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In *City of San Jose v. Operating Engineers Local Union No. 3, et al.*, the California Supreme Court held that when a public entity seeks to prevent a strike it believes would create a substantial and imminent threat to public health and safety, it must first, unless a recognized exception can be established, exhaust its administrative remedies, by filing an unfair practice charge with the Public Employment Relationship Board prior to asking a court for an injunction to prohibit the strike.

California Supreme Court Outlines Prerequisites for Municipalities Wanting to Prevent Strikes by Unionized Workforce

By Adam J. Fiss and Michael E. Harvey

In January 2006, the City of San Jose ("City") and the Operating Engineers Local Union No. 3 ("Union"), began negotiations for a successor labor contract. As part of the negotiations, the parties agreed that if they reached impasse, the Union would give the City 72 hours' notice before engaging in any work stoppages.

The City and Union reached impasse and on May 30, 2006, the Union provided the agreed upon 72 hours' notice that it would engage in work stoppages as a result. Prior to the Union commencing its work stoppage, the City filed a complaint seeking a court order that would prohibit "any strike or work stoppage by Union members performing services essential to public health and safety." The City's complaint alleged that a work stoppage by 110 Union members would disrupt maintenance work on the City's water pollution control plant, traffic signals, and emergency communication systems. Both the Union and the California Public Employment Relations Board (PERB) opposed the City's request for injunctive relief. The superior court denied the City's requested relief finding that the City failed to exhaust its administrative remedies because it did not first seek an injunction from PERB. In response, the City filed a notice of appeal, and petitioned the court of appeal for a writ of supersedeas. The appellate court then issued a stay that prohibited 59 employees from engaging in a strike against the City.

Subsequently, in November 2006, the City and Union reached an agreement on a new labor contract. Although the appellate court found that the issue before it was moot, it agreed, at both parties' urging, to address the issues presented "because of their statewide importance." The appellate court agreed with the trial court and upheld PERB's "exclusive initial jurisdiction to determine whether particular public employees covered by the MMBA [Meyers-Milias-Brown Act] have the right to strike in cases that implicate the MMBA."

The California Supreme Court granted review to determine whether a public employer that is threatened by a strike by employees that will endanger the public welfare must first seek relief from PERB before asking a superior court for injunctive relief.

Statutory Background

In California, the statutory collective bargaining rights of public employees can be traced to the Legislature's enactment of the George Brown Act in 1961, which conferred the rights to organize and have representatives "meet and confer" with public employers over wages and working conditions. In 1968, the Meyers-Milias-Brown Act (MMBA) expanded those rights to include the authority "to reach binding agreements on wages, hours, and working conditions." Under the MMBA, local public agencies and their employees generally must exhaust their administrative remedies "by applying to PERB for relief before they can ask a court to intervene in a labor dispute."

PERB's history can be traced to the Legislature's 1975 enactment of the Educational Employment Relations Act (EERA). Renamed the Public Employment Relations Board in 1977, the agency was charged with adjudicating unfair practice charges under the EERA. California Government Code section 3541.5 sets forth the Board's jurisdiction, in pertinent part: "The ***initial determination*** as to whether charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the ***exclusive jurisdiction*** of the board."

In 2000, the Legislature extended PERB's jurisdiction to cover matters arising under the MMBA. Interpreting this jurisdictional expansion, the California Supreme Court in *City of San Jose* considered PERB's jurisdiction over the City's civil complaint to prevent work stoppages of certain employees allegedly "essential to the public welfare."

Supreme Court's Reasoning

Drawing parallels between the MMBA and the EERA, the California Supreme Court reasoned that, at the time the Legislature transferred jurisdiction over the MMBA from courts to PERB in 2000, "it did so in light of this court's existing case law." The court cited three significant rules from its prior cases that it held now also apply to the MMBA:

- "Public employees have a right to strike *unless* it is clearly shown that there is a ***substantial and imminent threat*** to the public health and safety."[1]
- "PERB has exclusive initial jurisdiction over activities '***arguably protected or prohibited***' by public employment labor law."[2]
- "PERB's exclusive initial jurisdiction ***extends to remedies for strikes*** considered to be unfair labor practices."[3]

The court rejected the City's argument that a strike was not "arguably protected or prohibited" under the MMBA, but gave careful consideration to the City's second argument that the "local concern doctrine" barred PERB's consideration of the instant dispute. The doctrine generally limits administrative agency adjudicative authority where the alleged prohibited conduct touches interests "deeply rooted in local feeling and responsibility."[4]

In dismissing the City's argument, the court explained that the local concern doctrine primarily has been applied where necessary to maintain civil order and punish violence or other intentional torts (*e.g.*, defamation, trespass, and intentional infliction of emotional distress). The issue in the instant case, however, related to the legality of a public employee strike and the City failed to present evidence that the strike "posed an immediate threat to civil order." Notably, the standard for the "local concern doctrine" appears to be higher than the "substantial and imminent threat" test established in *County Sanitation*, though without explanation the court did not apply the latter test to the current case.

As a general rule, the court held that "a claim by a public entity that a proposed strike by public employees who perform services essential to the public welfare is generally subject to PERB's initial jurisdiction."

"Adequacy" of Administrative Remedies of PERB

The City also argued that the doctrine of exhaustion of administrative remedies *never* applies to public employee strikes that give

rise to unfair practices under the MMBA. On the other hand, the Union argued that the doctrine *always* applies. The California Supreme Court rejected both parties' arguments explaining that "[n]either party is right" because the applicability of the doctrine of exhaustion of administrative remedies "depends upon the facts of each case."

Generally, the doctrine of administrative remedies requires a party to exhaust available remedies before an administrative forum prior to seeking judicial relief. The exhaustion doctrine has certain exceptions and does not apply when the administrative remedy is inadequate, such as when the procedure is "too slow to be effective," "irreparable harm would result," or "administrative remedies would be futile."

The City argued that "the PERB remedy can never be effective when a proposed strike by public employees includes employees who services may be essential to protect the public welfare." The court considered PERB's available jurisdictional remedies in such a situation. It reasoned that PERB has the authority to "petition the court for appropriate temporary relief or restraining order." Specifically, PERB adopted regulations setting forth procedures for responding to a request for injunctive relief:

- Step 1: Complaining party gives the opposing party 24 hours' notice of filing request for injunctive relief;
- Step 2: Complaining party files a request with PERB's general counsel to have PERB apply to the court for injunctive relief;
- Step 3: The general counsel initiates an investigation;
- Step 4: The general counsel must make a recommendation to PERB within the following time frame:
  - 120 hours after the receipt of a request; or
  - 24 hours after the receipt of a request when the request is made ***during a work stoppage*** or lockout
- Step 5: PERB decides whether to seek injunctive relief in court based on its general counsel's recommendation; and
- Step 6: If PERB is unable to act within 24 hours, then PERB's general counsel may apply to the court for an injunction if there is "reasonable cause" to believe that such action "is in accordance with [PERB] policy and that legal grounds for injunctive relief are present."

The court disagreed with the City's argument that a "PERB remedy can never be adequate because PERB's regulations prevent it from acting with sufficient speed to prevent the proposed public employee strike from leading to irreparable harm to the public welfare." In explaining its decision, the court noted that the Union "agreed to give, and did give, the City at least ***72 hours' notice*** of the possibility of a strike." Because PERB's minimum time to seek injunctive relief is ***24 hours***, the court reasoned that "there was sufficient time for the City to have asked PERB for injunctive relief and sufficient time for PERB to have decided whether to apply for such relief in court."

Similarly, the court rejected the Union's contention that the doctrine of exhaustion of administrative remedies always applies to public employee strikes arising under the MMBA. The court found the Union's argument that PERB's remedies are always adequate to be without merit. The court also rejected the Union's argument that "if a matter is subject to PERB's initial jurisdiction, the proceedings before that board must be finalized before there can be jurisdiction in the courts." In addressing the authority the Union relied on, the court explained that such reliance was misplaced: the authority "simply held that the conflict there in issue between PERB's jurisdiction and the court's jurisdiction could be resolved by having the superior court stay the judicial proceeding, leaving it to the court's 'discretion as to how long the judicial proceedings should be stayed' while proceedings before PERB were pending."

Conclusion

The California Supreme Court's decision in *City of San Jose v. Operating Engineers Local Union No. 3* reflects the public policy

that "[w]henever possible, labor disputes asserting unfair labor practices under the MMBA should be submitted first to PERB rather than a court." In reaching this decision, the court affirms PERB's initial jurisdiction in attempting to resolve and/or remedy threatened strikes that would be an unfair practice under applicable law.

Despite this overall holding, the court did provide some guidance that if an exception to the doctrine of exhaustion of administrative remedies can be established, then PERB may be divested of its initial jurisdiction. In light of the court's discussion, when a public entity claims the existence of an exception to the doctrine of exhaustion of administrative remedies, "the trial court should afford due deference to PERB and issue injunctive relief only when it is clearly shown that PERB's remedy would be inadequate." Although the court's reasoning makes it clear that establishing the existence of the exception will not be easy, it may be possible, based on the individual facts of a specific case, to rely on the exception if the entity can show that: (1) the administrative procedure is too slow to be effective; (2) irreparable harm would result by requiring exhaustion of administrative remedies before seeking judicial relief; or (3) seeking administrative remedies would be futile.

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[1] Citing *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Ass'n*, 38 Cal. 3d 564, 586 (1985).

[2] Citing *El Rancho Unified Sch. Dist. v. National Educ. Ass'n*, 33 Cal. 3d 946, 953 (1983).

[3] Citing *San Diego Teachers Ass'n v. Superior Court*, 24 Cal. 3d 1, 12 and 14 (1979).

[4] *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 195 (1978); see also *Pittsburg Unified Sch. Dist. v. California School Employees Ass'n*, 166 Cal. App. 3d 875, 884-886 (1985) (extending the *Sears* holding to PERB's jurisdiction under the EERA).