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MCLE Self-Study:

Harmonization and "Gap Filling": 10 Years of the MMBA at PERB

By Timothy G. Yeung & Erich Shiners

Lately, the attention of the nation has been focused on public employees and the unions that represent them. In states such as Wisconsin and New Jersey, legislation has been introduced to scale back the collective bargaining rights of public employees. Critics of public sector collective bargaining have blamed Governor Jerry Brown for helping start a national trend by giving California public sector workers the right to unionize during his first two terms as Governor (1975-1983).[1] However, the first California law that gave public employees the right to collective bargaining was the Meyers-Milias-Brown Act (MMBA). The MMBA was signed in 1968, not by Governor Jerry Brown, but by Governor Ronald Reagan, a former union president.[2] The MMBA, modeled in part after the private sector's National Labor Relations Act (NLRA), grants employees of cities, counties, and most special districts the right to bargain collectively.

ENACTMENT OF THE MMBA

The first labor relations law in California, and one of the first in the nation for public employees, was the George M. Brown Act (Brown Act), enacted in 1961.[3] The Brown Act originally covered all public employers in California and gave employees the right to meet and confer over employment conditions and employer-employee relations.[4] However, the "meet and confer" requirement under the Brown Act differed significantly from the MMBA. The Brown Act's requirement to "meet and confer" only obligated the employer to "consider as fully as it deems reasonable such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action."[5] The Brown Act did not require the parties to bargain in good faith to impasse and it included no provision for exclusive representation.[6]

With the enactment of the MMBA in 1968, cities, counties and special districts were no longer covered by the Brown Act. Unlike the Brown Act, the MMBA

— Inside the Review —

provided for the recognition of exclusive representation in collective bargaining.[7] The MMBA also included a requirement that employers had to bargain in good faith with employee organizations[8] and that once the parties reached agreement, they could adopt a binding memorandum of understanding.[9] The MMBA also permitted each local agency to adopt it own employer-employee relations rules to administer the MMBA's requirements.[10]

SB 739: PERB OBTAINS JURISDICTION OVER THE MMBA

Unlike the NLRA, the MMBA, as enacted, did not provide for administrative enforcement. A party seeking to enforce provisions of the MMBA had to seek relief directly in superior court.[11] This changed with the passage of Senate Bill 739 (SB 739), authored by Assemblywoman Hilda Solis—now the U.S. Secretary of Labor—and signed by Governor Gray Davis in 2000. Under SB 739, enforcement of the MMBA was transferred to the Public Employment Relations Board (PERB).

Public sector unions lobbied heavily for the passage of SB 739. Proponents of the bill argued that the MMBA had "no effective enforcement procedures except for court action, which is time-consuming and expensive."[12] Proponents further argued that "[o]ne of the basic principles of an effective collective bargaining law should be to provide for enforcement by an administrative agency with expertise in labor relations. The appropriate role for the courts is to serve as an appellate body."[13]

An array of organizations representing public agencies, including the California State Association of Counties and the League of California Cities, argued against SB 739. Opponents of the bill argued that "locally-determined dispute resolution procedures are adequate and more appropriate than the transfer of these responsibilities to PERB."[14] In addition, opponents argued that other provisions in SB 739, such as one allowing agency fees, should be negotiated between the parties through collective bargaining instead of being mandated by legislation.[15]

The proponents of SB 739 prevailed and the bill was signed into law. On July 1, 2001 California cities, counties, and most special districts came under the jurisdiction of PERB, along with almost 2 million employees. July 1, 2011 marked the ten-year anniversary of PERB's jurisdiction over the MMBA. In recognition of that anniversary, it is appropriate to review developments under the MMBA over the last ten years.

PERB'S JURISDICTION OVER THE MMBA

PERB is a quasi-judicial administrative agency created by the Educational Employment Relations Act (EERA) in 1975.[16] Making its debut as the Educational Employment Relations Board on July 1, 1976, the agency was renamed the Public Employment Relations Board in 1978 when it obtained jurisdiction over the State Employer-Employee Relations Act.[17] The following year, PERB became responsible for administering the Higher Education Employer-Employee Relations Act (HEERA).[18]

For the past ten years, PERB has had exclusive initial jurisdiction to determine whether a local agency or employee organization subject to the MMBA has violated the statute and, if so, to determine the appropriate remedy to effectuate the purposes of the Act.[19] PERB also has jurisdiction over alleged violations of an agency's local rules adopted pursuant to Cal. Gov't Code § 3507.[20]

PERB does not have jurisdiction over all employees of local government agencies. Employees of the City of Los Angeles and the County of Los Angeles are excluded from PERB's jurisdiction;[21] those agencies have their own employee relations commissions that administer the MMBA.[22] Peace officers as defined in Cal. Penal Code § 830.1 must resort to the courts to enforce the MMBA because they too are excluded from PERB's jurisdiction.[23] Additionally, while management employees have representation rights under the MMBA, they may not file unfair practice charges with PERB and thus presumably must resort to the courts for enforcement of the Act.[24]

Immediately following PERB's assumption of jurisdiction over the MMBA, it was uncertain whether PERB would interpret the MMBA consistently with the EERA, HEERA and Dills Act, or whether it would chart a different course for this particular act. Before PERB had the opportunity to rule on many MMBA cases, the California Supreme Court resolved much of the uncertainty with its decision in *Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board*.[25] In that decision, the court held that the six-month statute of limitations under the other acts administered by PERB, and not the three-year limitations period in Cal. Civ. Proc. Code § 338(a), applied to unfair practice charges filed with PERB under the MMBA.[26] In so holding, the court emphasized the need for uniformity in public sector labor relations and essentially directed PERB to harmonize the statutes under its jurisdiction to achieve that result.[27]

Over the past eight years, PERB has largely followed the court's command. In its MMBA decisions, PERB has applied procedural doctrines developed in EERA, HEERA, and Dills Act decisions. For example, PERB has extended the equitable tolling doctrine from *Long*

Beach Community College District[28] to the MMBA. Thus, just as under the EERA, the statute of limitations under the MMBA is tolled while the parties utilize a mutually agreed-upon dispute resolution procedure for the dispute that is the subject of the unfair practice charge.[29] Similarly, the Board has applied the continuing violation doctrine, as articulated in *San Dieguito Union High School District*,[30] in MMBA cases. As a result, under the MMBA, an alleged violation outside the limitations period may be revived by a similar but independent violation within the limitations period.[31]

PERB also has applied, for the most part, the substantive law developed under the EERA, HEERA, and Dills Act when deciding MMBA cases:

- To establish retaliation, the charging party must prove that the employer took adverse action against the employee because of the employee's protected activity.[32]

- To establish an unlawful unilateral change, the charging party must prove that: (1) the respondent changed a past practice or written policy; (2) without providing the charging party notice and an opportunity to bargain over the change; (3) the change was not an isolated contract breach; and (4) the change involved a subject within the scope of representation.[33]

- To establish bad faith bargaining, the charging party must prove, based on the totality of the circumstances, that the respondent did not have a genuine desire to reach agreement and merely went through the motions of negotiation.[34]

Recently, PERB engaged in further harmonization of the MMBA with the other acts it administers when it applied MMBA case law in a decision that arose under the Dills Act. In *State of California (Department of Personnel Administration)*,[35] the California Correctional Peace Officers Association alleged that the State discriminated against union members when it offered a lower-cost dental benefit to non-member employees. In holding that the charge stated a prima facie case of discrimination, the Board relied on *Campbell Municipal Employees Association v. City of Campbell*.[36] In that decision, the court adopted a standard drawn from federal labor law under which a prima facie case of discrimination may be established by showing that the employer's conduct could have harmed employee rights to some extent.[37] The employer then bears the burden of proving its conduct was justified by operational necessity (if harm to employee rights is slight), or that its conduct was occasioned by circumstances beyond its control and no alternative was available (if the conduct was inherently destructive of employee rights).[38] In its decision, PERB adopted the *Campbell* standard for use in cases where an employer treats two groups of employees differently based on one group's protected activity.[39]

One important area in which PERB has declined to harmonize the MMBA with the other laws it administers is the determination of whether a subject falls within the scope of representation. In *Anaheim Union High School District*,[40] the Board developed a test for determining whether subjects not specifically enumerated in Cal. Gov't Code § 3543.2 are within the scope of representation under the EERA. Under that test, a subject must be negotiated if: "(1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment; (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission." The California Supreme Court endorsed this test in *San Mateo City School District v. Public Employment Relations Board*.[41] The Board has continued to apply this test in EERA cases[42] and has adopted a modified form of the test in HEERA and Dills Act cases.[43]

The California Supreme Court has developed a slightly different test for determining whether a subject is within the scope of representation under the MMBA. In *Claremont Police Officers Association v. City of Claremont*,[44] the court, relying on its earlier decision in *Building Material & Construction Teamsters Union v. Farrell*,[45] held that an employer's action must be negotiated if: (1) it has a "significant and adverse effect" on bargaining unit members' terms and conditions of employment; (2) the effect does not arise "from the implementation of a fundamental managerial or policy decision;" and (3) "the employer's need for unencumbered decision-making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question."[46] Significantly, by requiring the employer's action to have a "significant and adverse effect" on employees, this test, unlike the *Anaheim* test, imposes no duty to bargain over inconsequential or de minimis changes in terms or

conditions of employment. To date, PERB has applied the *Claremont* test only in cases arising under the MMBA.[47] In light of PERB's reliance on MMBA precedent in *State of California (Department of Personnel Administration)*, it remains to be seen whether PERB ultimately will harmonize the two scope of representation tests.

PERB AND LOCAL AGENCY RULES

The most significant difference between the MMBA and the EERA, HEERA and Dills Act is that the MMBA allows local agencies to adopt their own rules governing representation matters and impasse resolution.[48] The courts held long ago that such rules must be "reasonable," i.e., not contrary to the purposes of the MMBA.[49] With the transfer of jurisdiction, PERB now has authority to declare local rules unreasonable. In its first decision to address the reasonableness of a local rule, PERB held that one requiring an employee organization to show it represented at least three percent of the permanent positions in the county before it could be registered was unreasonable as applied because it amounted to a presumptive bargaining unit determination.[50] In a later decision, PERB clarified that its reasonableness inquiry does not ask whether the local rule is the most reasonable, but only whether the rule is contrary to the purposes of the MMBA.[51] Applying this test, PERB invalidated a local rule that required a majority of employees in the bargaining unit to vote in an election for it to be valid,[52] and upheld a city charter provision requiring binding arbitration of issues on which the parties are at impasse.[53]

The MMBA also granted PERB the authority to adopt regulations to apply when a local agency has no rule governing a particular situation.[54] Pursuant to this authority, PERB adopted representation regulations

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for the MMBA that mirror those for the other acts it administers.[55] These regulations clearly apply when an agency has not adopted any local representation rules.[56] However, most agencies have some local rules, although few are as extensive as PERB's MMBA regulations.

Surprisingly, the exact relationship of PERB regulations to local rules remained unresolved for most of the first decade of PERB's MMBA jurisdiction. In *County of Siskiyou/ Siskiyou County Superior Court*,[57] the Board finally addressed the issue and held that PERB's regulations serve to "fill in the gaps" when a local agency has no rule on a particular representation matter. In that case, the county and court had local representation rules that did not provide for amendment of an employee organization's certification. As a result, an employee organization seeking to disaffiliate from an international union filed a petition for amendment with PERB. The Board held that it had jurisdiction over the petition because the local rules did not provide for amendment of certification. The Board held in a later decision that PERB regulations apply only when the local agency has no rule that can accomplish what the petitioner is seeking without placing an undue burden on the petitioner.[58] PERB further noted that local rules may vary from PERB regulations and still be reasonable, as long as they do not impair employee rights contrary to the purposes of the MMBA. Taken together, these recent decisions establish that local rules govern when they explicitly cover a particular issue or provide a means of accomplishing the petitioner's goal without undue burden; otherwise, PERB regulations apply.

CONCLUSION

According to the Bureau of Labor Statistics, 2009 was the first year in which unionized public sector employees outnumbered unionized private sector employees nationally. According to those statistics, nationwide there were 7.9 million public sector employees belonging to a union compared with 7.4 million union workers in the private sector. As a result, we are entering an era in California and the nation where the practice of labor law is rapidly becoming dominated by the public sector. And among the public sector collective bargaining statutes in California, the MMBA covers the most employees and generates the most cases at PERB. It therefore will be interesting to watch the development of the MMBA in the future under PERB's jurisdiction. ⚖