Supreme Court Copy

No. S172377

IN THE SUPREME COURT OF CALIFORNIA

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 188, AFL-CIO,	Court of Appeal No. A114959
Petitioner and Appellant,	Contra Costa County Superior Court No. N05-0232
v.	
PUBLIC EMPLOYMENT RELATIONS BOARD,	
Respondent,	
CITY OF RICHMOND,	
Real Party in Interest and Respondent.	

PETITIONER IAFF LOCAL 188'S OPENING BRIEF ON THE MERITS

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

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I. THE ISSUES PRESENTED FOR REVIEW

The Court has granted separate Petitions for Review submitted by Petitioner/Appellant International Association of Fire Fighters, Local 188 ("Local 188") and by Petitioner/Respondent Public Employment Relations Board ("PERB").

A. The Issue Presented by IAFF Local 188

The Petition for Review filed herein by Local 188 requested review of the following issue:

> 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.

The Case Summary for this case on the Court's web page states the issue somewhat differently. According to the Case Summary,[1] the issue presented by Local 188 is as follows:

> Is a decision to lay off firefighters for fiscal reasons a matter that is subject to collective bargaining under the [Meyers-Milias-Brown] Act [(Gov. Code, section 3500 et seq.)]?

B. <u>The Issue Presented by PERB</u>

The Petition for Review filed herein by PERB requested review of the following issues:

> 1. Given PERB's mandate under the MMBA – i.e., to interpret and apply the MMBA consistent with and in accordance with judicial interpretations – may a court, when reviewing a Board decision that interprets judicial precedent, review that same precedent de novo or must it defer to PERB's expertise?
>
> 2. Does the express language of the MMBA – i.e., that no appeal can be taken of the Board's decision not to issue a complaint in an unfair practice case – preclude a court from hearing the same matter under the guise of a petition for writ of mandate?

Again, the Case Summary for this case on the Court's web page states these issues somewhat differently. According to the Case Summary, the issue presented by PERB is as follows:

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[1] http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=1906047&doc_no=S172377

Is the decision by the Public Employee Relations Board (PERB) not to issue an unfair labor practices complaint under the Meyers-Milias-Brown Act (Gov. Code, section 3500 et seq.) subject to judicial review?

C. The Issues Addressed in This Brief

The Court's order of July 8, 2009, granting both Local 188's Petition for Review and PERB's Petition for Review did not specify the issues to be briefed, nor has the Court issued any subsequent order specifying the issues to be briefed.

Accordingly, this opening brief will first address the issue for which Local 188 requested review as that issue is stated in the Court's Case Summary (is a decision to lay off firefighters for fiscal reasons a matter that is subject to collective bargaining under the MMBA) and then will also address that issue as it was stated somewhat differently in Local 188's Petition for Review.

With regard to the issue for which PERB requested review (whether a PERB decision not to issue a complaint in an unfair practice case is subject to judicial review), Local 188 will address this issue in an answer brief in response to PERB's opening brief on the merits of the issue.

II. STATEMENT OF THE CASE

A. The PERB Decision Not to Issue a Complaint

Local 188 is the recognized representative of a bargaining unit of employees of the City of Richmond Fire Department. (App. Tab 1, p. 1.) Local 188 initiated this proceeding by filing an unfair practice charge with PERB on January 12, 2004. (App. Tab 2, p. 19.)[2]

The unfair practice charge alleged that the City of Richmond violated the Meyers-Milias-Brown Act (Gov. Code, section 3500 et seq.) by failing to meet and confer with Local 188 over a decision to reduce minimum 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 and to lay off 18 firefighters.[3] (App. Tab 2, pp. 21-25.)

The unfair practice charge alleged further that as the result of the City's unilateral reduction in minimum firefighter shift staffing levels, working conditions for firefighters became far less safe and the work performed by firefighters became substantially

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[2] "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.

[3] The unfair practice charge also included allegations that the city had violated the MMBA by failing to provide timely responses to Local 188's requests for relevant financial information. (App. Tab 2, pp. 21-24.)

more dangerous. (App. Tab 2, p. 24.)

Local 188 requested as the remedy for the City's unilateral action that PERB order 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 unless and until the city has met and conferred in good faith and attempted to reach agreement with Local 188 over the proposed changes. (App. Tab 2, p. 25.) Local 188 also requested that PERB seek injunctive relief from the superior court requiring the city to reinstate the previous shift staffing levels and engine and truck company emergency response protocols. (App. Tab 2, p. 25; Tab 2, p. 42.)

On or about February 9, 2004, PERB denied Local 188's request that PERB seek injunctive relief. (App. Tab 2, p. 142.)

On February 11, 2004, PERB Regional Attorney Kristin L. Rosi sent a Partial Warning Letter to Local 188's counsel. (App. Tab 2, p 145.) The Partial Warning Letter stated in pertinent part:

> The decision to lay off employees is not subject to bargaining. (California Department of Forestry and Fire Prevention (1993) PERB Decision No. 999-S.) Likewise, attempts to limit the timing of layoffs to certain periods during the year and attempts to target certain classifications are nonnegotiable as they intrude on management's right to lay off employees.

(San Mateo City School District (1984) PERB Decision No. 383.) As such, Local 188's allegation that the City failed to meet and confer over the decision to layoff employees must be dismissed, as the union does not have the right to bargain layoff decisions. . . .

Charging Party asserts the City's layoff plan constitutes a change in staffing levels or shift assignments, and is therefore negotiable. However, staffing levels is simply another way of describing the number of employees on the City's payroll. The decision to reduce the number of City employees is reserved to the employer and is not negotiable. Therefore staffing levels and the level of service that such staff provide to the public is a management decision. . . . Thus there is no prima facie case based on a change in staffing levels or shift assignments.

(App. Tab 2, p. 151.)

The PERB precedential decisions cited by PERB's regional attorney involved employees other than firefighters and arose under the Ralph C. Dills Act ("Dills Act," Gov. Code section 3512 et seq.) (*California Department of Forestry and Fire Protection* (1993) PERB Decision No. 999-S) and the Educational Employment Relations Act ("EERA," Gov. Code section 3540 et seq,) (*San Mateo City School District* (1984) PERB Decision No. 383) rather than under the MMBA. (App. Tab 2, pp. 145, 151.)

The Partial Warning Letter advised Local 188 that its unilateral action claim would be dismissed unless Local 188 filed a first amended unfair practice charge before February 18, 2003. (App. Tab 2, p. 152.)

Local 188 filed a first amended unfair practice charge on February 17, 2003. (App. Tab 2, p. 155.)

The first amended charge alleged it was the practice of the city prior to January 1, 2004, to fully staff all of its seven (7) three-member engine companies and one (1) three-member truck company at all times. Each shift also included one (1) battalion chief, hence the city's minimum daily firefighter staffing level was 25 fire suppression personnel. In the event the number of fire suppression personnel on duty fell below 25 because of injuries, illnesses, vacations, or other reason, the city would use overtime to bring the staffing level up to 25. (App. Tab 2, p. 158.)

The first amended charge further alleged that because of financial exigencies, the city developed a plan to reduce fire department personnel costs as of January 1, 2004, by closing a fire station that housed one (1) engine company and deactivating a truck company. This would result in a reduction in the minimum firefighter daily staffing level from 25 fire suppression personnel to 19 fire suppression personnel on duty at all times. At the same time as the city announced this plan, the city sent layoff notices to

13 firefighters. (App. Tab 2, pp. 158, 161-162.)

The first amended charge further alleged that the city subsequently abandoned its original plan and adopted a new "brown-outs" plan for reduction of fire department personnel costs. 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 on duty at all times. Upon implementation of this new "brown-outs" plan on January 1, 2004, 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.

The first amended charge also provided a detailed account of significant and adverse effects on firefighter workload and safety that resulted from the city's reduction in minimum

firefighter daily shift staffing levels. (App. Tab 2, pp. 161-168.)

Inasmuch as this case was essentially only at the pleading stage, PERB's regional attorney was required to take the allegations in the first amended unfair practice charge as true for the purpose of determining whether the first amended charge stated a prima facie violation of the MMBA and whether a complaint should therefore be issued.[4] (*American Federation of State, County & Municipal Employees, Local Union No. 101 v. San Jose Unified School District* (2003) PERB Decision No. 1555, p. 6.)[5]

Local 188 contended that PERB was required to issue a complaint because (1) the MMBA requires PERB to "apply and

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[4] An allegation that a local government agency has refused to meet and confer over a mandatory subject of bargaining is processed by PERB as an unfair practice charge. (Gov. Code, § 3509.)

The PERB procedures for processing of unfair practice charges are set forth at Title 8, Division 3, Chapter 1, Subchapter 5 of the California Code of Regulations.

8 CCR § 32620 provides that when a charge is filed, it shall be assigned to a Board agent for processing.

8 CCR § 32630 provides that if the Board agent concludes that the charge or the evidence is insufficient to establish a prima facie case, the Board agent shall refuse to issue a complaint.

8 CCR § 32635 provides that the charging party may appeal the dismissal to the Board itself.

8 CCR § 32640 provides that the Board agent shall issue a complaint if the charge or the evidence is sufficient to establish a prima facie case.

8 CCR § 32650 provides that a Board agent may conduct an informal conference to explore the possibility of settlement.

8 CCR § 32680 provides that if the informal conference fails to result in settlement, the Board may order a hearing.

[5] The PERB decisions cited herein are available at the PERB web site, http://www.perb.ca.gov/decisionbank/default.aspx.

interpret unfair labor practices consistent with existing judicial interpretations of this chapter" (Gov. Code, §§ 3509(b), 3510(a)) and (2) *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 ("*Vallejo*") holds that a city is required to bargain over proposed changes in minimum firefighter staffing levels if the proposal primarily involves firefighter workload and safety rather than the policy of fire prevention of the city.

PERB's regional attorney issued a Partial Dismissal Letter on April 29, 2004, dismissing Local 188's unilateral action claim.[6] (App. Tab 2, p. 184.) The Partial Dismissal Letter stated that *Vallejo* did not require issuance of a complaint 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.)

Local 188 filed a timely appeal of the regional attorney's Partial Dismissal to the Public Employment Relations Board itself. (App. Tab 2, p. 190.)

The Board issued a decision (Decision No. 1720-M, Case No. SF-CE-157-M) on December 13, 2004, affirming the regional

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[6] PERB's regional attorney said the first amended charge stated a prima facie case that the city had violated the MMBA by failing to provide timely responses to Local 188's requests for relevant financial information and issued a complaint against the city on April 29, 2004, solely on that basis. (App. Tab 2, p. 182.)

attorney's dismissal of Local 188's unilateral action claim. (App. Tab 2, p. 250.)

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."[7] (App. Tab 2, p. 252.)

According to the PERB Board, this interpretation of *Vallejo* was consistent with long-standing PERB precedent that layoff decisions are not mandatory subjects of bargaining.

> 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

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[7] The Partial Dismissal also stated that Local 188 had waived any right it had to negotiate layoff decisions through the provisions of its collective bargaining agreement with City. (App. Tab 2, p. 185.) The Board's order affirming the Partial Dismissal stated that it was not necessary to address this issue because the Board agreed that a decision to lay off employees is not a mandatory subject of bargaining. (App. Tab 2, p. 252.)

> 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.)

B. The Superior Court Decision

Local 188 filed a petition for writ of mandate in the Court of Appeal, First Appellate District, on January 11, 2005, pursuant to Code Civ. Proc., § 1085, alleging that PERB had failed to perform its mandatory, ministerial duty to "apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter" (Gov. Code, §§ 3509(b), 3510(a)) and requesting that PERB be ordered to set aside its Decision No. 1720-M of December 13, 2004, in which it had concluded that the city's unilateral action was not a violation of the MMBA, and enter a new and different decision directing issuance of a complaint against the city. (*International Association of Fire Fighters Local 188, AFL-CIO v. Public Employment Relations Board of the State of California*, No. A108875.)

On January 28, 2005, Division Three of the First Appellate District issued a decision denying Local 188's petition for writ of mandate without prejudice to its being refiled in the Contra Costa

County Superior Court. (App. Tab 2, p. 255.)

Local 188 filed its petition for writ of mandate in the Contra Costa County Superior Court on February 28, 2005. (App. Tab 1.)

Local 188 submitted a declaration in support of the petition showing it was possible for the city to lay off firefighters and still maintain previously-existing daily shift staffing levels by bargaining with Local 188 for a temporary increase in firefighter workweeks and that, accordingly, the Partial Warning Letter's conclusion that "staffing levels is simply another way of describing the number of employees on the City's payroll" was unfounded.[8] (App. Tab 18, pp. 906-07.) In this regard, see *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9, 17-23 (city met obligation to bargain in good faith over a proposal to increase the number of fire personnel on duty every day by changing their work schedule from a 67-hour workweek with 24-hour work shifts to a 40-hour workweek with 8-hour work shifts.)

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[8] The superior court could receive these declarations into evidence because this is a traditional mandamus action brought pursuant to Code Civ. Proc., § 1085, rather than an administrative mandamus action brought pursuant to Code Civ. Proc., § 1094.5, due to the fact that PERB refused to issue a complaint and hold a hearing before making a decision to dismiss Local 188's unfair practice charge. (See *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 813-817; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 79 n. 6.)

Local 188 also submitted declarations and a request for judicial notice showing that after the *Vallejo* decision in 1975 many local government agencies entered into collective bargaining agreements which included minimum daily firefighter shift staffing levels. (App. Tab 6, pp. 528-29; Tab 7, pp. 531-667.)

PERB and the city contended in opposition to the petition for writ of mandate that (1) the MMBA prohibits judicial review of a PERB decision not to issue a complaint on the basis that an unfair practice charge fails to state a prima facie violation of the MMBA, hence the superior court lacked jurisdiction to grant Local 188's petition, and (2) Local 188's unfair practice charge fails to state a prima facie violation of the MMBA because *Vallejo* held that an employer is not obligated to negotiate a decision to lay off employees, but instead only must bargain over any negotiable effects of the layoff decision. (App. Tab.10; Tab 14 .)

The city objected to Local 188's declarations and request for judicial notice on the ground, among others, that the declarations and request for judicial notice were not relevant to the legal issue of whether layoffs are a mandatory subject of meeting and conferring under state law. (App. Tab 13.)

The superior court issued a decision on April 14, 2006, denying Local 188's petition for writ of mandate. (App. Tab. 30.) The decision (1) sustained the city's objections to Local 188's

declarations and request for judicial notice on the ground that they were not relevant to the issue of whether PERB violated its duty to "apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter" when it denied Local 188's appeal of the regional attorney's Partial Dismissal (App. Tab 30, p. 1386); (2) held that the superior court has jurisdiction to review, in a petition for writ of mandate, a decision by PERB not to issue an unfair labor practices complaint; and (3) held that PERB had correctly interpreted and applied *Vallejo*, and thus had correctly determined that the allegations in Local 188's unfair practice charge that the city had failed to meet and confer with Local 188 over the 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 did not state a prima facie violation of the MMBA. (App. Tab. 30, pp. 1387-88.)

The superior court entered a judgment consistent with this decision on July 19, 2006. (App. Tab. 31.)

Local 188 filed a timely notice of appeal. (App. Tab. 32.)

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

In a decision filed on March 18, 2009, the Court of Appeal affirmed the superior court's holding that the superior court had

jurisdiction to review, in a petition for writ of mandate, a decision by PERB not to issue an unfair labor practices complaint, and also affirmed the superior court's conclusion that PERB properly dismissed Local 188's unfair practice charge on the ground 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 firefighter shift staffing levels and lay off 18 firefighters.

After taking note of PERB's longstanding position 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," the Court of Appeal stated that this 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.'" (Slip Opinion, p. 18.)

The Court of Appeal cited *First National Maintenance Corp. v. National Labor Relations Bd.* (1981) 452 U.S. 666, 678, and *Highland Ranch v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 848, 857 as authorities providing support for this conclusion. (Slip Opinion, p. 18.) According to the Court of Appeal,

> 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 constitute 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.*)

(Slip Opinion, p. 18.)

The Court of Appeal rejected a Local 188 contention that *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651 (*Building Material*) and *Rialto Police Benefit Association v. City of Rialto* (2007) 155 Cal.App.4th 1295 (*Rialto*) eviscerate PERB's premise that layoff decision cases arising under the Dills Act and the EERA are applicable precedent in layoff decision cases arising under the MMBA.

According to the Court of Appeal, *Building Material* and *Rialto* have application only to layoffs that result from transfers of bargaining unit work to subcontractors or employees outside the

bargaining unit and therefore have no application in this case because the layoffs in this case did not result from a transfer of firefighting work to an entity other than the city's fire department but instead from a decision of the city to reduce the total number of firefighters. (Slip Opinion, pp. 19-20.)

The Court of Appeal also rejected a Local 188 contention that this Court's holding in *Vallejo* was that (1) staffing level changes and personnel reductions are separate and distinct issues, (2) both staffing level changes and personnel reductions are mandatory subjects of bargaining if they primarily involve firefighter workload and safety but not if they primarily involve the policy of fire prevention of the city, and (3) PERB was therefore required to issue a complaint and hold a hearing in order to make this determination. According to the Court of Appeal, although *Vallejo* held that staffing level changes are mandatory subjects of bargaining if they primarily involve firefighter workload and safety but not if they primarily involve the policy of fire prevention of the city, *Vallejo* held that the effects of a layoff decision are subject to collective bargaining but the layoff decision itself is not. (Slip Opinion, pp. 20-22.)

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 number of firefighter layoffs 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.

In response to the petition for rehearing, the Court of Appeal added footnote 10 to its opinion. 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 upheld PERB's interpretation of the MMBA that a decision to lay off firefighters based on a lack of sufficient funds to support their continued employment is categorically never subject to collective bargaining under the MMBA, even when the decision adversely affects workload and safety for the remaining employees. (See Slip Opinion, pp. 16-22.)

III. A DECISION TO LAY OFF FIREFIGHTERS FOR FISCAL REASONS IS SUBJECT TO COLLECTIVE BARGAINING UNDER THE MMBA

As shown below, PERB's position that layoffs are categorically outside the scope of representation and therefore never mandatory subjects of bargaining under the MMBA is clearly erroneous. Relevant federal precedent compels the conclusion that employer decisions to lay off employees are always within the scope of representation under the MMBA when made for fiscal reasons. Moreover, federal precedent compels the conclusion that employer decisions to lay off employees for other reasons may also be subject to collective bargaining under the MMBA if those decisions meet the same three-part balancing test that is articulated in *Building Material & Construction Teamsters' Union v. Farrell, supra,* 41 Cal.3d 651. This case should therefore be remanded to PERB with directions to vacate its decision herein and issue a new decision consistent with these principles.

A. The 2000 MMBA Amendments Require that PERB Apply and Interpret Unfair Labor Practices Consistent with Existing Judicial Interpretations of the MMBA

The MMBA was enacted in 1968. It requires local public agencies to meet and confer with recognized employee organizations over all matters within the scope of representation under the Act and thereby establishes collective bargaining rights for California's local government employees. (Gov. Code, § 3505;

See Grodin, *Public Employee Bargaining in California: the Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 720-21; *People of the State of California ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 596-97.)

The MMBA defines the scope of representation as follows (Gov. Code, § 3504):

> The scope of representation shall 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, 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.

The MMBA did not originally provide for an administrative agency to resolve charges that a local government agency or an employee organization had violated the Act. Accordingly, that jurisdiction was vested in the courts. (Grodin, *supra*, 23 Hastings L.J. at pp. 728-29.) The result was the development of a substantial body of case law interpreting the MMBA's scope of representation. See, e.g., *Fire Fighters Union v. City of Vallejo, supra,* 12 Cal.3d 608 (proposed terms of a collective bargaining agreement enumerating the number of firefighters on duty each work shift and prohibiting unilateral layoff decisions are within the scope of bargaining and arbitration if those proposed terms primarily involve workload and

safety rather than the policy of fire prevention of the city); *Holliday v. City of Modesto* (1991) 229 Cal.App.3d 528 (city must bargain over drug testing order); *Long Beach Police Officers Assn. v. City of Long Beach* (1984) 156 Cal.App.3d 996 (practice of allowing police officer an opportunity to consult an association representative or attorney before making a report concerning a shooting incident is a working condition that cannot be terminated by management without meeting and conferring); *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802 (rule prohibiting personal use of city facilities is a mandatory subject of bargaining); *Huntington Beach Police Officers Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492 (changes in work schedules are a mandatory subject of bargaining); *Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116 (change in policy for assignments of overtime work is a mandatory subject of bargaining).

The Legislature amended the MMBA in 2000 to provide that, except for cases involving management employees and employees who are peace officers as defined in Section 830.1 of the Penal Code, PERB has jurisdiction over charges that a local government agency has violated the Act. (Gov. Code, §§ 3509, 3509(e), 3511, added Stats 2000 ch 901 § 8 (SB 739), operative July 1, 2001.)

The 2000 MMBA amendments also imposed the mandatory, ministerial duty on PERB to "apply and interpret unfair labor

practices consistent with existing judicial interpretations of this chapter." (Gov. Code, §§ 3509(b), 3510(a).)

B. In 2000, Existing Judicial Interpretations of the MMBA Were that Federal Court Decisions and National Labor Relations Board Decisions Construing the Scope of Representation Under the National Labor Relations Act Provide Reliable Authority for Construction of the Scope of Representation under the MMBA

This Court held in cases decided prior to the 2000 MMBA amendments that federal precedents construing the scope of representation under the National Labor Relations Act reflect the same interests as those underlying MMBA section 3504, which defines the scope of representation under the MMBA, hence federal court decisions and National Labor Relations Board decisions construing the scope of representation under the NLRA furnish reliable authority for the construction of section 3504. (*Building Material, supra,* 41 Cal.3d at 658, citing *Vallejo, supra,* at pp. 616-617, and *San Jose Peace Officer's Assn. v. City of San Jose* (1978) 78 Cal.App.3d 935, 943.)

C. The National Labor Relations Board and the United States Circuit Courts of Appeals have Uniformly and Consistently Held That an Employer's Decision to Lay Off Employees for Economic Reasons is Within the Scope of Representation Under the NLRA

The National Labor Relations Board and the United States Circuit Courts of Appeals have uniformly and consistently held that an employer's decision to lay off employees for economic reasons is within the scope of representation under the National Labor

Relations Act and therefore a mandatory subject of bargaining.

1. **NLRB Decisions**

The National Labor Relations Board held in the following cases – and others cited therein – that an employer's decision to lay off employees for economic reasons is a mandatory subject of bargaining under the National Labor Relations Act.

Lapeer Foundry and Machine, Inc. (1988) 289 N.L.R.B. 952; 1988 NLRB LEXIS 319; 129 L.R.R.M. 1001; 1987-88 NLRB Dec. (CCH) P19,558; 289 NLRB No. 126 (economically motivated business decision to lay off seven (7) employees held to be mandatory subject of bargaining.)

> Having determined that the Respondent's bargaining obligation attached on June 30, we next consider the General Counsel's contention that the Respondent's unilateral layoff of seven employees on November 29 violated Section 8(a)(5). The General Counsel argues that the Respondent breached its duty to bargain by unilaterally laying off these employees without notice to the Union. In addressing this argument, we must determine what bargaining obligation the Respondent assumed concerning these layoffs, which were caused solely by economic factors. We note that, depending on the factual situation and the allegations set forth in the complaint, Board decisions have required employers to bargain over the decision to lay off

> for economic reasons and the effects of that decision or have required bargaining only over the effects of the decision to lay off. For the reasons set forth below, we conclude that an employer's decision to lay off employees for economic reasons is a mandatory subject of bargaining and that the Respondent violated the Act by failing to bargain over its layoff decision and the effects of that decision.

(*Id.*, p. 953) (footnote omitted.)

Tri-Tech Services, Inc. (2003) 340 N.L.R.B. 894; 2003 NLRB LEXIS 679; 173 L.R.R.M. 1334; 2002-3 NLRB Dec. (CCH) P16,569; 340 NLRB No. 97 (employer committed unfair labor practice by failing to bargain with union over layoff of 24 employees due to a shortage of orders for the product they manufactured).

> We agree with the judge that the Respondent had an obligation to notify and bargain with the Union prior to the layoff, and that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union with an opportunity to bargain about the layoff before it was implemented. It is well established that the layoff of unit employees is a change in terms and conditions of employment over which an employer must bargain. See *Taino Paper Co.*, 290 NLRB 975, 977-978 (1988); *Peat Mfg. Co.*, 261 NLRB 240 (1982).

(*Id.*, pp. 894-895.)

Alpha Associates (2005) 344 N.L.R.B. 782; 2005 NLRB LEXIS 256; 177 L.R.R.M. 1201; 344 NLRB No. 95 (employer committed unfair labor practice by failing to bargain over layoff decision prompted by "extreme economic pressures brought on by a flood of imports on the market.")

> Finally, with respect to the alleged unilateral layoff of unit employees, the Respondent contends that its decision was the result of "extreme economic pressures brought on by a flood of imports on the market" and, accordingly, did not violate the Act. It is axiomatic that an employer's decision to lay off employees is a mandatory subject of bargaining; thus, in the absence of an agreed-upon contractual provision on the subject, an employer is obligated to bargain with an incumbent union with respect to both the decision to conduct a layoff and the effects of any such decision. See *Farina Corp.*, 310 NLRB 318, 320 (1993). That an employer's determination to lay off employees is motivated by economic considerations does not relieve an employer of its bargaining obligation. *Id.* However, if an employer can demonstrate that "economic exigencies" compelled prompt action, the Board will excuse the employer's failure to notify and bargain with the union prior to implementing its decision. See *Bottom Line Enterprises*, 302 NLRB 373 (1991). The Board has characterized the economic exigency exception as

> a heavy burden, however; thus, the Board has limited its application of the exception to "extraordinary events which are 'an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'" *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995) (quoting *Angelica Healthcare Services*, 284 NLRB 844, 852-53 (1987)). "Absent a dire financial emergency, the Board has held that economic events such as the loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action." *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995).

(*Id.*, p. 785) (footnote omitted.)

Pan American Grain Co., Inc. (2007) 351 N.L.R.B. 1412; 2007 NLRB LEXIS 530, *; 183 L.R.R.M. 1193; 2008-09 NLRB Dec. (CCH) P15,048; 351 NLRB No. 93 (employer committed unfair labor practice by failing to bargain over decision to lay off 15 employees based, in part, on "economic reasons," including a reduction in sales resulting from decreased demand for its products and a loss of production resulting from an unfair labor practice strike.)

> For the reasons that follow, we reaffirm the Board's prior finding that the Respondent violated Section 8(a)(5) and (1) by implementing its February 27, 2002 layoffs without providing the Union with adequate notice and a reasonable opportunity to bargain. In so finding, we reject

the Respondent's argument that it did not have a duty to bargain over the layoffs because the layoffs resulted, in part, from the Respondent's ongoing modernization efforts. As explained below, we find that, because the Respondent's layoffs were admittedly based, in part, on "economic reasons," including a reduction in sales resulting from decreased demand for its products and a loss of production resulting from an unfair labor practice strike, and because the Respondent failed to establish that it would have implemented any particular layoffs solely as a result of modernization and even in the absence of its economic reasons, the Respondent had a duty to bargain over the February 27 layoff decision.

* * *

The record establishes that the Respondent's decision to lay off 15 employees on February 27 was based on the Respondent's reduced need for staffing at that time. The Respondent, in its letter notifying the Union of its decision to lay off employees, indicated that the layoffs were "due to economic reasons and as a result of a substantial decrease in production and sales."

* * *

In this case, to the extent that the Respondent's February 27 decision to lay off employees was motivated by a desire to reduce labor costs in response to a substantial decrease in production and sales, it is clear that the

> Respondent had a duty to bargain with the Union over the layoff decision. Crucially, the Respondent failed to establish that its decision to lay off any specific individual on February 27 was based exclusively on its modernization program. Had the Respondent shown that certain layoffs were attributable to modernization and others to economic concerns, then we would be in a position to address the question, raised by the court of appeals, of whether the Respondent had a duty to bargain over the particular layoffs arising solely from its modernization program. The Respondent, however, failed to produce such evidence. As a result, we must assume that all of the February 27 layoffs were motivated, at least in part, by reasons other than efficiency gains resulting from modernization, i.e., a desire to reduce labor costs prompted by a substantial decrease in production and sales. Accordingly, we find that the Respondent had a duty to bargain with the Union over these layoffs, and that its unilateral implementation of the layoffs violated Section 8(a)(5) and (1) of the Act.

(*Id.*, pp. ____ - ____, *3-*4, *6, *12-*13) (footnotes omitted.)

2. <u>Circuit Court of Appeals Decisions</u>

The United States Circuit Courts of Appeals held in the following cases – and others cited therein – that an employer's decision to lay off employees for economic reasons is a mandatory subject of bargaining under the National Labor Relations Act.

NLRB v. Carbonex Coal Co. (10th Cir. 1982) 679 F.2d 200 (even if layoffs were economically motivated, employer had a duty to bargain over the layoffs).

> It is established that while an employer's power to alter working conditions is not contingent upon union agreement, the employer does have a duty to notify the union before effecting the changes so as to give the union a meaningful chance to offer counter-proposals and counter-arguments. *NLRB v. W. R. Grace & Co.*, 571 F.2d 279, 283 (5th Cir. 1978); *NLRB v. J. P. Stevens & Co.*, 538 F.2d 1152, 1162 (5th Cir. 1976). Therefore, even accepting Carbonex's claim that the layoffs were economically motivated, the Company's failure to bargain with the union over the layoffs violated section 8(a)(5). See *NLRB v. United Nuclear Corp.*, 381 F.2d 972 (10th Cir. 1967).

(*Id.*, p. 204.)

NLRB v. 1199, Nat'l Union of Hospital & Health Care Employees (4th Cir. 1987) 824 F.2d 318 (The operator of a convalescent center and retirement village committed an unfair labor practice when it failed to bargain with a Union over a decision to lay off six (6) of the 85 employees in the Union's bargaining unit.)

> We cannot accept the employer's related contention that the decision to lay off was not a

mandatory subject of bargaining under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 69 L. Ed. 2d 318, 101 S. Ct. 2573 (1981).

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

v. NLRB, 379 U.S. 203, 13 L. Ed. 2d 233, 85 S. Ct. 398 (1964), and *Otis Elevator, supra*, with *Nurminco, Inc.*, 274 NLRB 264 (1984).

In this case, the employer failed to establish that the layoff represented a fundamental decision to close down any part of its business or to change its nature or scope. After the layoff, which involved but six of eighty-five unit employees, the employer continued to operate much as before, pursuing the same business, in the same manner, at the same locations. As its decision reflected more "a desire to reduce labor costs," *First National Maintenance*, 452 U.S. at 680, than an exercise of entrepreneurial prerogative or control, we agree with the Board that it was amenable to resolution through the collective bargaining process. The line may admittedly be a fine one in some cases, but it has been drawn by the Supreme Court to accommodate management's interest under the NLRA in the essential conduct of an enterprise and a union's interest in more secure employment for those it represents.

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

Local 512, Warehouse & Office Workers' Union v. NLRB (9th Cir. 1986) 795 F.2d 705 (employer committed unfair labor practice by temporarily laying off three employees without notifying their

bargaining unit representative or giving it an opportunity to bargain over the layoff.)

> On August 22 or 24, 1981, Felbro laid off employees Armando Castaneda, Ramirez, and Santizo. The layoff was not discriminatory. However, Felbro did not notify Local 512 of its intention to lay off the three employees.
>
> An employer violates section 8(a)(5) of the NLRA when it institutes a material change in the terms and conditions of employment in an area that is a compulsory subject of collective bargaining without giving the bargaining agent both reasonable notice and an opportunity to negotiate about the proposed change. *NLRB v. Katz*, 369 U.S. 736, 747, 8 L. Ed. 2d 230, 82 S. Ct. 1107 (1962); *NLRB v. Merrill & Ring, Inc.*, 731 F.2d 605, 608 (9th Cir. 1984). A unilateral layoff by an employer violates section 8(a)(5). See *NLRB v. Carbonex Coal Co.*, 679 F.2d 200, 204 (10th Cir. 1982); cf. *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 735 (9th Cir. 1981) (unilateral change in pension provisions violates section 8(a)(5)).

(*Id.*, pp. 710-711.)

NLRB v. Advertisers Mfg. Co. (7th Cir. 1987) 823 F.2d 1086 (employer required to bargain over layoff decision motivated by a downward trend in sales).

> Layoffs are not a management prerogative. They are a mandatory subject of collective

> bargaining. Until the modalities of layoff are established in the agreement, a company that wants to lay off employees must bargain over the matter with the union. See *Local 512, Warehouse & Office Workers' Union v. NLRB, supra,* 795 F.2d at 711-12.

(*Id.*, pp. 1090-91.)

Pan Am. Grain Co. v. NLRB (1st Cir. 2009) 558 F.3d 22 (layoff decision is a mandatory subject of bargaining if labor costs are one of the motivating factors for the layoffs.)

> In its most recent decision, the Board explains that an employer must bargain over a multiple-motive layoff based partially on labor costs. See *Regal Cinemas, Inc. v. N.L.R.B.*, 354 U.S. App. D.C. 398, 317 F.3d 300, 307-08 (D.C. Cir. 2003) (affirming the Board's finding of a Section 8(a)(5) violation where the layoff was motivated by labor costs rather than technological advances); *Winchell Co.*, 315 N.L.R.B. 526, 530, 534-36 (1994), enforced mem., 74 F.3d 1227 (3d Cir. 1995) (holding that the employer must bargain over a layoff decision motivated both by a business downturn and business decisions including the installation of new technology); see also *FiveCAP, Inc.*, 332 N.L.R.B. 943, 955 (2000). Pan American concedes that it cannot demonstrate that any particular layoff arose solely due to its modernization program, and we note that there is substantial evidence, including the

> testimony of company president Gonzalez, supporting the Board's finding that the layoffs were motivated in part by the costs associated with the strike. Because labor costs were a motivating factor for the layoffs, the Board explained that the company had a duty to bargain with the Union over the layoffs. Acknowledging the clarity with which the Board responded to our remand, we find its position reasonably defensible and affirm.

(*Id.*, pp. 27-28.)

D. The Conclusion by the NLRB and the United States Circuit Courts of Appeals that an Employer's Decision to Lay off Employees for Economic Reasons Is Within the Scope of Representation under the National Labor Relations Act Resulted from the Application of a Three-Part Balancing Test Derived from *Fibreboard Corp. v. NLRB* (1964) 379 U.S. 203 and *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666

The NLRB and the federal Circuit Courts of Appeals arrived at the conclusion that an employer's decision to lay off employees for economic reasons is within the scope of representation under the NLRA by applying a three-part balancing test derived from *Fibreboard Corp. v. NLRB*(1964) 379 U.S. 203 and *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666. (See *Lapeer Foundry and Machine, Inc., supra,* 289 N.L.R.B. 952, 953-54; *Pan American Grain Co., Inc., supra,* 351 N.L.R.B. 1412, 2007 NLRB LEXIS 530, *8-*13; *NLRB v. 1199, Nat'l Union of Hospital & Health Care Employees, supra,* 824 F.2d 318, 321-22; *Pan Am. Grain Co. v.*

NLRB, supra, 558 F.3d 22, 26-28.) This test is applicable not only to decisions to lay off employees for economic reasons but also to other management actions which result in termination of employment, such as subcontracting, mergers, plant closings, and plant relocations. (See *United Food and Commercial Workers International Union, AFL-CIO, Local 150-A* (D.C. Cir. 1989) 880 F.2d 1422, 1428-1436 (three-part balancing test must be applied to determine whether a plant relocation decision was a mandatory subject of bargaining); *Geiger Ready-Mix Co. v. NLRB* (D.C. Cir. 1996) 87 F.3d 1363, 1366-1369 (three-part balancing test applicable to determine whether employer committed unfair labor practice by failing to bargain over decision to close union plant and subsequently open non-union plant); *IBEW, Local 21 v. NLRB* (9th Cir. 2009) 563 F.3d 418, 422-423 (merger decision); *NLRB v. Westinghouse Broadcasting & Cable, Inc.* (1st Cir. 1988) 849 F.2d 15, 21-24 (decision to abolish unit and subcontract the work performed by the unit).)

The three parts of this test are (1) does the particular management action have a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees; if so, (2) does the significant and adverse effect arise from the implementation of a fundamental managerial or policy decision; and (3) 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 – is the employer's need for unencumbered decisionmaking in managing its operations outweighed by the benefit to employer-employee relations of bargaining about the action in question. (*Pan Am. Grain Co. v. NLRB, supra*, 558 F.3d 22, 26-28; NLRB v. *1199, Nat'l Union of Hospital & Health Care Employees, supra*, 824 F.2d 318, 321-322; *Lapeer Foundry and Machine, Inc., supra*, 289 N.L.R.B. 952, 953-954.)

E. This Court held in *Building Material and Construction Teamsters' Union v. Farrell* that the Same Three-Part Balancing Test Determines Whether a Management Action Is Within the Scope of Representation under the MMBA

This Court held in *Building Material* that the same three-part balancing test determines whether a management action is within the scope of representation under the MMBA. (*Building Material, supra*, 41 Cal.3d at 663; *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 638; *Rialto, supra*, 155 Cal.App.4th at 1301.)

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 held in *Rialto* to be 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.)

F. Previous PERB Decisions Have Also Applied the Three-Part *Building Material* Balancing Test To Determine Whether Management Actions Are Mandatory Subjects of Bargaining

Previous PERB decisions have also applied the three-part *Building Material* balancing test to determine whether management actions are mandatory subjects of bargaining. (See *California*

Faculty Assn. v. Public Employment Relations Bd. (2008) 160 Cal.App.4th 609 (employer required to bargain over decision to exclude employees from new parking facility).)

> Under board precedent, "[a] subject is within the scope of representation" "as a 'term or condition of employment' " "if: (1) it involves the employment relationship; (2) is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective bargaining is an appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not unduly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer's mission." (*Academic Professionals of California v. Trustees of the California State University* (2003) PERB Dec. No. 1507-H [27 PERC ¶ 26, p. 147].)

(*Id.*, p. 616.)

G. PERB's Decision in this Case Was Clearly Erroneous and Should Be Vacated Because PERB Failed to Apply the Three-Part *Building Material* Balancing Test to the City's Layoff Decision and Because PERB's Position That Layoff Decisions Are Categorically Never a Mandatory Subject of Bargaining Under the MMBA Is Contrary to the Relevant Federal Precedent Under the NLRA

However, as noted above, PERB did not apply the three-part *Building Material* balancing test to determine whether the City of Richmond's decision to lay off 18 firefighters on January 1, 2004, was a mandatory subject of bargaining under the MMBA.

Instead, PERB's decision affirming the regional attorney's dismissal of Local 188's unilateral action claim cited PERB precedent in cases arising under the Dills Act and the EERA in which PERB held that layoff decisions are matters of fundamental managerial concern which are left to the employer's prerogative. (App. Tab 2, p. 252.)

Although PERB's construction of the MMBA is to be regarded with deference by a court performing the judicial function of statutory construction, and will generally be followed unless it is clearly erroneous, a PERB decision that a management action is not a mandatory subject of bargaining will be set aside as clearly erroneous where (1) the PERB decision is contrary to PERB precedent, and/or (2) the PERB decision is contrary to relevant federal precedent under the NLRA. (See *California Faculty Assn. v. Public Employment Relations Bd., supra,* 160 Cal. App. 4th 609, 615-21.)

As shown above, PERB's decision herein that layoff decisions based on fiscal reasons are not within the scope of representation under the MMBA is squarely contrary to relevant federal precedent under the NLRA.

It is equally clear that it was wrong in this layoff decision case arising under the MMBA for PERB to rely on layoff decision cases arising under the Dills Act and the EERA rather than apply

the three-part *Building Material* balancing test to the layoff decision.

In this regard, as PERB explained in *California Department of Forestry and Fire Prevention, supra,* PERB Decision No. 999, Government Code section 19997 provides the State with the authority to lay off employees "because of lack of work or funds, or whenever it is advisable in the interests of economy." The Dills Act does not make section 19997 supersedable by a collective bargaining agreement. PERB's decision that layoff decisions are not within the scope of representation under the Dills Act thus was not based on an application of the three-part *Building Material* bargaining test. Instead, it was based on a statute providing that the State has unfettered authority to lay off employees. (*California Department of Forestry and Fire Prevention, supra,* PERB Decision No. 999, at p. 17.)

Similarly, PERB explained in *Newman-Crows Landing Unified School District, supra,* PERB Decision No. 223, at ppl 12-14, that its holding that layoff decisions are not mandatory subjects of bargaining under the EERA was based on the provision of Education Code section 45308 that classified school district employees "shall be subject to layoff for lack of work or lack of funds," and on the decision in *CSEA v. Pasadena Unified School District* (1977) 71 Cal.App.3d 318 rejecting CSEA's arguments that

a school district's discretion to lay off because of a "lack of funds" should be limited.

However, local governments subject to the MMBA cannot claim the benefit of any statute similar either to Government Code section 19997 or Education Code section 45308. No State law purports to provide local government employers with unfettered authority to lay off employees for lack or work or lack of funds. It necessarily follows that PERB should have applied the three-part *Building Material* balancing test to determine whether layoff decisions are mandatory subjects of bargaining under the MMBA rather than relying on PERB precedent under the Dills Act and the EERA, and that PERB's decision in this case was therefore clearly erroneous.

H. Application of the Three-Part *Building Material* Balancing Test Compels the Conclusion that the 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

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 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 significantly and 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.)

Recent experience clearly proves local government layoff decisions are eminently suitable for resolution through collective bargaining. In order to alleviate the impact which the nation's current economic distress would otherwise have on essential public services, and in order to preserve jobs for the employees who provide those essential public services, local governments throughout the State have bargained with the organizations which

represent their employees over layoffs and actions intended to avert layoffs such as reductions in wages, increases in workweeks, and other concessions that reduce labor costs. See http://www.sacbee.com/topstories/v-print/story/1994725.html, Sacramento Bee, July 2, 2009, *Firefighters to vote on plan that would save 68 jobs*: "After months of bitter negotiations, the city of Sacramento and its fire union have agreed to salary concessions that they say will save the jobs of dozens of firefighters"; http://www.ktvu.com/print/20096910/detail.html, KTVU.com, *Oakland Firefighters union Agrees to Contract*: "The firefighters union overwhelmingly approved a new contract that freezes wages for three years and increases the hours that firefighters work"; San Francisco Chronicle, June 5, 2009, *SEIU, city deal will limit layoffs*.

The three-part *Building Material* balancing test thus compels the conclusion that the City of Richmond's decision to reduce minimum firefighter shift staffing levels and lay off 18 firefighters on January 1, 2004, was within the MMBA's scope of representation and therefore a mandatory subject of bargaining.

I. *Firefighters Union v. City of Vallejo* Also Compels the Conclusion that the City's Layoff Decision was Within the Scope of Representation Under the MMBA

Vallejo compels the same conclusion. With regard to whether the city was required to bargain over a proposed

personnel reduction clause to be included in a collective bargaining agreement, *Vallejo* states as follows:

> Finally, the union advanced a Personnel Reduction proposal which would require that the city bargain with the union with respect to any decision to reduce the number of fire fighters. Under the proposal, any reduction would be on a least-seniority basis, and no new employees could be hired until all those laid off were given an opportunity to return. The city objects to that part of the proposal requiring bargaining on a decision to reduce personnel and contends that any such matter is not negotiable because it involves the merits, necessity or organization of the fire fighting service.
>
> 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.
>
> 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. (*N.L.R.B. v. United Nuclear Corporation* (10th Cir. 1967) 381 F.2d 972.) In some situations, such as that in which a layoff results from a decision to subcontract out bargaining unit work, the decision to subcontract and lay off employees is subject to bargaining. (*Fibreboard Corp. v. Labor Board* (1964) 379 U.S. 203 [13 L.Ed.2d

> 233, 85 S.Ct. 398, 6 A.L.R.3d 1130].) The fact, however, that the decision to lay off results in termination of one or more individuals' employment is not alone sufficient to render the decision itself a subject of bargaining. (*N.L.R.B. v. Dixie Ohio Express Co.* (6th Cir. 1969) 409 F.2d 10.)
>
> On the other hand, because of the nature of fire fighting, a reduction of personnel may affect the fire fighters' working conditions by increasing their workload and endangering their safety in the same way that general manning provisions affect workload and safety. To the extent, therefore, that the decision to lay off some employees affects the workload and safety of the remaining workers, it is subject to bargaining and arbitration for the same reasons indicated in the prior discussion of the manning proposal.

(*Id.*, pp. 621-22.)

Vallejo thus holds that although layoff decisions are not within the scope of representation under the MMBA when those decisions are motivated by an employer's desire to close down part of its business or change its nature or scope for reasons that are not related to labor issues and thus not amenable to resolution through the collective bargaining process, layoff decisions do become mandatory subjects of bargaining under the MMBA when they affect labor issues for the remaining employees. This holding is completely consistent with federal precedent interpreting the

scope of representation under the NLRA. (See, e.g., *Lapeer Foundry and Machine, Inc., supra,* 289 N.L.R.B. 952, 953-54; *Pan American Grain Co., Inc., supra,* 351 N.L.R.B. 1412, 2007 NLRB LEXIS 530, *8-*13; *NLRB v. 1199, Nat'l Union of Hospital & Health Care Employees, supra,* 824 F.2d 318, 321-22; *Pan Am. Grain Co. v. NLRB, supra,* 558 F.3d 22, 26-28.)

The California Courts of Appeal have uniformly and consistently interpreted *Vallejo* in this manner.

> *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.)

As stated above, the reason the City of Richmond decided to reduce minimum firefighter shift staffing levels and lay off 18 firefighters on January 1, 2004, was not because of a desire on the part of the city to change the nature or scope of its fire protection services. Instead, the reason for this decision was a desire on the part of the city to reduce the city's labor costs to meet financial exigencies. The decision clearly had an effect on labor issues for the remaining employees. Accordingly, *Vallejo* also compels the conclusion that the city's decision was a mandatory subject of bargaining under the MMBA.

IV. THE CITY WAS REQUIRED TO BARGAIN OVER ITS DECISION TO REDUCE FIREFIGHTER SHIFT STAFFING LEVELS REGARDLESS OF WHETHER THAT DECISION WAS RELATED TO A LAYOFF DECISION

But even if a decision to lay off firefighters for fiscal reasons were not a mandatory subject of bargaining under the MMBA, PERB's decision not to issue a complaint in this case was clearly erroneous because the city's reduction in firefighter shift staffing

levels had a significant and adverse effect on employee workload and safety and thus, under *Vallejo*, was a mandatory subject of bargaining in and of itself.

The Court of Appeal acknowledged the holding of *Vallejo* that staffing level changes are mandatory subjects of bargaining if they primarily involve firefighter workload and safety but not if they primarily involve the policy of fire prevention of the city. However, the Court of Appeal concluded that the city had no obligation under the MMBA to bargain over its decision to reduce minimum firefighter shift staffing levels on January 1, 2004, because that decision was interdependent with the city's decision to lay off 18 firefighters on that same date. (Slip Opinion, pp. 20-23.)

Nothing in *Vallejo* supports the Court of Appeal's conclusion 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, nor is there anything in *Vallejo* 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*, any

management decision becomes a mandatory subject of bargaining under the MMBA when it affects labor issues for the remaining employees.

The Court of Appeal also incorrectly misinterpreted *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.

(*Vallejo*, 12 Cal.3d at 620.)

PERB thus failed to perform its duty to "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), when it declined to issue a complaint alleging that the City of Richmond violated the MMBA by unilaterally deciding 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.

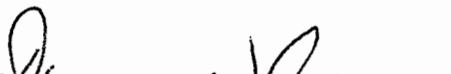
V. CONCLUSION

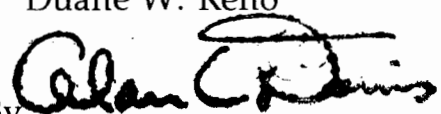
For all of the reasons stated above, the Court should reverse the decision of the Court of Appeal and hold that the City of Richmond's decision to reduce firefighter shift staffing levels in the Richmond Fire Department from a minimum of twenty-four (24) fire suppression personnel on duty at all times to a minimum of eighteen (18) fire suppression personnel on duty at all times and lay off 18 firefighters on January 1, 2004, was a mandatory subject of bargaining under the MMBA and that PERB should

therefore have issued a Complaint alleging that the city violated the MMBA by failing to meet and confer with Local 188 over these shift staffing level reductions and layoffs.

Dated: September 8, 2009

DAVIS & RENO

By 
Duane W. Reno

By 
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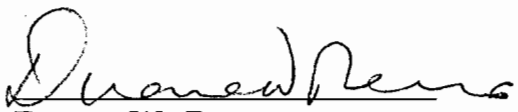
CERTIFICATE OF COUNSEL RE: WORD COUNT

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

This brief was prepared using Wordperfect X3 and the Palamino 13 point font. The word count of the brief, as determined by the Wordperfect program, is 12,922, 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 September 8, 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 September 8, 2009, I caused the following document(s) **PETITIONER IAFF LOCAL 188'S OPENING BRIEF ON THE MERITS** to be served as follows:

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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.

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

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I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on September 8, 2009.

Grania Duffy