No. S172377

IN THE SUPREME COURT OF CALIFORNIA

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

ANSWER BRIEF OF PETITIONER IAFF LOCAL 188 IN RESPONSE TO RESPONDENT PERB'S OPENING BRIEF ON THE MERITS

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

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I. INTRODUCTION

Should an administrative agency decision be entirely immune from judicial review when the decision is clearly erroneous and wrongly deprives employees of their statutory collective bargaining rights?

Federal administrative agency decisions are not. The United States Supreme Court made clear in *Leedon v. Kyne* (1958) 358 U.S. 184, 190 that if Congress has not provided a statutory means for judicial review of a federal administrative agency decision that contravenes federal labor law and thereby deprives employees of collective bargaining rights which Congress intended them to have, the general jurisdictional statutes for the federal courts provide those courts with authority to review and set aside the administrative agency's decision.

Similarly, if the Legislature has not provided a statutory means for judicial review of a clearly erroneous administrative agency's decision that wrongly deprives employees of their statutory collective bargaining rights, the courts of this State are granted authority by Article VI, section 10 of the California Constitution to review the decision and set it aside.[1]

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[1] Article VI, section 10 provides in pertinent part as follows:

The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings .

Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition.

Yamada Brothers v. Agricultural Labor Relations Bd. (1979) 99 Cal.App.3d 112, 119-120 held in this regard that a California Agricultural Labor Relations Board decision is subject to review by the California courts in writ of mandamus proceedings if (1) the decision contravenes the California Agricultural Labor Relations Act, Cal. Lab. Code § 1140 et seq. ("ALRA"), (2) an ultimate judicial remedy is otherwise unavailable because the Act provides no means of redress for the erroneous decision, and (3) the appellant has a substantial beneficial interest entitled to review by a writ of mandamus.

See also *Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 556.

Respondent Public Employment Relations Board ("PERB") contends herein that these well-established principles have no application to a PERB refusal to issue a complaint in an unfair practice proceeding under the Meyers-Milias-Brown Act, Cal. Gov. Code § 3500 et seq. ("MMBA"). According to PERB, the Legislature intended when it enacted the MMBA to entirely "preclude" the courts from reviewing a PERB decision not to issue a complaint in an unfair practice case, hence precedent as to the availability of judicial review in unfair practice proceedings under the federal labor laws and the ALRA is irrelevant. (See PERB's Opening Brief at pp. 8-13).

PERB's contention is manifestly without merit and was properly rejected by the Contra Costa Superior Court and the Court of Appeal, First Appellate District, Division Three, for all of the following reasons:

- PERB conceded during the superior court proceedings in this case that if PERB refuses to issue a complaint and its refusal is based on an erroneous construction of the MMBA, *Belridge Farms v. Agricultural Labor Relations Bd., supra,* 21 Cal.3d 551 establishes that a writ of mandate may issue requiring PERB to issue a complaint.
- No provision of the MMBA expressly precludes mandamus proceedings to review a PERB refusal to issue a complaint in an unfair practice case, nor is there any reasonable basis upon which it may be concluded that the MMBA precludes such review by implication.
- The MMBA should not be interpreted as precluding mandamus proceedings to review a PERB refusal to issue a complaint in an unfair practice case because, if so interpreted, the MMBA would violate separation of powers principles embodied in the California Constitution.

PERB contends further that even if the courts have jurisdiction in writ of mandamus proceedings to set aside a PERB refusal to issue a complaint in an unfair practice case when such refusal is based on an erroneous construction of the MMBA, PERB's refusal to issue a complaint in this particular case must nevertheless be upheld for the reason that PERB correctly interpreted the MMBA when PERB ruled that the City of Richmond's decision to lay off firefighters for fiscal reasons was not a mandatory subject of bargaining under the MMBA.

However, as shown below and in Local 188's Opening Brief on the Merits, PERB's decision herein 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 National Labor Relations Act ("NLRA").

II. PERB PREVIOUSLY CONCEDED THAT THE COURTS HAVE EQUITABLE JURISDICTION TO REVIEW AND SET ASIDE A PERB REFUSAL TO ISSUE A COMPLAINT IN AN UNFAIR PRACTICE PROCEEDING WHEN THE PERB DECISION REFUSING TO ISSUE A COMPLAINT ERRONEOUSLY CONSTRUES THE MMBA

PERB conceded during the superior court proceedings in this case (App. Tab. 24, p. 980) that

> In very limited circumstances, equitable review may be appropriate where a PERB decision refusing to

issue a complaint: (1) violates a constitutional right; (2) exceeds a specific grant of authority; or (3) erroneously construes an applicable statute. (*Belridge Farms v. Agricultural Labor Relations Board* (1978) 21 Cal.3d 551, 556-557; see PERB's Opposition to Petition for Writ of Mandate, p. 6-7.)

Having thus previously conceded this point in the superior court proceedings herein, PERB is estopped from raising it again on appeal. (*Horn v. Atchison, Topeka & Santa Fe Ry. Co.* (1964) 61 Cal.2d 602, 605.)

III. NO PROVISION OF THE MMBA EXPRESSLY PRECLUDES MANDAMUS PROCEEDINGS TO REVIEW A PERB REFUSAL TO ISSUE A COMPLAINT IN AN UNFAIR PRACTICE CASE, NOR IS THERE ANY REASONABLE BASIS FOR A CONCLUSION THAT THE MMBA PRECLUDES SUCH REVIEW BY IMPLICATION

A. No Provision of the MMBA Expressly Precludes Mandamus Proceedings to Review A PERB Refusal to Issue a Complaint in an Unfair Practice Case

Moreover, PERB's contention is clearly without merit.

According to PERB, the Legislature intended when it enacted the MMBA to "preclude" any judicial review of a PERB decision not to issue a complaint in an unfair practice case. (See PERB's Opening Brief at pp. 8-13).

PERB cites Government Code section 3509.5, subd. (a) in support of this contention. Subd. (a) provides as follows:

> (a) Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case, except a decision of

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

PERB's contention is too much of a stretch. No provision of subd. (a) or any other provision of the MMBA expressly "precludes" mandamus proceedings to review a PERB refusal to issue a complaint in an unfair practice case.

PERB's contention is based entirely on an erroneous premise that a writ of mandamus is the same thing as the writ of extraordinary relief made available by Government Code section 3509.5, subd. (a) to persons aggrieved by aggrieved by a final decision or order of the board in an unfair practice case. The two are manifestly not the same thing.

This is evident from the fact that a petition by an aggrieved party for any such "writ of extraordinary relief" is governed by Government Code section 3542, subd. (c),[2] which provides that

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[2] Government Code section 3542, subd. (c) states as follows:

(c) Such petition shall be filed in the district court of appeal in the appellate district where the unit determination or unfair practice dispute occurred. The petition shall be filed within 30 days after issuance of the board's final order, order denying reconsideration, or order joining in the request for judicial review, as applicable. Upon the filing of such petition, the court shall

such petition shall be filed in the district court of appeal in the appellate district where the unfair practice occurred within 30 days after issuance of the board's final order. Government Code section 3542(c) further provides that the findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, are conclusive.

On the other hand, Article VI, section 10 of the California Constitution provides that the Supreme Court, courts of appeal, and superior courts all have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus. Sections 1084-1097 of the Code of Civil Procedure govern writ of mandamus proceedings. Sections 1109-1110b govern appeals in writ of mandamus proceedings.

Moreover, the writ of mandamus is available only where the Legislature has failed to provide any statutory means for judicial

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cause notice to be served upon the board and thereupon shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board, within 10 days after the clerk's notice unless such time is extended by the court for good cause shown. The court shall have jurisdiction to grant to the board such temporary relief or restraining order it deems just and proper and in like manner to make and enter a decree enforcing, modifying, or setting aside the order of the board. The findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, are conclusive. The provisions of Title 1 (commencing with Section 1067) of Part 3 of the Code of Civil Procedure relating to writs shall, except where specifically superseded herein, apply to proceedings pursuant to this section.

review of an administrative agency's decision. (*Modern Barber Colleges v. California Employment Stabilization Commission* (1948) 31 Cal.2d 720, 724.) Inasmuch as the "writ of extraordinary relief" made available by Government Code section 3509.5, subd. (a) is itself a statutory means for judicial review of PERB decisions, it simply cannot be the same thing as a "writ of mandamus."[3]

Government Code section 3509.5, subd. (a) thus does not expressly preclude review of a PERB refusal to issue a complaint by way of a writ of mandamus proceeding governed by Article VI, section 10 of the California Constitution and Code of Civil Procedure sections 1084-1097 and 1109-1110b.

Instead, the only judicial review of a PERB refusal to issue a complaint that is expressly precluded by subd. (a) is judicial review by way of a "writ of extraordinary relief" proceeding governed by Government Code section 3542, subd. (c).

B. There is No Reasonable Basis for A Conclusion that the MMBA Prohibits Writ of Mandamus Proceedings to Review PERB Refusals to Issue Complaints in Unfair Practice Proceedings by Implication

Nor is there any reasonable basis to conclude that subd. (a) or any other provision of the MMBA "precludes" writ of mandamus proceedings to review PERB refusals to issue

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[3] The writ of mandamus is available for review of a PERB refusal to issue a complaint in an unfair practice proceeding under the MMBA precisely because judicial review by way of a "writ of extraordinary relief" proceeding governed by Government Code section 3542, subd. (c) is not.

complaints in unfair practice proceedings by implication.

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

> In *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, this Court held that the District Court did not have jurisdiction of an original suit to review an order of the National Mediation Board determining that all yardmen of the rail lines operated by the New York Central system constituted an appropriate bargaining unit, because the Railway Labor Board had acted within its delegated powers. But in the course of that opinion the Court announced principles that are controlling here. "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in *Texas & New Orleans R. Co. v. Brotherhood of Clerks*, 281 U.S. 548, and *Virginian R. Co. v. System Federation*, 300 U.S. 515. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would

have been that the 'right' of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose." *Id.*, at 300.

Here, differently from the *Switchmen's* case, "absence of jurisdiction of the federal courts" would mean "a sacrifice or obliteration of a right which Congress" has given professional employees, for there is no other means, within their control (*American Federation of Labor v. Labor Board, supra*), to protect and enforce that right. And "the inference [is] strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." 320 U.S., at 300. This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers. Cf. *Harmon v. Brucker*, 355 U.S. 579; *Stark v. Wickard*, 321 U.S. 288; *School of Magnetic Healing v. McAnnulty*, 187 U.S. 94.

Where, as here, Congress has given a "right" to the professional employees it must be held that it intended that right to be enforced, and "the courts . . . encounter no difficulty in fulfilling its purpose." *Texas & New Orleans R. Co. v. Railway Clerks, supra*, at 568.

(*Id.*, p. 190.)

It is equally well established that a California Agricultural Labor Relations Board decision comes within the equitable jurisdiction of the California courts and is subject to judicial review in writ of mandamus proceedings if (1) the decision contravenes

the California Agricultural Labor Relations Act, Cal. Lab. Code § 1140 et seq. ("ALRA"), (2) an ultimate judicial remedy is otherwise unavailable because the Act provides no means of redress for the erroneous decision, and (3) the appellant has a substantial beneficial interest entitled to review by a writ of mandamus. (*Yamada Brothers v. Agricultural Labor Relations Bd., supra,* 99 Cal.App.3d 112.)

> One of the grounds upon which the superior court sustained the demurrer to appellant's petition was that the ALRB's order extending certification was not a "final order" subject to judicial review. (See § 1160.8.) On appeal, appellant contends judicial review via mandamus lies because the board was without jurisdiction to extend certification and did so in violation of a clear and mandatory statutory provision. Further, appellant contends no adequate remedy at law exists by which to challenge the board's jurisdictional violation because it has exhausted all administrative remedies and the board's extension order is immune from review under the statute and ALRB rules. Thus, appellant maintains, mandamus is the only available avenue to review the board's extension of certification. For reasons which will appear, we agree with appellant.

(*Id.*, p. 119-120, citing *Belridge Farms v. Agricultural Labor Relations Bd., supra,* 21 Cal.3d 551, 556.)

PERB's attempt to distinguish the MMBA from the ALRA is unavailing. PERB contends in this regard:

> As discussed above, the MMBA and other PERB-administered statutes contain explicit language precluding judicial review of decisions not to issue a complaint in unfair practice cases, whereas the NLRA and ALRA are silent on the subject. Also, unlike at the NLRB and ALRB, PERB's General Counsel is not the final authority when it comes to dismissing unfair practice charges; instead, such decisions by PERB's General Counsel not to issue an unfair practice complaint may be appealed to the Board itself. (CaL. Code. Regs., tit. 8, § 32635.) These significant statutory and procedural differences make the holding in *Belridge Farms, supra,* 21 Cal.3d 551 inapplicable to decisions by PERB not to issue a complaint in unfair practice cases.

(PERB's Opening Brief at p. 16.)

First, as explained above, the PERB-administered statutes do not explicitly preclude writ of mandamus proceedings to review a PERB refusal to issue a complaint in an unfair practice proceeding. Instead, these statutes create a writ of extraordinary relief for review of PERB decisions resolving unit determination or unfair practice disputes but state that this statutory means of judicial review of PERB decisions is not available for review of a PERB refusal to issue a complaint in an unfair practice proceeding.

The Legislature knows how to expressly preclude review of decisions of particular administrative agencies by way of writ of mandamus proceedings when it intends that result. (See *Modern*

Barber Colleges v. California Employment Stabilization Commission, supra, 31 Cal.2d 720, 723 [giving effect to section 45.11 of the Unemployment Insurance Act, which provided in pertinent part: "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any contributions sought to be collected."].)

"When the Legislature 'has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded.' (Citations omitted)." (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 576.)

Thus, the fact that Government Code section 3509.5, subd. (a) does not expressly preclude writ of mandamus proceedings for review of a PERB refusal to issue a complaint in an unfair practice proceeding under the MMBA compels the conclusion that no such preclusion was intended by the Legislature.

This conclusion is also compelled by the rule that in determining legislative intent in enacting a statute, courts must strive for a reasonable construction with the knowledge that the legislature is presumed to act in light of existing judicial decisions. (*People v. Sample* (1984) 161 Cal.App.3d 1053, 1058.)

The provisions of Government Code section 3509.5, subd. (a) for review of PERB decisions by way of a writ of extraordinary

relief were enacted in 2002. Inasmuch as *Yamada Brothers v. Agricultural Labor Relations Bd., supra*, 99 Cal.App.3d 112, 119-120, previously held in 1979 that a California Agricultural Labor Relations Board decision is subject to review by the California courts in writ of mandamus proceedings if (1) the decision contravenes the California Agricultural Labor Relations Act, Cal. Lab. Code § 1140 et seq. ("ALRA"), (2) an ultimate judicial remedy is otherwise unavailable because the Act provides no means of redress for the erroneous decision, and (3) the appellant has a substantial beneficial interest entitled to review by a writ of mandamus, it must therefore be presumed that the absence of an express preclusion in Government Code section 3509.5, subd. (a) of writ of mandamus proceedings to review a PERB refusal to issue a complaint in an unfair practice proceeding under the MMBA means that the Legislature intended that writ of mandamus proceedings are to be available for review of PERB decisions in a case arising under the MMBA to the same extent those proceedings are available for review of ALRB decisions in cases arising under the ALRA.

PERB contends that ALRB precedent should not be applied in a case arising under the MMBA because administrative decisions by staff at the ALRB may be appealed only to the agency's general counsel and not to the board. (PERB's Opening Brief at pp. 13, 16.) However, this fact makes no difference.

Although *Belridge Farms v. Agricultural Labor Relations Bd., supra,* 21 Cal.3d 551 was a proceeding in mandamus to review a decision of the ALRB General Counsel not to issue unfair labor practice complaints rather than a decision of the Agricultural Labor Relations Board itself, *Yamada Brothers v. Agricultural Labor Relations Bd., supra,* 99 Cal.App.3d 112 was a proceeding in mandamus to review of a decision of the Agricultural Labor Relations Board itself. *Yamada Brothers* squarely rejected a contention similar to PERB's contention that an administrative agency's preeminence in the field of labor relations preempts the courts from reviewing a contested agency decision. (*Id.*, at pp. 128-29.)

Despite being the Legislature's designated expert on the interpretation of statutes it was created to administer, PERB sometimes gets it wrong.

For instance, PERB was held in *California Faculty Assn. v. Public Employment Relations Bd.* (2008) 160 Cal.App.4th 609, 615-16 (*California Faculty Assn.*) to have misinterpreted the Higher Education Employer-Employee Relations Act (HEERA) (Gov. Code, § 3560 et seq.) when PERB ruled that California State University had no duty under the EERA to bargain with a faculty association over a decision to prohibit employees from parking in new structures at Northridge and Sacramento.

Because PERB had issued a complaint in *California Faculty Assn.*, judicial review of PERB's erroneous interpretation of the EERA was available by way of a writ of extraordinary relief as provided by Government Code section 3564 and PERB's decision depriving employees of their statutory collective bargaining rights was set aside.

But whether PERB has issued a complaint or refused to issue a complaint in an unfair practice proceeding should not be determinative of whether the courts may review and set aside a PERB decision that deprives employees of their statutory collective bargaining rights. Otherwise, issues of procedure will preempt the collective bargaining rights which the Legislature intended to create. Accordingly, when a PERB decision deprives employees of those collective bargaining rights and judicial review of the PERB decision is not available by way of the statutorily-provided writ of extraordinary relief, judicial review of the PERB decision should then be available by the constitutionally-provided writ of mandamus.

For all of these reasons, the MMBA cannot reasonably be interpreted as precluding writ of mandamus proceedings to review a PERB refusal to issue a complaint in an unfair practice proceeding.

IV. THE MMBA SHOULD NOT BE INTERPRETED AS PRECLUDING MANDAMUS PROCEEDINGS TO REVIEW A PERB REFUSAL TO ISSUE A COMPLAINT IN AN UNFAIR PRACTICE CASE BECAUSE, IF SO INTERPRETED, THE MMBA WOULD VIOLATE SEPARATION OF POWERS PRINCIPLES EMBODIED IN THE CALIFORNIA CONSTITUTION

PERB's contention must also be rejected for the reason that Article VI, section 10 of the California Constitution confers writ of mandamus jurisdiction on the courts to review clearly erroneous administrative agency decisions which wrongly deprive employees of their statutory collective bargaining rights, hence a construction of the MMBA as "precluding" any mandamus proceeding to review a PERB refusal to issue a complaint in an unfair practice case would create an unwarranted conflict between the MMBA and constitutional separation of powers principles.

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

Board (2000) 22 Cal.4th 660, 673-75 (George, C.J., concurring).)

Because a mandamus proceeding in the superior court to remedy errors in an administrative decision is closely similar to a direct appeal from the administrative decision, and because Article VI, section 10 of the California Constitution expressly grants judicial authority to the superior courts to conduct proceedings for extraordinary relief in the nature of mandamus, *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 110 compels the conclusions that (1) the Legislature may not substantially impair the constitutional powers of the superior courts to remedy errors in an administrative decision through a mandamus proceeding, or practically defeat their exercise, and (2) the superior courts do not have the discretion to deny an apparently meritorious writ petition for review of an administrative agency decision notwithstanding the absence of a statute authorizing judicial review of the decision.

Powers addressed the constitutional powers granted to the courts of appeal by Article VI, section 11 of the California Constitution.[4] However, the principles established by that decision are equally applicable to the constitutional powers

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

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

granted to the superior courts.

The pertinent provision of Article VI, section 11 is the provision that except for cases in which judgment of death has been pronounced, "courts of appeal have appellate jurisdiction when superior courts have original jurisdiction in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995, and in other causes prescribed by statute." According to *Powers*, although the Legislature has the authority to determine that the appellate authority of the courts of appeal over decisions of the superior courts must be exercised in certain kinds of cases by extraordinary writ petition rather than by direct appeal, the Legislature may not substantially impair the constitutional powers of the courts, or practically defeat their exercise. (*Id.*, at p. 100.) Furthermore, according to *Powers*, inasmuch as the Constitution imposes the authority upon the courts of appeal to remedy errors in the decisions of the superior courts, the courts of appeal do not have the discretion to deny apparently meritorious writ petitions for review of decisions of the superior court that the Legislature has excluded from direct appeal. (*Id.*, at pp. 113-14.)

Article VI, section 10 is closely similar to Article VI, section 11, in that it explicitly grants judicial authority to the superior courts to conduct proceedings for extraordinary relief in the nature of mandamus. Accordingly, a construction of the MMBA as "precluding" any mandamus proceeding to review a PERB refusal

to issue a complaint in an unfair practice case would create an unwarranted conflict between the MMBA and constitutional separation of powers principles.

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

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

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

The cases cited by PERB do not hold to the contrary.

PERB relies primarily on *Modern Barber Colleges v. California Employment Stabilization Commission, supra,* 31 Cal.2d 720. (PERB's Opening Brief at p. 9.) In *Modern Barber Colleges* the San Francisco Superior Court denied a writ of mandamus to compel the California Employment Stabilization Commission to vacate its findings that certain persons, including the owner, part-time bookkeeper, and student barbers, were employees of a barber college for purposes of the Unemployment Insurance Act. Because the barber college had a statutory method of review of the

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

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

City of Irvine v. Southern California Assn. of Governments (2009) 175 Cal. App. 4th 506, 516, confirmed that the California Constitution grants the California Supreme Court, courts of appeal, superior courts, and their judges original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition, and that the Legislature cannot alter the jurisdiction over extraordinary writs prescribed by the constitution. In this case, as in *Modern Barber Colleges*, the writ of mandamus was not available because other remedies – in this case an administrative procedure established under Government Code section 65584 et seq. – were available for resolution of the

calculation of a local government's allocation of the regional housing needs assessment. (*Id.*, p. 512.)

The Legislature has not provided any statutory means for judicial review of a PERB refusal to issue a complaint in an unfair practice proceeding arising under the MMBA. Accordingly, PERB's interpretation of the MMBA as precluding writ of mandamus review of such refusals would violate constitutional separation of powers principles and must therefore be rejected.

V. 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

As stated in Local 188's Opening Brief on the Merits, the scope of representation under the MMBA is dissimilar from the scope of representation under other laws administered by PERB in that there are statutes which grant discretionary authority to the State and to school districts over layoff decisions but no statute grants unfettered discretion to local governments to lay off employees for lack of work or lack of funds. (See Local 188's Opening Brief at pp. 41-44.) Accordingly, PERB cannot justifiably rely on its own precedent interpreting laws other than the MMBA in support of its conclusion that layoff decisions are categorically excluded from the scope of representation under the MMBA.

PERB relies primarily on *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666 as judicial precedent in support of its contention that layoff decisions are categorically excluded from the scope or representation under the MMBA. However, as stated in Local 188's Opening Brief on the Merits, the National Labor Relations Board and the federal Circuit Courts of Appeals interpret *First National Maintenance* differently. (See, e.g., *NLRB v. 1199, Nat'l Union of Hospital & Health Care Employees* (4th Cir. 1987) 824 F.2d 318, 321-22 [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].) (See Local 188's Opening Brief at pp. 24-44.)

PERB's reliance on *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 is also misplaced. As the Court noted in Vallejo, "[i]n 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." (*Ibid*, p. 621.) Thus, *Vallejo* does not hold that layoff decisions are categorically excluded from the scope of bargaining under the MMBA. Instead, *Vallejo* is consistent with an the decisions of the National Labor Relations Board and federal Circuit Courts of Appeals that an employer's decision to lay off employees for economic reasons is a mandatory subject of bargaining under the

National Labor Relations Act, but an employer's decision to lay off employees for reasons not related to labor costs (e.g., plant modernization or other fundamental changes in the scope and direction of the enterprise) is a management prerogative. (See, e.g., *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].)

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, the city's decision was a mandatory subject of bargaining under the MMBA.

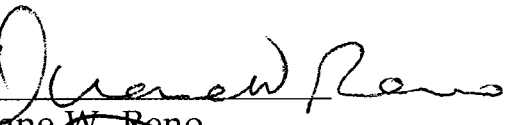
VI. CONCLUSION

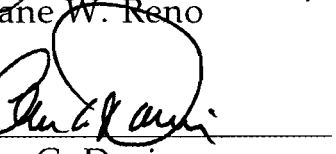
For all of the reasons stated above, the Court should affirm the decision of the Court of Appeal that the superior court had

jurisdiction in writ of mandamus proceedings to review PERB's refusal to issue a complaint in this case but should reverse the decision of the Court of Appeal that the City of Richmond's decision to reduce firefighter shift staffing levels in the Richmond Fire Department from a minimum of twenty-four (24) fire suppression personnel on duty at all times to a minimum of eighteen (18) fire suppression personnel on duty at all times and lay off 18 firefighters on January 1, 2004, was not a mandatory subject of bargaining under the MMBA.

Dated: October 8, 2009

DAVIS & RENO

By 
Duane W. Reno

By 
Alan C. Davis

Attorneys for Local 188

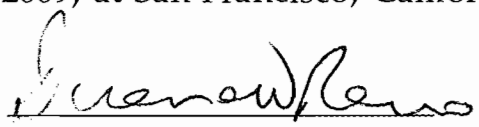
CERTIFICATE OF COUNSEL RE: WORD COUNT

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

This brief was prepared using Wordperfect X3 and the Palamino 13 point font. The word count of the brief, as determined by the Wordperfect program, is 5,711, 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 October 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 October 8, 2009, I caused the following document(s) **ANSWER BRIEF OF PETITIONER IAFF LOCAL 188 IN RESPONSE TO RESPONDENT PERB'S OPENING BRIEF ON THE MERITS**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.

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

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

Grania Duffy