. (App. Tab 2, pp. 21-24.) PERB concluded that these allegations stated a prima facie violation of the MMBA and issued a complaint against the City on April 29, 2004, solely on that basis. (App. Tab 2, p. 182.)

conditions for firefighters became far less safe and the work performed by firefighters became substantially more dangerous. (App. Tab 2, p. 24.)

The unfair practice charge specifically cited and relied on *Fire Fighters Union v. City of Vallejo, supra,* 12 Cal.3d 608. (See App. Tab 2, p. 25.)

Among the issues in *Vallejo* were whether the Fire Fighters Union's proposals on constant staffing procedures and personnel reductions were mandatory subjects of bargaining under the MMBA. *Vallejo* observed that although, as general rule, staffing level and layoff decisions are not subject to collective bargaining but instead are matters reserved exclusively to management, "the nature of fire fighting" is such that decisions on these matters may affect the remaining employees' workload and safety, which are well-established mandatory subjects of bargaining. *Vallejo* concluded that the Union's constant staffing procedures and personnel reduction proposals would be mandatory subjects of bargaining if they primarily involved firefighter workload and safety, but would not be mandatory subjects of bargaining if they primarily involved the policy of fire prevention of the city. (*Id.*, pp. 620-623.) The Court held that the proper course was for the parties to submit the dispute to the arbitration panel established by the Vallejo Charter for resolution of collective bargaining impasses so that a factual record could be established and the

arbitration panel could properly determine in the first instance whether "the manpower issue primarily involves the workload and safety of the men ('wages, hours and working conditions') or the policy of fire prevention of the city ('merits, necessity or organization of any governmental service')." (*Id.*, pp. 620-621.)

Although the City's actions herein involved both constant staffing procedures and personnel reductions, Local 188's unfair practice charge focused primarily on the City's decision to reduce minimum shift staffing levels for fire suppression personnel (constant staffing procedures). (App. Tab 2, p. 24.)

Local 188's requested remedy was thus an order requiring the City to reinstate the shift staffing levels and engine and truck company emergency response protocols that were in effect prior to January 1, 2004, and to make no changes in those shift staffing levels and emergency response protocols until the City had met and conferred with Local 188 over the shift staffing level changes. (App. Tab 2, p. 25.)

Even though this Court's decision in *Vallejo* treated constant staffing procedures and personnel reductions as two separate and distinct subjects of collective bargaining (*id.*, pp. 618-622) but held "[t]o 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," PERB's regional attorney formally advised Local 188 on February 11, 2004, that its unfair practice charge failed to state a prima facie violation of the MMBA because the City had no duty under the MMBA to negotiate with Local 188 over layoffs and "staffing levels is simply another way of describing the number of employees on the City's payroll." (App. Tab 2, p. 151.)

PERB's regional attorney cited PERB precedential decisions which held that decisions to lay off employees are categorically not subject to collective bargaining. Those precedential decisions involved employees other than firefighters and laws other than the MMBA.[3] PERB's regional attorney gave no explanation as to how those precedential decisions could be squared with *Vallejo*. (App. Tab 2, pp. 145, 151.)

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[3] PERB's jurisdiction prior to July 1, 2001, was limited to the adjudication of disputes over alleged violations of the Educational Employment Relations Act of 1976 establishing collective bargaining in California's public schools (K-12) and community colleges (Gov. Code, § 3540 et seq.); the State Employer-Employee Relations Act of 1978, known as the Ralph C. Dills Act, establishing collective bargaining for state government employees (Gov. Code, § 3512 et seq.); and the Higher Education Employer-Employee Relations Act of 1979 extending the same coverage to the California State University System, the University of California System and Hastings College of Law. (Gov. Code, § 3560 et seq.)

The regional attorney cited PERB precedent under the Ralph C. Dills Act (*California Department of Forestry and Fire Protection* (1993) PERB Decision No. 999-S) and the Educational Employment Relations Act (*San Mateo City School District* (1984) PERB Decision No. 383) rather than case law under the MMBA. (App. Tab 2, p. 151.)

Local 188 filed a first amended unfair practice charge on February 17, 2004. (App. Tab 2, p. 155.) The amended charge included a detailed discussion of the adverse consequences which the City's reduction in minimum shift staffing levels had on firefighter workload and safety. (App. Tab 2, pp. 161-168.)

PERB's regional attorney issued a letter on April 29, 2004, dismissing Local 188's claim that the City violated the MMBA by failing to meet and confer with Local 188 over the shift staffing level reduction. (App. Tab 2, p. 184.) PERB's Regional Attorney stated in this letter that *Vallejo* did not require the City to meet and confer with Local 188 because the holding of *Vallejo* was that "an employer has the right unilaterally to decide that a layoff is necessary, although it must bargain about such matters as the timing of layoffs and the number and identity of the employees affected." (App. Tab 2, p. 185.)

The PERB Board issued a decision on December 13, 2004, affirming the regional attorney's dismissal of Local 188's claim that the City had violated the MMBA by failing and refusing to meet and confer over the decision to reduce minimum shift staffing levels and lay off 18 firefighters. (App. Tab 2, p. 250.) The PERB Board reasoned also that shift staffing level changes and personnel reductions are two sides of the same coin. Thus, in response to Local 188's contention that *Vallejo* required reversal of the regional attorney's dismissal of the unfair practice charge, the Board's

decision stated in pertinent part, "by its plain language, *Vallejo* supports the Board's holding that a decision to layoff employees is not within the scope of representation under the MMBA." (App. Tab 2, p. 252.)

According to the PERB Board, this interpretation of *Vallejo* was consistent with long-standing PERB precedent addressing the negotiability of layoff decisions.

> In *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223 (*Newman-Crows*), the Board recognized that although:
>
> > The layoff of employees unquestionably impacts on their wages, hours and other conditions of employment. It may concurrently impact upon those employees who remain. Nevertheless, the determination that there is insufficient work to justify the existing number of employees or sufficient funds to support the work force, is a matter of fundamental managerial concern which requires that such decisions be left to the employer's prerogative.
>
> In the 22 years since *Newman-Crows*, the Board has not waivered [sic] from this position. The Board finds nothing in *Vallejo* or the text of the MMBA requiring a departure from this well-established rule.

(App. Tab 2, p. 252.) (Footnote omitted.)

2. <u>The Court of Appeal Decision</u>

The Court of Appeal decision filed herein on March 18, 2009, acknowledged that this Court held in *Vallejo* that constant staffing procedures which primarily involve employee workload and safety rather than the policy of fire prevention of the city are

mandatory subjects of collective bargaining for firefighters (Slip Opinion, p. 21), but held nevertheless that the City did not violate the MMBA when it failed and refused to meet and confer with Local 188 over the decision to reduce minimum shift staffing levels and lay off 18 firefighters.

The Court of Appeal did not adopt PERB's reasoning that staffing levels is simply another way of describing the number of employees on the payroll. Instead, the Court of Appeal reasoned that, in this case, the City's shift staffing level reduction was a consequence of a decision by the City to lay off 18 firefighters, hence the issue was not whether *Vallejo* requires bargaining over staffing level changes but instead was whether *Vallejo* requires bargaining over personnel reductions. According to the Court of Appeal, *Vallejo* does not require bargaining over personnel reduction decisions even when those decisions adversely affect firefighter workload and safety, but instead only requires bargaining over the effects of those decisions. (Slip Opinion, pp. 22-23.)

Local 188 filed a petition for rehearing which pointed out, among other things, that the Court of Appeal was wrong to base its decision on the factual premise that the shift staffing level reduction was a consequence of a decision by the City to lay off 18 firefighters. As stated in the petition for rehearing at pp. 6-8, the City's original plan for reduction of Fire Department personnel

costs as of January 1, 2004, to help meet the City's financial exigencies was to close a fire station that housed one (1) engine company and deactivate a truck company, which would result in a reduction in the minimum firefighter daily staffing level from 25 fire suppression personnel to 19 fire suppression personnel. At the time the City announced this plan, the City sent layoff notices to 13 firefighters. (App. Tab 2, pp. 158, 161-162.) The City subsequently abandoned its original plan and adopted a new "brown-outs" plan for reduction of Fire Department personnel costs to help meet the City's financial exigencies. Under this new "brown-outs" plan, the engine companies at three different fire stations were to be taken out of service and those stations closed on a rotational basis. This new "brown-outs" plan reduced the minimum firefighter daily staffing level from 25 fire suppression personnel to 18 fire suppression personnel. Upon implementation of this new "brown-outs" plan, 18 firefighters were laid off. (App. Tab 2, pp. 166-168.)

The number of firefighter layoffs thus increased from 13 to 18 when the City abandoned its original plan to reduce the minimum firefighter daily staffing level from 25 fire suppression personnel to 19 fire suppression personnel by closing a fire station and deactivating a truck company and instead adopted a plan to reduce the minimum firefighter daily staffing level from 25 fire suppression personnel to 18 fire suppression personnel by

"browning-out" three engine companies on a rotating basis. It can therefore only be concluded that the City's reduction of its minimum daily firefighter staffing level from 25 to 18 was not a consequence of a decision by the City to lay off 18 firefighters. Instead, it was the other way around – the layoff of 18 firefighters was a consequence of the City's decision to reduce its minimum daily firefighter staffing level from 25 to 18.

The Court of Appeal added footnote 10 to its opinion in response to Local 188's petition for rehearing. This footnote states in pertinent part,

> Local 188's attempt to divorce the staffing decision from the layoff decision is unavailing. The fact remains that in this case there was a direct correlation between the workforce reduction and the reduction in shift staffing, regardless of whether one decision is said to have preceded the other. The decisions were necessarily interdependent.

(Order Modifying Opinion and Denying Rehearing [No Change in Judgment], p. 1.)

The Court of Appeal's decision in this case thus affirmed PERB's interpretation of *Vallejo* that decisions to lay off firefighters are categorically not subject to collective bargaining, even when those decisions adversely affect firefighter workload and safety. (See Slip Opinion, pp. 16-22.)

3. The Conflict with Decisions of Other Courts of Appeals

This interpretation is squarely in conflict with the interpretation of every other Court of Appeal decision that has discussed *Vallejo*. All of these other Court of Appeal decisions have interpreted *Vallejo* to mean that public agencies are required to negotiate with affected employee organizations over decisions to reduce firefighter staffing levels as well as over decisions to lay off firefighters if those decisions primarily involve the workload and safety of the employees rather than the policy of fire prevention of the city.

> *Fire Fighters Union* concluded that because of "the nature of fire fighting," laying off some fire fighters affected the remaining employees' workload and safety. This effect on other employees made a decision to lay off some employees subject to bargaining and arbitration. (12 Cal.3d at p. 622.)

(*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 655-656.)

> In *Fire Fighters Union, supra,* 12 Cal.3d 608, the Supreme Court relied on federal precedent in arriving at the conclusion that a constant manning schedule, while arguably relating to an important policy of maintaining a particular standard for fire prevention, was subject to collective bargaining under the MMBA to the extent that the schedule affected the work loads and safety of the fire fighter employees. (At pp. 618-621.) In rejecting the argument that the challenged schedule was necessarily a management prerogative excluded from the scope of bargaining, the court relied upon the "strong public policy in California favoring peaceful resolution of employment disputes by means of arbitration" and observed that care must be taken "not to restrict unduly the scope of

> the arbitration by an overbroad definition of 'merits, necessity or organization.'" (At pp. 615, 622; italics in original.)

(*Sullivan v. State Bd. of Control* (1985) 176 Cal.App.3d 1059, 1065.)

> In discussing whether the question of the level of manpower in the fire department was definitely a matter of fire prevention policy and thus not within the scope of representation under the Meyers-Milias-Brown Act (MMBA), the *Fire Fighters* court pointed out that under federal decisions, the questions of employee workload and safety are recognized as mandatory subjects of bargaining. (*Fire Fighters, supra,* 12 Cal.3d at pp. 619-620.) Our Supreme Court disposed of this issue by sending the matter back for arbitration to decide "whether the manpower issue primarily involves the workload and safety of the men ('wages, hours and working conditions') or the policy of fire prevention of the city ('merits, necessity or organization of any governmental service')." (*Id.*, at pp. 620-621.)

(*Long Beach Police Officer Ass'n v. City of Long Beach* (1984) 156 Cal.App.3d 996, 1005-06.)

> . . . as the Union correctly points out, virtually every management decision entails some economic impact, and to exempt a changed condition of employment or safety rule from bargaining on that basis would quickly lead to the demise of employer-employee bargaining and the strong public policies underlying such bargaining. (Gov. Code, § 3500; *Fire Fighters Union v. City of Vallejo, supra,* 12 Cal.3d 608, 622.)

(*Solano County Employees' Assn. v. County of Solano* (1982) 136 Cal.App.3d 256, 264.)

> In *Fire Fighters,* in its discussion of the union's proposal that more fire fighters be added, our Supreme Court shed some light on the considerations which govern the resolution of the issue in this case. The City of Vallejo argued that the level of manpower in the fire department was inevitably a matter of fire

prevention policy, and thus not within the scope of representation under the MMBA. The court commented that if the union's manpower proposal was aimed at maintaining a particular level of fire protection in the community, the city's argument would be well taken. The union argued, however, that the more firemen the city employed, the less the workload of each would be and that because of the hazardous nature of the job, the number of men available to fight a fire directly affected the safety of the firemen. The court pointed out that under federal decisions, questions of employee workload and safety are recognized as mandatory subjects of bargaining (*Fire Fighters, supra,* at pp. 619-620). The court disposed of the issue by sending the case to an arbitrator, pursuant to provision of the City of Vallejo Charter similar to the MMBA, to decide in the first instance whether the manpower question "primarily involves the workload and safety of the men ('wages, hours and working conditions') or the policy of fire prevention of the City ('merits, necessity or organization of any governmental service')." (Italics supplied.) (*Fire Fighters, supra,* at pp. 620-621.)

(*San Jose Peace Officer's Assn. v. City of San Jose* (1978) 78 Cal.App.3d 935, 944-45.)

Vallejo involved the interpretation of a city charter provision requiring arbitration of labor disputes. (*Id.*, at pp. 612-613.) In negotiations between the fire fighters union and the city over the terms of a new contract, the parties failed to agree on a number of issues. (*Id.*, at p. 611.) In accordance with the procedure provided in the charter, the disputed issues were submitted to mediation and fact finding, and when those procedures failed to resolve the disputed issues, the city agreed to submit all issues to arbitration except "Personnel Reduction," "Vacancies and Promotions," "Schedule of Hours," and "Constant Manning Procedure." (*Id.*) In a mandate proceeding to compel the city to submit the disputed issues to arbitration, the trial court found in favor of the union and entered judgment commanding the city to proceed to arbitration on all issues, including the four which the city maintained were nonarbitrable. (*Id.*, at p. 612.) The city appealed. (*Id.*)

> The Vallejo charter provided that city employees had the right to negotiate "on matters of wages, hours and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity. . . ." (*Id.*, at p. 614, fn. 5.) The high court analyzed the four disputed issues and concluded that they were all negotiable, some in full and others to a limited extent. (*Id.*, at p. 623.)

(*Public Employees of Riverside County, Inc. v. County of Riverside* (1977) 75 Cal.App.3d 882, 886.)

The Court of Appeal's decision in this case thus creates confusion and uncertainty in the law where none existed before. This confusion and uncertainty will inevitably lead to disruption of long-established, stable collective bargaining relationships that presently exist between public agencies and the organizations which represent their firefighters.

In this regard, Local 188 submitted evidence that many collective bargaining agreements negotiated by local government agencies after the *Vallejo* decision have included minimum firefighter shift staffing levels. (App. Tab 6, pp. 528-29; Tab 7, pp. 531-667.) The Court of Appeal erroneously held that this evidence is irrelevant. (Slip Opinion, p. 17.) This evidence shows that the issue of minimum firefighter shift staffing levels is a matter eminently suitable for resolution through collective bargaining and is therefore properly taken into account in determining whether the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-

employee relations of bargaining about the action in question. (*Rialto Police Benefit Association v. City of Rialto* (2007) 155 Cal.App.4th 1295, 1305, 1309.)

A compelling need thus exists for resolution of the conflict between the Court of Appeal's decision herein and the decision of other Courts of Appeals on the extent to which *Vallejo* holds that firefighters have the right to engage in collective bargaining over constant staffing and personnel reduction decisions that are manifestly of vital importance to firefighter safety and well-being.

Moreover, PERB and the Court of Appeal's decision herein have clearly misinterpreted *Vallejo*. The key phrase in Vallejo is:

> 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.

(*Vallejo, supra*, 12 Cal.3d at p. 622.)

Although the language used in *Vallejo* on the subject of personnel reductions was different from the language used in the discussion of staffing level changes, the meaning of the language used for those two separate subjects was manifestly intended to be the same as shown by the phrase, "the subject of personnel reductions is subject to bargaining and arbitration for the same

reasons indicated in the prior discussion of the manning proposal."

In any event, there is nothing in *Vallejo* to indicate that a decision to reduce minimum firefighter shift staffing levels loses its character as a mandatory subject of collective bargaining merely because it is interdependent with a decision to lay off firefighters, or that justifies the Court of Appeal's elevation of the right of management to lay off employees free from the constraint of collective bargaining above the right of firefighters to collectively bargain over decisions which make working conditions for firefighters far less safe and their work substantially more dangerous. As held in *Vallejo* and as shown below, the proper approach is instead to balance those competing interests.

The Court of Appeal also incorrectly misinterprets *Vallejo* as meaning that a public agency does not have an obligation to bargain over a staffing level decision if the staffing level decision will affect the size of the workforce. (Slip Opinion, pp. 22-23.) *Vallejo* expressly acknowledged that under some circumstances minimum staffing levels may effectively determine the size of the workforce and makes clear that even under those circumstances, when changes in shift staffing levels affect workload and safety, those changes are mandatory subjects of bargaining notwithstanding the direct relationship between staffing levels and the size of the workforce.

> Moreover, a recent California public employment case, *Los Angeles County Employees Assn. Local 660 v. County of Los Angeles* (1973) 33 Cal.App.3d 1 [108 Cal.Rptr. 625], affords additional support for the union's position. In interpreting the scope of bargaining language in the Meyers-Milias-Brown Act -- language which, as pointed out earlier, largely parallels the scope of negotiation provision under the Vallejo City Charter -- the *Los Angeles County Employees* court held that the county was required to negotiate with the union with respect to the size of the caseloads carried by social service eligibility workers. Because the caseload, i.e., "workload," of the social workers effectively determined the number of these workers needed to service the recipients of aid, bargaining over the size of caseloads in Los Angeles County Employees was in reality comparable to bargaining over "manning" levels. In the case before us, the union claims that the fire fighters, like the Los Angeles social workers, are essentially demanding a particular workload but have framed their demand in terms of "manning," that is the number of people available to fight each fire.

(*Id.*, p. 620.)

Review should therefore be granted to secure uniformity of decision on the important issue of the extent to which *Vallejo* holds that firefighters have the right to engage in collective bargaining over constant staffing and personnel reduction decisions that are manifestly of vital importance to firefighter safety and well-being.

B. Review Should be Granted to Resolve a Conflict in Decisions of the Courts of Appeal on the Interpretation and Application of *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651

Review should also be granted in this case because the Court of Appeal's interpretation and application of *Building*

Material & Construction Teamsters' Union v. Farrell, supra, 41 Cal.3d 651 is squarely in conflict with the interpretation and application of the *Building Material* decision in *Rialto Police Benefit Association v. City of Rialto, supra,* 155 Cal.App.4th 1295.

The issue in *Rialto* was whether a decision of the City of Rialto to lay off its entire police force and contract with the county sheriff for law enforcement services was a mandatory subject of collective bargaining under the MMBA. (*Id.*, p. 1298.) In affirming that this layoff decision was a mandatory subject of bargaining, the *Rialto* Court of Appeal applied the three-part balancing test established by *Building Material* for determining when a management decision is subject to the MMBA's meet-and-confer requirement. As the *Rialto* Court of Appeal explained, this three-part test is set forth in *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623 as follows:

> Thus, in *Building Material, supra,* 41 Cal.3d at page 663, the court established a balancing test for determining whether a meet-and-confer requirement applies to management decisions. (See also *Claremont Police Officers, supra,* 39 Cal.4th at p. 637 [holding that the same test applies to the implementation of fundamental managerial and policy decisions].) The court in *Claremont Police Officers* set forth that test as follows: "First, we ask whether the management action has 'a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees.' [Citation.] If not, there is no duty to meet and confer. [Citations.] Second, we ask whether the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If not, then, as in *Building Material,* the meet-and-confer requirement

> applies. [Citation.] Third, if both factors are present—if an action taken to implement a fundamental managerial or policy decision has a significant and adverse effect on the wages, hours, or working conditions of the employees—we apply a balancing test. The action 'is within the scope of representation only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.' [Citation.] In balancing the interests to determine whether parties must meet and confer over a certain matter (§ 3505), a court may also consider whether the 'transactional cost of the bargaining process outweighs its value.'" *(Claremont Police Officers, supra,* 39 Cal.4th at p. 638.)

(*Rialto, supra,* 155 Cal.App.4th at 1301.)

The *Rialto* Court of Appeal concluded that (1) the City's decision to lay off its entire police force and contract with the county sheriff for law enforcement services affects wages, hours, and conditions of employment of the City's police officers within the meaning of the first inquiry under *Building Material* (*id.*, p. 1303), and (2) it was unnecessary to resolve the issue of whether the City's decision fell within the exception for fundamental management decisions under Government Code section 3504 even assuming, for purposes of argument, that the decision to contract out police services to the Sheriff's Department was a fundamental policy decision within the meaning of section 3504, because the City's decision was motivated by issues eminently suitable for resolution through collective bargaining, such as a desire to reduce costs as well as issues involving employee morale, level of service,

and management conflicts. (*Id.*, pp. 1305-1309.)

The *Rialto* Court of Appeal held that the City's layoff decision was therefore subject to the MMBA's meet-and-confer requirement. (*Id.*, p. 1309.)

The Court of Appeal's decision herein states that *Rialto* is distinguishable because the layoffs in *Rialto* resulted from a decision to transfer work outside the bargaining unit, whereas the layoffs at issue in this case were the result of a decision to reduce the total number of firefighters. (Slip Opinion, p. 20.)

The Court of Appeal's decision herein thus did not apply the three-part *Building Material* balancing test to determine whether the City's decision to reduce shift staffing levels and lay off 18 firefighters was a mandatory subject of collective bargaining.

However, application of the three-part *Building Material* balancing test is not limited solely to layoffs resulting from a decision to transfer work outside the bargaining unit. Instead, this test applies to any management decision which has a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees. (*Claremont Police Officers Assn. v. City of Claremont, supra*, 39 Cal.4th 623, 637-638.)

As noted above, even if the Court of Appeal were correct in its characterization of the City's action at issue herein as primarily a decision to reduce the total number of firefighters, that action was indisputably related to a reduction in minimum shift staffing

levels which was alleged by Local 188 to have had the result that working conditions for firefighters became far less safe and the work performed by firefighters became substantially more dangerous.

Because the City's decision thus had a significant and adverse effect on working conditions for the City's firefighters , the issue of whether that decision was a mandatory subject of collective bargaining should have been resolved by application of the same balancing test that was applied in *Rialto*.

Instead, as noted above, the Court of Appeal adopted PERB's reasoning that layoff decisions are categorically not mandatory subjects of bargaining.

The Court of Appeal cites *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666, 678, *NLRB v. Royal Plating and Polishing Co.* (1965) 350 F.2d 191, 196, and *Highland Ranch v. ALRB* (1981) 29 Cal.3d 848, 857 for the proposition that an employer may exercise its managerial prerogative to eliminate or reduce services and lay off employees "free from the constraints of the bargaining process." (Slip Opinion, p. 18.) But nothing in these opinions indicates that any of the employees being laid off were firefighters or that the layoff decisions had a substantial adverse effect on employee workload and safety. Instead, the negotiable "effects" of the layoff decisions in these cases were matters such as severance pay, seniority and pensions. (*Highland Ranch v. ALRB,*

supra, 29 Cal.3d 848, 857; *NLRB v. Royal Plating and Polishing Co.*, *supra*, 350 F.2d 191, 196.)

Application of the three-part *Building Material* balancing test to the City's decision to reduce minimum firefighter shift staffing levels and lay off 18 firefighters leads inevitably to the opposite conclusion that the City's decision was subject to the MMBA's meet-and-confer requirement.

As noted previously, the City's decision had a significant adverse effect on wages, hours, and working conditions within the meaning of the first inquiry under *Building Material* because members of Local 188's bargaining unit would lose their jobs as a result of the decision and the workload and safety of the remaining employees would be adversely impacted. (See *Building Material, supra*, 41 Cal.3d at p. 664; *Rialto, supra*, 155 Cal.App.4th at pp. 1301-1302.)

As in *Rialto*, it is unnecessary to resolve the issue of whether the City's decision falls within the exception for fundamental management decisions under Government Code section 3504 even assuming, for purposes of argument, that the decision to reduce minimum shift staffing levels and lay off 18 firefighters was a fundamental policy decision within the meaning of section 3504, because the City's decision was motivated by an issue eminently suitable for resolution through collective bargaining, namely, a desire to reduce costs. (App Tab 2, pp. 161, 167.) (*Rialto, supra*,

155 Cal.App.4th at pp. 1306-1307.)

The three-part *Building Material* balancing test thus compels the conclusion that City's decision to reduce minimum firefighter shift staffing levels and lay off 18 firefighters was subject to the MMBA's meet-and-confer requirement.

The Court of Appeal's holding herein that the three-part *Building Material* test only applies to a decision to transfer work outside the bargaining unit is not only in conflict with *Rialto* and *Claremont Police Officers Assn. v. City of Claremont, supra,* 39 Cal.4th 623, but also has the unreasonable result that although the Meyers-Milias-Brown Act applies both to police officers and firefighters as well as other local government employees, a different test will be applied for police officers than for firefighters in determining whether a layoff decision is a mandatory subject of bargaining under the MMBA.

In this regard, when the Legislature amended the MMBA in 2000 to extend PERB's jurisdiction to charges that a local government agency has violated the Act, the amendment did not extend PERB's jurisdiction to cases involving management employees and employees who are peace officers. (Gov. Code, §§ 3509, 3509(e), 3511, added Stats 2000 ch 901 § 8 (SB 739), operative July 1, 2001.)

For this reason, PERB had jurisdiction over Local 188's claim that the City of Richmond's constant staffing and layoff decisions

were mandatory subjects of collective bargaining under the MMBA, whereas the Superior Court of San Bernardino County had jurisdiction over the Rialto Police Benefit Association's claim that the City of Rialto's layoff decision was a mandatory subject of bargaining under the MMBA.

Rialto holds that a layoff decision for police officers may be a mandatory subject of collective bargaining under the MMBA because such a decision, by its very nature, impacts on wages, hours, and other conditions of employment, and that whether or not a layoff decision is a mandatory subject of collective bargaining is to be determined by application of the three-part *Building Material* test. (*Rialto*, 155 Cal.App.4th at pp. 1304-1307.)

Here, however, the Court of Appeal has affirmed a PERB decision which holds, in reliance on PERB precedent, that for firefighters, even though "[t]he layoff of employees unquestionably impacts on their wages, hours and other conditions of employment . . . the determination that there is insufficient work to justify the existing number of employees or sufficient funds to support the work force, is a matter of fundamental managerial concern which requires that such decisions be left to the employer's prerogative." (App. Tab 2, p. 252.)

Layoff decisions for police officers will thus be reviewed by the superior courts pursuant to the three-part *Building Material*

test, but layoff decisions for firefighters will be reviewed by PERB pursuant to PERB precedential decisions in which PERB has held in cases involving employees other than firefighters and laws other than the MMBA that layoff decisions are categorically not mandatory subjects of bargaining.

The Court of Appeal decision herein thus is not only in conflict with *Rialto* on the issue of whether layoff decisions are categorically not mandatory subjects of collective bargaining under the MMBA or are instead subject to the three-part *Building Material* balancing test but also creates an untenable difference between the collective bargaining rights of police officers and the collective bargaining rights of firefighters over layoff decisions.

Review should therefore be granted to resolve the important question of law of whether PERB should have applied the three-part *Building Material* balancing test to the City's decision herein to reduce minimum shift staffing levels in the Richmond Fire Department on January 1, 2004, 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.

C. Review Should be Granted Because the Court of Appeal has Rendered a Decision in Excess of its Jurisdiction

Finally, review should also be granted because the decision of the Court of Appeal filed herein on March 18, 2009, improperly abrogates the exclusive jurisdiction granted to PERB (Gov. Code, §

3509) to decide in the first instance on the basis of an evidentiary hearing and factual record whether "the manpower issue primarily involves the workload and safety of the men ('wages, hours and working conditions') or the policy of fire prevention of the city ('merits, necessity or organization of any governmental service')." (See *Vallejo*, 12 Cal.3d 608, 620-21.)

The Vallejo municipal charter provides for binding arbitration as a means of resolving disputes that cannot be resolved through the collective bargaining process. (*Id.*, pp. 612-13). The wages, hours, and other terms and conditions of employment which are subject to arbitration under the Vallejo charter are the same as those which are mandatory subjects of bargaining under the MMBA. (*Id.*, p. 614.)

Vallejo did not rule that the Union's constant staffing and personnel reduction proposals either were or were not categorically mandatory subjects of bargaining. Instead, *Vallejo* held that these proposals were mandatory subjects of bargaining – and therefore subject to arbitration – if they primarily involved firefighter workload and safety, but were not mandatory subjects of bargaining – and therefore not subject to arbitration – if they primarily involved the policy of fire prevention of the city. (*Id.*, pp. 620-623.) *Vallejo* concluded that the proper course was for the parties to submit the issue to the arbitration panel established by the Vallejo Charter so that a factual record can be established and

the arbitration panel can properly determine in the first instance whether "the manpower issue primarily involves the workload and safety of the men ('wages, hours and working conditions') or the policy of fire prevention of the city ('merits, necessity or organization of any governmental service')." (*Id.*, pp. 620-621.)

PERB performs the same role as the arbitration panel established by the Vallejo Charter in that PERB must decide in the first instance if firefighter staffing level changes are mandatory subjects of bargaining. (Gov. Code, §§ 3509, 3511; Stats. 2000, ch. 901 § 8.) *Vallejo* thus compels the conclusion that where, as here, an unfair practice is filed alleging that a local public agency has decided to make firefighter staffing level reductions or personnel reductions which have the result that working conditions for firefighters become far less safe and the work performed by firefighters becomes substantially more dangerous, PERB is required by the MMBA to hold an evidentiary hearing and make a decision on the basis of the factual record as to whether the reductions primarily involve firefighter workload and safety or the policy of fire prevention of the city.

Notwithstanding PERB's exclusive jurisdiction to decide in the first instance if firefighter staffing level changes are mandatory subjects of bargaining, the decision of the Court of Appeal filed herein on March 18, 2009, makes the following statement of purported fact at pp. 22-23: "[i]f there are fewer firefighters and

engines in service throughout the City, the primary impact is upon firefighting protection provided to City residents."

Whether this statement of purported fact is true or not is exactly the issue that PERB has exclusive jurisdiction to decide in the first instance. PERB has not done so because PERB refused to issue a complaint and have an evidentiary hearing to develop a factual record on the issue. By affirming PERB's refusal to issue a complaint on the basis the purported fact that the primary impact of changes in minimum firefighter daily staffing levels is upon firefighting protection provided to City residents rather than on firefighter workload and safety, the decision filed herein on March 18, 2009, improperly abrogates the exclusive jurisdiction granted to PERB to decide this factual issue in the first instance.

Moreover, the decision filed herein on March 18, 2009, appears to hold that if the City had reduced equipment staffing levels rather than shift staffing levels, the reduction would have been a mandatory subject of collective bargaining even though the reduction was a consequence of a layoff decision. (See Slip Opinion, pp. 22-23.) But as noted previously, there is no evidentiary basis or factual record to support either the conclusion that the City's reduction of its minimum daily firefighter staffing levels was a consequence of a decision by the City to lay off 18 firefighters or the conclusion that a reduction in equipment staffing levels would have a greater adverse effect on firefighter

workload and safety than a reduction in minimum daily staffing levels.

The decision filed herein on March 18, 2009, thus improperly purports not only to resolve issues of fact that are clearly within PERB's exclusive jurisdiction to resolve in the first instance, but to do so without any factual record which would provide evidentiary support for the findings and conclusions stated in the decision.

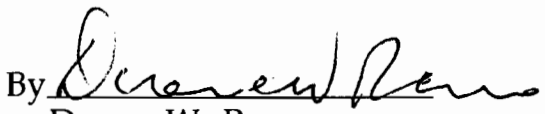
Review should therefore be granted to clarify the role of the courts and the role of PERB when, as in this case, an unfair practice charge alleges that a public agency has violated the MMBA by failing and refusing to collectively bargain over a decision to reduce firefighter shift staffing levels and lay off firefighters.

IV. CONCLUSION

For all of the reasons stated above, review should be granted in this case and the decision of the Court of Appeal should be reversed.

Dated: April 27, 2009

DAVIS & RENO

By 
Duane W. Reno
Attorneys for Petitioner
IAFF Local 188

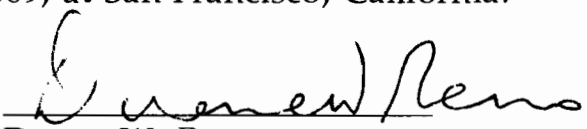
CERTIFICATE OF COUNSEL RE: WORD COUNT

I, Duane W. Reno, am the attorney of record for the petitioner in this action.

This petition was prepared using Wordperfect X3 and the Palamino 13 point font. The word count of the brief, as determined by the Wordperfect program, is 7,278, 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 April 27, 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 April 27, 2009, I caused the following document(s) **PETITION FOR REVIEW** 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.

xx by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as set forth below.

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.

Counsel for Respondent Public Employment Relations Board
Tami R. Bogert, General Counsel
Wendi L. Ross, Deputy General Counsel
PERB
1031 18th Street
Sacramento, CA 95811-4124

Superior Court Clerk
Contra Costa County
725 Court Street
Martinez, CA 94553

Counsel for Real Party in Interest City of Richmond

Randy Riddle, Esq.
K. Scott Dickey, Esq.
Merlyn Goeschl, Esq.
Renne Sloan Holtzman & Sakai, LLP
Public Law Group
350 Sansome Street, Suite 300
San Francisco, CA 94104

Clerk of the California Court of Appeal
350 McAllister Street
San Francisco, CA 94102

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 April 27, 2009.

Grania Duffy

Filed 3/18/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 188, AFL-CIO, Plaintiff and Appellant, v. PUBLIC EMPLOYMENT RELATIONS BOARD, Defendant and Respondent; CITY OF RICHMOND, Real Party in Interest and Respondent.	A114959 (Contra Costa County Super. Ct. No. N05-0232)

Faced with a severe financial crisis, the City of Richmond (City) laid off 18 firefighters and consequently reduced the number of firefighters on each work shift. The firefighters' union, International Association of Fire Fighters, Local 188, AFL-CIO (Local 188), sought to meet and confer over the decision, but the City claimed the layoff decision was not subject to collective bargaining. Local 188 filed an unfair practices claim with the Public Employment Relations Board (PERB), which dismissed the charges relating to the layoff and shift staffing decision. This appeal arises out of Local 188's petition to compel PERB to issue a complaint against the City.

The threshold jurisdictional question on appeal is whether a court may consider a challenge to a PERB decision dismissing an unfair labor practices charge and refusing to issue a complaint under the Meyers-Milias-Brown Act (Gov. Code,[1] § 3500 et seq.)

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[1] All further statutory references are to the Government Code unless otherwise specified.

(MMBA or Act). We conclude an aggrieved party may seek a writ of mandate on certain narrow grounds described in this opinion to challenge a PERB decision not to issue an unfair labor practices complaint.

The substantive issue raised on appeal is whether a local government agency's decision to lay off firefighters is a mandatory subject of bargaining under the MMBA. Consistent with our Supreme Court's decision in *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 (*Vallejo*), we conclude a decision to lay off firefighters is not subject to collective bargaining. Accordingly, we shall affirm the judgment of the trial court denying Local 188's petition for writ of mandate.

FACTUAL AND PROCEDURAL BACKGROUND

The City is a local public agency subject to the provisions of the MMBA. Local 188 is the exclusive representative of a bargaining unit consisting of the City's sworn fire suppression employees.

As of early 2004, the City had seven fire stations. There was a fire engine at each of the stations and a fire truck at two of the stations, although one of the fire trucks was not regularly staffed.[2] If a second truck company were needed, the engine at one of the stations would be taken out of service and the engine's crew would then operate the second truck. The fire department had a policy that all seven of the engines and one of the trucks were to be fully staffed at all times. Each fire engine was staffed with three personnel. The fire truck likewise had a three-person crew. The department maintained a minimum of 24 fire suppression personnel on duty in the City's seven fire stations at all times, composed of three personnel assigned to each of the seven engines plus the three personnel assigned to one of the trucks.

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[2] A fire engine carries a pump, hose, and water, as well as some tools. The function of an engine company is to extinguish the fire. The function of a truck company, by contrast, is to ventilate a burning building, provide access to the upper stories of the building with the truck's aerial ladder, and to provide a means of escape for firefighters from the building, if necessary.

In the 2003-2004 fiscal year, the City was facing a severe financial crisis. In a meeting held October 16, 2003, City officials met with union representatives to discuss a budget proposal that involved laying off 13 firefighters effective December 31, 2003. Combining the effect of the 13 proposed layoffs with the anticipated retirements of six firefighters, there was a "high likelihood" the City would need to close one of its seven fire stations. The City later determined that, based on the actual number of retirements, it was necessary to lay off five additional firefighters, for a total of 18 firefighters to be laid off.

After layoff notices were sent to affected personnel, the City arranged to meet with Local 188 over the negotiable effects of the envisioned layoffs. On November 19, 25, and December 15, 2003, City representatives met with Local 188 to discuss the proposed layoffs as well as other staffing issues. During the course of these discussions, Local 188 identified some measures it claimed would save the City up to $1.2 million, which it claimed would make layoffs of its members unnecessary. The City concluded that Local 188's proposals would not be sufficient to offset any of the planned layoffs. Local 188 did not attempt to identify specific impacts of the proposed layoffs, nor did it present any plan concerning the effects of the proposed layoffs.

As of December 2003, the City had abandoned its proposal to permanently close one of the fire stations and instead proposed a new plan that would result in one of the fire stations being taken out of service on a rotating basis. Ultimately, on January 1, 2004, the City proceeded to lay off 18 members of Local 188.[3] The City also instituted "rolling closures" among three designated fire stations, also referred to as a "brownout" of the affected station. Shift staffing levels of fire suppression personnel were reduced from 24 to 18 per shift, accomplished by the rolling closure of one engine company and the elimination of the regular staffing of one truck company.

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[3] The City laid off a total of 78 employees at the time, including the 18 firefighters.

In early January 2004, Local 188 requested a meeting, purportedly to discuss some of the effects of the layoff. At the meeting, held January 5, 2004, Local 188 presented a number of proposals dealing with severance pay, compensation for laid-off employees, and restoration of sick leave for employees upon reinstatement. None of the proposals concerned firefighter safety and workload.

Local 188 filed an unfair labor practice charge against the City with PERB on January 12, 2004. Among other things, Local 188 alleged the City had violated the MMBA by failing to meet and confer in good faith over the decision to reduce staffing levels, and by failing to comply with Local 188's repeated requests for detailed information about the City's financial condition. In its statement accompanying the charge, Local 188 stated the fire chief had "confirmed in public statements after the layoffs that the community is less safe as a result of the layoffs." Local 188 also asserted working conditions were "far less safe" for the remaining firefighters, who had "to perform substantially more dangerous work than they did before" because there were "no longer enough staffed engines in the City of Richmond to provide the teamwork necessary for the remaining fire fighters to perform fire suppression duties without significantly increasing risks to their lives and safety." Local 188 requested that PERB seek injunctive relief requiring the City to reinstate the previous shift staffing levels as well as the engine and truck company emergency response protocols. Local 188 further requested the City make no changes in shift staffing levels and response protocols unless and until the City satisfied its obligation to meet and confer in good faith and attempt to reach agreement over the proposed staffing level changes.

The PERB regional office responded to Local 188's unfair labor practice charge in a partial warning letter dated February 11, 2004. The letter indicated the allegations failed to state a prima facie case for relief, explaining that "the decision to lay off employees is not subject to bargaining." However, the letter also explained that "Although the decision to lay off employees is nonnegotiable, the effects of that decision are matters within the scope of representation." Examples of such effects were described

as "(1) recall and reemployment rights; (2) bumping rights; (3) severance pay; (4) distribution of work among remaining employees; and (5) retraining of laid off employees." The letter responded to allegations the layoff plan constituted a change in "staffing levels or shift assignments," stating that "staffing levels is simply another way of describing the number of employees on the City's payroll."

Local 188 filed a first amended charge against the City on February 17, 2004. In contrast to the original claim, which contained a brief discussion of the alleged workload and safety consequences of the staffing reduction, the amended claim contained a much more detailed discussion of the purported safety consequences of the layoffs. Among other things, Local 188 claimed the reduction in shift staffing levels would reduce the number of engines and trucks that were available to respond to a fire, thereby causing a significant increase in the risk of injury for members of the remaining engine companies. Further, Local 188 claimed the deactivation of a regularly staffed fire truck would cause delays in responding to a fire, resulting in a "greatly increased risk that the structure [would] collapse with fire fighters and victims inside." Notably, however, in a declaration submitted to PERB on January 23, 2004, Local 188's president admitted the union had "not made any proposals to the City regarding firefighter workload and safety issues related to the new staffing level and emergency response protocols" the City had implemented, purportedly because the decision was presented to Local 188 as a "fait accompli."

PERB's Office of General Counsel issued a complaint on behalf of Local 188 and against the City on April 29, 2004, limited to the issue of whether the City had committed an unfair practice in violation of the MMBA by its delay in providing relevant financial information. Also on April 29, 2004, PERB's General Counsel issued a partial dismissal letter dismissing the allegation that the City had failed to meet and confer in good faith over the layoff decision or the effects of that decision.

In the letter dismissing the charges related to the layoff decision, PERB's General Counsel stated that Local 188's amended charge did not contain significantly different

facts but instead focused primarily on legal arguments. The letter reiterated the conclusions contained in the earlier partial warning letter.

Local 188 appealed the partial dismissal, arguing its unfair practice charge adequately alleged that the reduction in staffing adversely affected the workload and safety of the remaining firefighters and that the Supreme Court's opinion in *Vallejo, supra,* "squarely holds that a [public entity] is required to meet and confer over a decision to lay off employees when this decision affects the workload and safety of the remaining employees."

On December 13, 2004, a panel of three PERB board members issued a decision upholding the partial dismissal of Local 188's unfair practices charge. The PERB panel framed the issue as "whether a decision to layoff [*sic*] employees is within the scope of representation under the MMBA." The panel concluded it was not and disagreed with Local 188's interpretation of *Vallejo.* The decision stated that *Vallejo* supported PERB's position that layoffs are not subject to collective bargaining "by its plain language." The panel concluded the passage cited by Local 188 merely held the *effects* of a layoff decision, such as workload and safety concerns, are negotiable. The panel also concluded Local 188 had repeatedly requested to bargain over the layoff decision itself instead of the effects of that decision, such that the City was never on notice of Local 188's request to bargain over the effects of the layoff decision. As a consequence, PERB held Local 188 had waived its right to bargain over the effects of the decision.

Local 188 filed a petition for writ of mandate in this court on January 11, 2005, in case number A108875. Following this court's receipt of opposition to the petition from PERB and the City, we denied the petition "without prejudice to its being refiled in the Contra Costa County Superior Court."

Local 188 thereafter filed a petition for writ of mandate in the Contra Costa County Superior Court. Local 188 alleged that PERB had misinterpreted and misapplied the Supreme Court's decision in *Vallejo*, and it sought a writ of mandate directing PERB to issue a complaint against the City alleging it had violated the MMBA by unilaterally

implementing changes in firefighter shift staffing levels. PERB and the City opposed the petition, contending (1) the trial court lacked jurisdiction to grant the petition because the MMBA prohibits judicial review of a PERB decision not to issue a complaint, and (2) Local 188's unfair practice charge failed to state a prima facie violation of the MMBA in light of *Vallejo*'s holding that an employer is not obligated to negotiate a decision to lay off employees, but instead is only required to bargain over any negotiable effects of the layoff decision.

The trial court denied Local 188's petition in a decision filed April 14, 2006. As an initial matter, the court concluded it had "jurisdiction to review, in a petition for writ of mandate, a decision by PERB not to issue an unfair labor practices complaint." The court found that PERB had correctly interpreted *Vallejo*, which the court agreed stood for the proposition that a layoff decision is not within the scope of representation under the MMBA, although the effects of such a decision are properly the subject of collective bargaining. On July 19, 2006, the trial court's decision was reduced to judgment, which Local 188 timely appealed to this court.

DISCUSSION

I. *A PERB Decision Not to Issue an Unfair Practices Complaint is Subject to Judicial Review on Limited Grounds.*

As a threshold matter, we are called upon to determine whether a party aggrieved by a PERB decision not to issue an unfair practices complaint has any recourse to challenge the decision in a court of law. Because this question involves a pure issue of law, our review is de novo. (See *Rialto Police Benefit Assn. v. City of Rialto* (2007) 155 Cal.App.4th 1295, 1300 (*Rialto*).)

The MMBA establishes collective bargaining rights for California's local government employees and requires local public agencies to meet and confer with recognized employee organizations over all matters within the scope of representation. (See § 3505.) The scope of representation is defined as "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the

scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (§ 3504.)

As originally enacted in 1968, the MMBA did not provide for an administrative agency to resolve charges that a local government agency or an employee organization had violated the Act. (Stats. 1968, ch. 1390, §§ 1-12.5, pp. 2725-2729; Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 728-729.) Instead, the only remedy for a violation of the MMBA was through the courts. (*Ibid.*) As a consequence, a substantial body of case law arose interpreting the MMBA. (See, e.g., *Vallejo, supra,* 12 Cal.3d at p. 614, 618-620 [firefighter equipment manning proposal subject to bargaining if it primarily involves workload and safety]; *Holliday v. City of Modesto* (1991) 229 Cal.App.3d 528, 530 [city must bargain over drug testing]; *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 504-505 [work schedule change is mandatory subject of bargaining].)

The Legislature amended the MMBA in 2000 to provide that, except for cases involving management employees or certain peace officers, PERB has exclusive jurisdiction over charges that a local government agency or employee organization has violated the Act. (§§ 3509, 3511; Stats. 2000, ch. 901, § 8.) As specified in section 3509, subdivision (b), "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 [the MMBA], shall be a matter within the exclusive jurisdiction of [PERB]." A complaint alleging that a local government agency has refused to meet and confer over a mandatory subject of bargaining is processed as an unfair practice charge. (§ 3509, subd. (b).) The 2000 amendments to the MMBA required that PERB "shall apply and interpret unfair labor practices consistent with existing judicial interpretations of [the MMBA]." (*Ibid.*)

The procedures for processing an unfair practice charge are set forth in Title 8 of the California Code of Regulations. When a charge is filed, it is assigned to a PERB

agent for processing. (Cal. Code Regs., tit. 8, § 32620, subd. (a).) Among other things, PERB's agent is authorized to make inquiries and review the charge to determine whether an unfair labor practice has been committed. (*Id.*, § 32620, subd. (b)(4).) If PERB's agent concludes the charge or evidence is insufficient to establish a prima facie case, the agent shall refuse to issue a complaint, in whole or in part. (*Id.*, §§ 32620, subd. (b)(5), 32630.) A refusal to issue a complaint constitutes a dismissal of the charge. (*Id.*, § 32630.) The charging party may appeal a dismissal to the PERB board itself. (*Id.*, § 32635, subd. (a).)

In 2002, the Legislature further amended the MMBA to specify that any charging party, respondent, or intervenor could challenge a final PERB decision by petition for extraordinary relief to a Court of Appeal. (Stats. 2002, ch. 1137, § 3.) More specifically, section 3509.5, subdivision (a) provides in relevant part that a party "aggrieved by a final decision or order of [PERB] 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."[4] (Italics added.) Such a petition must be filed in the "district court of appeal having jurisdiction over the county where the events giving rise to the decision or order occurred." (§ 3509.5, subd. (b).) The statutory writ procedure provides that the appellate court "shall have jurisdiction to grant any temporary relief or restraining order it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as modified, or setting aside in whole or in part the decision or order of [PERB]." (*Ibid.*) On questions of fact, the appellate court is bound to uphold a PERB decision if it is supported by substantial evidence. (*Ibid.*)

The key language for purposes of our analysis is the specific exception for "decision[s] of the board not to issue a complaint" from the legislative authorization for

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[4] Similar language that excludes decisions not to issue a complaint from the authorization for judicial review in the Court of Appeal can be found in six other statutory schemes administered by PERB. (See § 3520, subd. (b), § 3542, subd. (b), § 3564, subd. (b), § 71639.4, subd. (a), § 71825.1, subd. (a); see also Pub. Util. Code, § 99562, subd. (b).)

judicial review of a final PERB decision. (§ 3509.5, subd. (a).) PERB and the City argue this statutory language confirms that a PERB decision upholding a refusal to issue a complaint is final and nonreviewable.

The plain language of section 3509.5 establishes that a PERB decision upholding a refusal to issue a complaint is not reviewable under that statute. Local 188 does not argue otherwise. The question is whether the express exclusion of such decisions from the scope of judicial review in section 3509.5 entirely deprives the courts of jurisdiction to consider a challenge to such decisions in any context.

PERB and the City point out that the Legislature has the authority to establish or limit private rights of action, including the right to deny any means of appeal. "Except as the Constitution otherwise provides, the Legislature has complete power to determine the rights of individuals. [Citation.] It may create new rights or provide that rights which have previously existed shall no longer arise, and it has full power to regulate and circumscribe the methods and means of enjoying those rights, so long as there is no interference with constitutional guaranties." (*Modern Barber Col. Cal. Emp. Stab. Com.* (1948) 31 Cal.2d 720, 726.) "[T]he Legislature has the power to declare by statute what orders are appealable, and, unless a statute does so declare, the order is not appealable. [Citations.]" (*Id.* at p. 728.)

The statutory exemption from judicial review granted to PERB for a decision not to issue a complaint derives from similar exemptions found in other labor statutes and correspondingly granted to both the state Agricultural Labor Relations Board (ALRB) under the Agricultural Labor Relations Act (Lab. Code, § 1140 et seq. (ALRA)) and the federal National Labor Relations Board (NLRB) under the National Labor Relations Act (29 U.S.C. § 151 et seq. (NLRA)). (See *National Labor Relations Bd. v. United Food and Commercial Workers Union* (1987) 484 U.S. 112, 129-130; *Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 556 (*Belridge Farms*).) The MMBA and the ALRA were patterned after the federal NLRA. For this reason,

California courts have approved reliance on NLRA and ALRA precedent to interpret public sector labor statutes such as the MMBA. (*Vallejo, supra,* 12 Cal.3d at p. 617.)

Under the NLRA, the general counsel of the NLRB has "unreviewable discretion" to file or withdraw unfair practices complaints. (*National Labor Relations Bd. v. United Food and Commercial Workers Union, supra,* 484 U.S. at pp. 113, 126.) Similarly, under the ALRA, a refusal by the ALRB's general counsel to issue a complaint is generally not subject to judicial review. (*Belridge Farms, supra,* 21 Cal.3d at pp. 555, 556.) The aim of these rules is to defer to the discretion and special expertise of the agency charged with administering the law. (See *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 12.)

We agree with PERB and the City that PERB's refusal to issue a complaint is generally not subject to judicial review. However, as PERB acknowledges, the courts have carved out a narrow exception to the rule precluding judicial review of such decisions.

In *Belridge Farms, supra,* 21 Cal.3d at p. 557, our Supreme Court identified limited circumstances under the ALRA when equitable review might be appropriate in a case in which a decision has been made not to issue a complaint. In that case, an employer filed with the ALRA four unfair labor practice charges against a union. (*Belridge Farms, supra,* 21 Cal.3d at p. 554.) The ALRA's general counsel refused to issue a complaint, finding that the alleged violation did not rise to the level of an unfair labor practice. (*Id.* at pp. 554-555.) The employer sought judicial review of the refusal to issue a complaint, notwithstanding statutory language limiting judicial review to "final order[s] of the board." (*Id.* at p. 555; see Lab. Code, § 1160.8.) The Supreme Court held the general counsel's refusal to file a complaint was not a "final order of the board," in part because it was not a decision of the board and in part because it was not a *final* decision, which federal courts have interpreted to refer to decisions "either dismissing an unfair labor practice complaint or directing a remedy for an unfair labor practice as a result of the *culmination* of [NLRA] procedures . . . ." (*Belridge Farms, supra,* 21 Cal.3d

at p. 556.) Nevertheless, the court noted that federal courts have exercised their equitable powers to review non-final determinations of the NLRA in three limited circumstances: (1) if the decision violates a constitutional right; (2) if the decision exceeds a specific grant of authority; or (3) if the decision erroneously construes an applicable statute. (*Id.* at pp. 556-557.) The *Belridge Farms* court applied these equitable exceptions allowing judicial review in the context of the ALRA, concluding that mandamus review was available to challenge the general counsel's decision even though the statutory writ procedure was not. (*Id.* at p. 560.) The Supreme Court nonetheless denied relief, concluding the general counsel's interpretation of the applicable statute was proper. (*Id.* at pp. 559-559.)

As the City points out, there is a difference in the relevant statutory language under the ALRA and the MMBA. In particular, whereas the ALRA limits judicial review to final orders of the ALRB without express reference to decisions not to issue a complaint (Lab. Code, § 1160.8), the MMBA specifically excludes from the scope of judicial review decisions not to issue a complaint (§ 3509.5, subd. (a)). This is a distinction without a difference, at least in terms of whether a court may exercise equitable powers to conduct a limited review of the decision. Regardless of whether the limitation on review is implicit or explicit, the limitation merely precludes a challenge to a decision refusing to issue a complaint under the *statutory writ review procedure* provided in both the ALRA and the MMBA. The Legislature's decision to expressly exclude a decision not to issue a complaint from the scope of the statutory writ remedy provided by section 3509.5 does not limit the court's equitable powers to review such a decision in a mandamus proceeding on the narrow grounds identified in *Belridge Farms.*

Accordingly, we conclude the *Belridge Farms* holding permitting limited judicial review of non-final ALRB decisions applies equally to non-final PERB decisions,

including a decision upholding a refusal to issue a complaint.[5] Although a statutory writ of review under section 3509.5 does not lie to challenge such decisions, mandamus review of such decisions is available on the limited grounds discussed in *Belridge Farms*.

Having concluded judicial review is available—on the limited grounds specified in *Belridge Farms*—to challenge a PERB decision not to issue a complaint, we must clarify the nature and scope of the court's review, particularly in light of obvious confusion about the proper standard of review as evidenced by the trial court's decision and the appellate briefs. The trial court employed an abuse of discretion standard to assess the PERB decision but also proceeded to review the matter de novo. The City urges that a substantial evidence standard of review applies to conclusions of fact contained in the PERB decision, citing legal authorities addressing administrative writs of mandate. (See Code Civ. Proc., § 1094.5, subds. (b) & (c).) The appropriate standard of review is much more limited than those relied upon or suggested by the trial court and the City.

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[5] In support of its jurisdictional finding, the trial court cited *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 110 (*Powers*). Although the holding of that case is not inconsistent with our analysis, the *Powers* decision has only a limited application to the question before us. In *Powers,* the Supreme Court considered whether a party has a right of appeal from a trial court decision under the Public Records Act (§ 6250 et seq.). The Legislature provided that any such decision could only be challenged by a writ petition filed in the Court of Appeal. The *Powers* decision focuses on whether the California Constitution provides a right of direct appeal (as opposed to writ review) from a trial court decision. (See *Powers, supra,* 10 Cal.4th at p. 91.) The *Powers* court concluded the Legislature could specify the form of appellate review available from a trial court decision. (*Id.* at p. 115.) Plainly, the opinion does not address whether a party has a right to judicial review of a type of administrative agency decision the Legislature has seen fit to specifically exclude from the scope of a statutory review procedure. Nevertheless, the opinion is relevant to our analysis in one respect. While the Supreme Court acknowledged the Legislature has authority to specify the mode of judicial review, it clarified that "it may do so only to the extent that it does not thereby ' "substantially impair the constitutional powers of the courts, or practically defeat their exercise." ' [Citations.]" (*Id.* at p. 110.) That same principle guides our analysis and is reflected in the *Belridge Farms* decision on which we rely.

This appeal is from a judgment denying a traditional writ of mandamus under Code of Civil Procedure section 1085,[6] which allows a court to issue a writ of mandate to an inferior tribunal compelling the performance of a mandatory, ministerial duty. A substantial evidence standard of review, which applies in administrative mandate proceedings (Code Civ. Proc., § 1094.5, subds. (b) & (c)) and in a proceeding under the statutory writ of review procedure outlined in section 3509.5 of the MMBA, does not apply in a traditional mandate proceeding. (See *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 230.) Instead, the appropriate standard of review in such a proceeding is the deferential abuse of discretion standard, such that the agency decision under review will be upheld unless it is arbitrary, capricious, or entirely lacking in evidentiary support. (*American Board of Cosmetic Surgery v. Medical Board of California* (2008) 162 Cal.App.4th 534, 547-548.)

Because a challenge to a PERB decision not to issue a complaint is accomplished by means of a traditional mandate petition, the substantial evidence standard of review is inapplicable. Moreover, a court necessarily may not undertake an even less deferential de novo review of the challenged PERB decision. At most, the court's review is limited to considering whether the decision constitutes an abuse of discretion. However, even this limited review, while generally applicable to traditional mandamus actions, exceeds the authority of the court to review a PERB decision not to issue a complaint. As *Belridge Farms* makes clear, the court's authority to review a decision not to issue a

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[6] A party seeking review of a public agency decision may bring an administrative mandamus action under Code of Civil Procedure section 1094.5 if the agency decision was " 'made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency . . . .' " (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 566.) "On the other hand, an administrative decision that does not require a hearing or a response to public input is generally not reviewable under Code of Civil Procedure section 1094.5 but by traditional mandamus pursuant to Code of Civil Procedure section 1085 . . . ." (*Environmental Protection & Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 521.)

complaint is limited to a determination of whether the decision violates a constitutional right, exceeds a specific grant of authority, or is based on an erroneous construction of an applicable statute. (*Belridge Farms, supra,* 21 Cal.3d at pp. 556-557.) These issues involve pure questions of law. Further, PERB's interpretation of its statutory authority "will generally be followed unless it is clearly erroneous. [Citations.]" (*Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804.) If PERB's interpretation of its authority is not clearly erroneous, and absent violation of a constitutional right, the court's inquiry is at an end. A court is not empowered to review the factual basis for a decision, even under the deferential abuse of discretion standard. This is so because PERB, like the general counsel of the NLRB, "has unreviewable discretion to refuse to institute an unfair labor practice complaint." (*Vaca v. Sipes* (1967) 386 U.S. 171, 182.) As the court recognized in *Belridge Farms,* an erroneous decision that the facts alleged by a complaining party fail to rise to the level of an unfair labor practice does not warrant the issuance of an extraordinary writ because the issue "presents a factual question within the general counsel's broad discretion" and "not a matter of statutory construction." (*Beldridge Farms, supra,* 21 Cal.3d at p. 559, fn. 4.)

As a final matter, we clarify that any judicial challenge to a PERB decision not to issue a complaint must typically be filed in the trial court in the first instance and not the Court of Appeal. Although section 3509.5 provides that a petition for a writ of review must be filed in an appropriate Court of Appeal, that statutory procedure is inapplicable to a mandamus petition challenging a decision not to issue an unfair practices complaint. Instead, a party seeking writ relief should ordinarily file a mandate petition in the trial court located in the county where the controversy arose, notwithstanding the fact that a Court of Appeal also possesses original jurisdiction to consider such a petition in the first

instance under article VI, section 10 of the California Constitution.[7] (See *County of Sacramento v. Hastings* (1955) 132 Cal.App.2d 419, 420-421.)

II. *A Decision to Lay Off Firefighters is Not Subject to Collective Bargaining.*

We proceed to determine whether any of the limited grounds identified in *Belridge Farms* permit judicial review of the challenged PERB decision not to issue a complaint against the City. Two of the possible bases for review are plainly inapplicable. First, Local 188 has never claimed the PERB decision violates a constitutional right. Second, the decision does not exceed a specific grant of authority. Section 3509, subdivision (b) expressly grants PERB exclusive jurisdiction to make an "initial determination as to whether the charge of unfair practice is justified."

Our focus is upon the third ground for review discussed in *Belridge Farms*—whether PERB's decision is based upon the erroneous construction of an applicable statute. The relevant statute here is section 3509, subdivision (b), which requires PERB to "apply and interpret unfair labor practices consistent with existing judicial interpretations of [the MMBA]." The dispute here concerns the proper interpretation of our Supreme Court's decision in *Vallejo,* in which the court addressed whether firefighter personnel and manning decisions are properly the subject of collective bargaining. (*Vallejo, supra,* 12 Cal.3d at pp. 618-623.) Because the interpretation of *Vallejo* presents

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[7] Because this rule is discretionary and rests upon principles of judicial efficiency, an appellate court may choose to hear a writ petition challenging nonjudicial action even though it could have been heard first by the trial court if, for example, the petition presents an issue of great public importance that must be resolved promptly. (See *County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 845.) It should be acknowledged, too, that with respect to some administrative agency decisions, such as decisions of the Public Utilities Commission and the Workers' Compensation Appeals Board, the Legislature has specifically declared that no court except a Court of Appeal or the Supreme Court has jurisdiction to review the agency's decision. (Pub. Util. Code, § 1759; Lab. Code, § 5955.) No such similar jurisdictional limitation applies to PERB decisions that are not specifically subject to review under the statutory procedure in section 3509.5.

a pure question of law, our review is de novo.[8] (See *Rialto, supra,* 155 Cal.App.4th at p. 1300.)

Local 188 contends *Vallejo* establishes that changes in firefighter staffing levels that primarily involve employee workload and safety rather than a government agency's policy of fire prevention are mandatory subjects of collective bargaining. By contrast, PERB argues *Vallejo* establishes that collective bargaining applies only to the *effects* of a layoff decision but not to the decision itself. Under PERB's interpretation of *Vallejo*, workload and safety concerns fall into the category of negotiable effects of a layoff decision. As we explain, PERB's interpretation is not erroneous. Nevertheless, Local 188's interpretation is correct to some extent, in part because it attempts to cast the challenged decision as one involving shift staffing levels rather than an overall reduction in the entire firefighting workforce. However, recharacterizing a layoff decision as one that merely impacts shift staffing levels does not transform the decision into a mandatory subject of collective bargaining.

In order to put the *Vallejo* decision in context, we first address the general principles governing whether a decision to lay off employees is subject to collective bargaining. Under the MMBA, a public agency's duty to meet and confer is confined to matters within the "scope of representation," which "include all matters relating to employment conditions and employer-employee relations including, but not limited to, wages, hours, and other terms and conditions of employment . . . ." (§ 3504; *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931, 936.) The MMBA further provides that "the scope of representation shall not include consideration of the merits,

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[8] Local 188 argues the trial court erred by denying its request for judicial notice of certain trial court decisions and collective bargaining agreements that purportedly support its interpretation of *Vallejo.* We find no error. Trial court decisions are not "existing judicial interpretations" of the MMBA; they have no precedential value under the principle of stare decisis. (See *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, 1149.) With respect to the collective bargaining agreements, at most they constitute anecdotal evidence of how some parties construed the "existing judicial interpretations" of the MMBA.

necessity, or organization of any service or activity provided by law or executive order." (§ 3504.) This limiting language "forestall[s] any expansion of the language of 'wages, hours and working conditions' to include more general managerial policy decisions." (*Vallejo, supra,* 12 Cal.3d at p. 616.)

PERB's longstanding position has been that a public agency's "decision to terminate employees, based on lack of sufficient funds to support their continued employment . . . [is] a 'fundamental managerial concern which requires that such decisions be left to the employer's prerogative. (*Newman-Crows Landing Unified School District* (June 30, 1982) PERB Dec. No. 223 [6 PERC ¶ 131621].)" (*San Diego Adult Educators v. Public Employment Relations Bd.* (1990) 223 Cal.App.3d 1124, 1134.) A decision to lay off employees is not negotiable. (*Vallejo, supra,* 12 Cal.3d at p. 621.)

This general rule is consistent with state and federal precedent establishing that an employer may exercise its managerial prerogative to eliminate or reduce services and lay off employees "free from the constraints of the bargaining process." (*First National Maintenance Corp. v. National Labor Relations Bd.* (1981) 452 U.S. 666, 678; see also *Highland Ranch v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 848, 857.) In *First National Maintenance Corp. v. NLRB, supra,* the United States Supreme Court considered whether an employer's economically motivated decision to close part of its business and lay off employees was negotiable. The court held the decision was not subject to bargaining because it involved the scope and direction of an enterprise and therefore constituted a fundamental management right. (452 U.S. at pp. 677, 686.)

Although the decision to lay off employees is not subject to collective bargaining, an employer does have an obligation to bargain over the *effects* of the nonnegotiable layoff decision on both departing and remaining employees. (See *National Labor Relations Bd. v. Royal Plating and Polishing Co.* (3d Cir. 1965) 350 F.2d 191, 196.) Effects subject to bargaining include severance pay, seniority, and pensions, among other things. (*Ibid.*)

Local 188 claims PERB's contention that layoff decisions are never subject to bargaining is eviscerated by the holdings of *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651 (*Building Material*), and *Rialto, supra,* 155 Cal.App.4th 1295. Local 188's reliance on these cases is misplaced.

In *Building Material,* our Supreme Court applied a balancing test to determine whether a management decision is subject to a meet and confer requirement. First, the court considered whether the management action has a "significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees." (*Building Material, supra,* 41 Cal.3d at p. 660.) If not, there is no duty to meet and confer. (*Id.* at pp. 659-660.) Second, the court considered whether the significant and adverse effect arises from implementation of a "fundamental managerial or policy decision." (*Id.* at p. 660.) If not, a meet and confer requirement applies. (*Ibid.*) Third, if both facts are present, the court applies a balancing test and applies a meet and confer requirement only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question. (*Id.* at p. 663.) Applying this three-part test in *Building Material,* our Supreme Court held that a decision to transfer work previously performed by bargaining unit members to employees outside the unit was subject to the meet and confer requirements of the MMBA. (*Id.* at pp. 660-661.) However, the court was careful to distinguish between transfers of work to a non-bargaining unit from a decision to lay off employees due to budget constraints, noting, "Decisions to close a plant or to reduce the size of an entire workforce . . . are of a different order from a plan to transfer work duties between various employees." (*Id.* at p. 663)

In *Rialto,* a city chose to transfer all law enforcement services to the county sheriff's department and disband its police force. (155 Cal.App.4th at p. 1299.) Applying the three-party *Building Material* test, the court held the decision to transfer police work to an outside entity was subject to collective bargaining under the MMBA. (*Id.* at p. 1309.)

Building Material and *Rialto* concerned situations in which layoffs resulted from a decision to transfer work outside the bargaining unit. It is well established that layoffs are subject to collective bargaining when they result from transferring work to subcontractors or employees outside the bargaining unit. (*Vallejo, supra,* 12 Cal.3d at p. 621.) Here, the layoffs did not result from a transfer of firefighting work to an entity other than the City's fire department. Instead, the City chose to reduce the total number of firefighters. *Building Material* and *Rialto* are inapposite.

We now turn our attention to *Vallejo.* In that case, the Vallejo city charter provided for binding arbitration as a means of resolving disputes that could not be resolved through the collective bargaining process. (*Vallejo, supra,* 12 Cal.3d at pp. 612-613.) Because the scope of the bargaining provision in the Vallejo city charter largely paralleled the MMBA, the court concluded its interpretation of the city charter would necessarily bear upon the meaning of the same language in the MMBA. (*Id.* at p. 614.)

At issue in *Vallejo* were four proposals the union contended were mandatory subjects of bargaining under the MMBA and therefore subject to arbitration under the city charter. (*Vallejo, supra,* 12 Cal.3d at pp. 611-612.) Two of the proposals—a schedule of hours and a proposal concerning vacancies and promotions—are not relevant to our analysis.[9] The other two proposals, however, are directly relevant. One proposal concerned a "constant manning procedure" and the other involved a "personnel reduction" proposal. (*Id.* at pp. 611, 618, 621.) The constant manning procedure first arose out of a request by the firefighters' union to add an engine company and increase personnel assigned to existing engine companies. The proposal was later scaled back to a request that the city maintain its then-existing manning schedules during the term of the new collective bargaining agreement. (*Id.* at pp. 618-619.) The personnel reduction proposal, by contrast, would have required the city to bargain concerning any decision to reduce the number of firefighters. (*Id.* at p. 621.) The constant manning procedure could

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[9] The court concluded these proposals related to the terms and conditions of employment and were therefore negotiable. (*Vallejo, supra,* 12 Cal.3d at pp. 617-618.)

be characterized as a staffing proposal, whereas the personnel reduction proposal concerned the negotiability of layoffs.

With respect to the constant manning procedure, our Supreme Court did not rule the proposal either was or was not categorically the subject of collective bargaining. (*Vallejo, supra,* 12 Cal.3d at p. 620-621.) Instead, the court held the proposal was a mandatory subject of bargaining—and therefore subject to arbitration—only if it "primarily involve[d] the workload and safety of the men ('wages, hours and working conditions') [rather than] the policy of fire prevention of the city ('merits, necessity or organization of any governmental service')." (*Id.* at pp. 620-621.) According to the court, the proper course was for the parties to submit the issue to the arbitration panel so that a factual record could be established from which it could be determined whether the staffing proposals primarily related to workload and safety or the city's policy of fire prevention. (*Ibid.*)

The *Vallejo* court took a different approach with respect to the personnel reduction proposal. The court stated without qualification that "[a] reduction of the entire fire fighting force based on the city's decision that as a matter of policy of fire prevention the force was too large would not be arbitrable in that it is an issue involving the organization of the service." (*Vallejo, supra,* 12 Cal.3d at p. 621.) However, the court observed that the effects of the decision are subject to negotiation: "Thus cases under the NLRA indicate that an employer has the right unilaterally to decide that a layoff is necessary, although it must bargain about such matters as the *timing* of layoffs and the *number* and *identity* of the employees affected. [Citation.]" (*Ibid.*)

The portions of the opinion cited above reflect that the case merely echoes the general rule that the effects of a layoff decision, but not the decision itself, are subject to collective bargaining, even in the context of firefighter staffing. The dispute over the proper interpretation of *Vallejo* arises from the ensuing paragraph of the opinion: "On the other hand, because of the nature of fire fighting, a reduction of personnel may affect the firefighters' 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." (*Vallejo, supra,* 12 Cal.3d at p. 622.)

We agree with PERB that the cited passage merely indicates that workload and safety issues resulting from a decision to lay off firefighters are subject to negotiation. The layoff decision itself, however, is not subject to negotiation. This conclusion is evident from the different treatment the court afforded to the constant manning procedure as opposed to the personnel reduction proposal. With respect to the constant manning procedure, the court concluded the decision itself was subject to bargaining only if it primarily involved workload and safety rather than the city's policy of fire prevention. (*Vallejo, supra,* 12 Cal.3d at pp. 620-621.) By contrast, in its discussion of the personnel reduction policy, the court did not suggest a determination should be made concerning what the matter "primarily involved" or if such a determination would dictate whether the policy itself was subject to bargaining. Instead, the court concluded bargaining was mandated only "[t]o the extent" the proposal impacted the workload and safety of the remaining workers. (*Id.* at p. 622.) The court's intent is clear in the opinion's disposition, where it specified the personnel reduction proposal was "arbitrable *only insofar* as it affects the working conditions and safety of the remaining employees." (*Id.* at p. 623, italics added.) The disposition reflects that the personnel reduction proposal is not subject to negotiation, because it assumes that collective bargaining rights attach only after the workforce is reduced and there are "remaining employees" whose workload and safety must be considered.

Apparently recognizing that layoff decisions are not subject to negotiation, Local 188 goes to great lengths to clarify that its complaint concerns shift staffing levels rather than the layoff decision. In Local 188's view, *Vallejo* "compels the conclusion . . . PERB is required by the MMBA to hold a hearing and make a decision on the basis of the

evidence as to whether the changes primarily involve firefighter workload and safety or the policy of fire prevention of the city." The import of Local 188's argument is that PERB would be required to issue a complaint in any firefighter layoff case in which it is alleged that the layoffs affect the workload and safety of the remaining firefighters. We disagree.

As a practical matter, if we were to accept Local 188's argument that workload and safety concerns associated with staffing levels dictate whether a layoff decision is negotiable, a layoff decision would almost always be subject to collective bargaining or, at a minimum, a public entity's refusal to bargain would compel the issuance of an unfair practice complaint by PERB that could only be resolved following a factual determination whether the layoff primarily involved the workload and safety of the remaining employees. Focusing on staffing levels would entirely undermine the rule that layoffs are not subject to negotiation. Rather, the focus should be on the layoffs and not the consequent reduction in the number of firefighters on duty per shift. When shift staffing levels are reduced following layoffs motivated by economic concerns, it goes without saying that the decision primarily concerns issues within the managerial prerogative of the public entity.

Furthermore, Local 188 fails to acknowledge the important distinction between *shift* staffing levels and *equipment* staffing levels. Local 188's complaint concerns shift staffing levels, or the number of firefighters on duty throughout the City at any one time. The complaint does not concern equipment staffing levels, or the number of personnel assigned to each engine or other piece of equipment. Indeed, there could be no such complaint because the City maintained a complement of three personnel assigned to each staffed engine or truck. This distinction is important because a change in the number of personnel assigned to each engine or truck presumably has a much greater impact on workload and safety than the number of firefighters on duty throughout the City. If there are fewer firefighters and engines in service throughout the City, the primary impact is upon firefighting protection provided to City residents. It may take longer to respond to a

fire, or there may be fewer engines available to respond when there are large or multiple fires. The impact on firefighter safety and workload, however, is less direct. There may be an incremental increase in the number of fires to which each remaining firefighter must respond. As Local 188 points out, reducing shift staffing may reduce the number of engines able to respond to an alarm within the first few minutes of a fire, limiting the number of firefighters available to man a hose or operate a nozzle, thus increasing the risk of injury to firefighters. These safety effects are magnified, however, when the number of firefighters assigned to each engine or truck is reduced.

It goes without saying that firefighters have an extremely dangerous job, and we do not mean to suggest that workload and safety issues are inconsequential when shift staffing levels are reduced. Nevertheless, changes in shift staffing plainly have a less significant impact upon workload and safety than changes in equipment staffing.

In one of the decisions relied upon by Local 188, *International Association of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission* (1989) 113 Wash.2d 197 [778 P.2d 32], the Washington State Supreme Court explained that shift staffing is treated differently from equipment staffing, stating that "The law is clear that general staffing levels are fundamental prerogatives of management." (*Id.* at p. 36.) Requiring bargaining over fire department shift staffing would interfere with " 'the flexibility of elected officials to determine the amount of fire services to be delivered within the Town . . . . Agreement on minimum manning per shift in essence would lock the Town into a certain level of firefighting service for the duration of the collective bargaining agreement.' " (*Id.* at p. 37.) "Compared with *shift* staffing, however, *equipment* staffing is not so importantly reserved to the prerogative of management." (*Ibid.*, italics added.)

Notably, many of the out-of-state decisions cited by Local 188 for the proposition that firefighter staffing decisions are subject to collective bargaining concern equipment staffing and not shift staffing. Thus, for example, in *International Association of Fire Fighters, Local Union 1052 v. Public Employment Relations Commission, supra,* the

proposal at issue concerned the minimum number of personnel assigned to each piece of equipment. (778 P.2d at p. 33.) Likewise, in an Oregon case cited by Local 188, the concern was that a "drop from a three-person engine company to a two-person company would cause an immediate increase in the frequency and severity of injuries to the remaining firefighters . . . ." (*International Association of Firefighters, Local 314 v. City of Salem* (1984) 68 Or.App. 793, 798 [684 P.2d 605, 607-608].) Similarly, in *City of Manistee v. Manistee Fire Fighters Association, Local 645, I.A.F.F.* (1989) 174 Mich.App. 118 [435 N.W.2d 778], a Michigan case relied upon by Local 188, the court observed that the record was "replete with testimony that the use of only two-man on duty shifts would hamper the ability to effectively and promptly respond to and fight fires. . . . [R]escue efforts with the use of the buddy system are jeopardized without a third man to watch over operation of the equipment and the supply of water." (*Id.* at p. 781)

Although the *Vallejo* court did not focus on the distinction between shift staffing and equipment staffing, an examination of the opinion reveals that the constant manning procedure involved equipment staffing, or the number of personnel assigned to each piece of equipment. In summarizing the union's argument, the court stated that workload and safety could be impacted because "the number of persons manning the fire truck or comprising the engine company fixes and determines the amount of *work* each fire fighter must perform." (*Vallejo, supra,* 12 Cal.3d at p. 619.) Indeed, the union's original proposal sought to increase the number of personnel assigned to each engine company; the modified proposal sought to maintain existing manning levels. (*Id.* at pp. 618-619.)

We conclude that PERB's interpretation of *Vallejo* is correct. The decision to lay off firefighters is not subject to negotiation. However, the effects of that decision, including the workload and safety of the remaining employees, are properly the subject of collective bargaining. Local 188's attempt to recast the layoff decision as a reduction in shift staffing does not transform it into a proper subject of collective bargaining.

DISPOSITION

The judgment denying appellant's petition for writ of mandate is affirmed. Respondent PERB and real party in interest City of Richmond shall be entitled to recover their costs on appeal.

McGuiness, P.J.

We concur:

Pollak, J.

Siggins, J.

Trial Court: Contra Costa County Superior Court

Trial Judge: Steven K. Austin

Davis & Reno, Duane W. Reno and Alan C. Davis for Appellant and Plaintiff

Tami R. Bogert, General Counsel, Wendi L. Ross, Deputy General Counsel and Kristin L. Rosi, Senior Counsel for Respondent and Defendant

Rene Sloan Holtzman Sakai, Charles D. Sakai, Randy Riddle, K. Scott Dickey and Meryln Goeschl for Real Party in Interest and Respondent

Filed 4/8/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 188, AFL-CIO, Plaintiff and Appellant, v. PUBLIC EMPLOYMENT RELATIONS BOARD, Defendant and Respondent; CITY OF RICHMOND, Real Party in Interest and Respondent.	A114959 (Contra Costa County Super. Ct. No. N05-0232) **ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion filed herein on March 18, 2009, be modified as follows:

1. At the end of the second full paragraph on page 22, add as footnote 10 the following new footnote:

> [10] Local 188 contends that shift staffing decisions typically precede layoff decisions, arguing that most cities first determine how many fire stations to keep open and how many engine and truck companies to operate and then, on that basis, determine the size of the workforce needed to maintain staffing levels. Local 188 also asserts that the overall size of the workforce may not be directly correlated with shift staffing levels. Local 188's attempt to divorce the staffing decision from the layoff decision is unavailing. The fact remains that in this case there was a direct correlation between the workforce reduction and the reduction in shift staffing, regardless of whether one decision is said to have preceded the other. The decisions were necessarily interdependent. Further, to suggest the City would have to maintain constant shift staffing levels after the layoffs, either by allowing

the remaining firefighters to work overtime or by hiring new firefighters, would render the City's power to lay off firefighters meaningless.

2. In the first full sentence on page 23, delete the word "is" and replace it with "will typically be." The corrected sentence will read:

> If there are fewer firefighters and engines in service throughout the City, the primary impact will typically be upon firefighting protection provided to City residents.

3. At the end of the first full paragraph on page 23, add as footnote 11 the following new footnote:

> [11] Our general observations contrasting equipment staffing with shift staffing should not be construed to imply that one is categorically subject to collective bargaining whereas the other is not. In the case of equipment staffing, the decision may or may not be subject to collective bargaining, depending upon whether it primarily involves firefighter workload and safety or the local public entity's policy of fire prevention. In the case of shift staffing, the decision will typically be exempt from collective bargaining because, as a general matter, such decisions necessarily relate to matters within the managerial prerogative of the local public entity, such as reducing the size of the workforce.

There is no change in the judgment.

The petition for rehearing is denied.

Dated: _____

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McGuiness, P.J.