# THE PUBLIC SECTOR

## Court of appeal rules challenges to San Diego's pension reform must be heard initially by PERB

by Jonathan V. Holtzman

There is an increasing trend toward citizen initiatives for pension reform. A notable aspect of these citizen measures is that they're often led by elected officials acting in their private capacity. That's the case in San Diego, where the citizen-sponsored Comprehensive Pension Reform Initiative (CPRI), championed by, among others, San Diego's mayor, recently passed by a 2-1 margin.

There is a notable difference between ballot measures placed on the ballot by a board of supervisors or city council under its constitutional powers and a measure placed on the ballot through the signatures of citizens. Under the case of *People Ex. Rel. Seal Beach*, a local government must meet and confer with unions before the measure is placed on the ballot. That isn't the case with citizen initiatives because, among other things, citizens have no ability or right to negotiate directly with unions, and they have a right under the California Constitution to place initiatives on the ballot.

So those of us who regularly work on initiatives were shocked when the Public Employment Relations Board (PERB) took the surprising position that the San Diego citizen initiative was invalid because the city had failed to meet and confer. While the trial court not only denied PERB's requested injunction but also actually barred the board from holding a hearing on the alleged unfair labor practice, the California Court of Appeal has sent the matter back to PERB for a hearing, holding on very narrow grounds that the board has exclusive initial jurisdiction over unfair labor practice charges—even charges that implicate the free-speech rights of citizens.

While there is some technical merit to the court of appeal's holding that PERB generally has initial jurisdiction over unfair labor practice charges, the decision exalts form over substance and almost certainly heralds a long fight in which the board will try to limit citizens' initiative rights in the misguided view that citizens have no right to weigh in on matters such as pension reform—because the exercise of democratic rights interferes with traditional private-sector labor law principles.

The outcome of the case turned on a fairly narrow issue: whether the CPRI was a citizen initiative or a government-sponsored ballot measure. Pointing to the mayor's advocacy and support of the measure, the San Diego Municipal Employees Association contended that the mayor was acting as an agent of the city and the initiative process was a "sham device" used by the city to evade its meet-and-confer obligations. The city, on the other hand, contended that the mayor's advocacy was an exercise of his individual right to freedom of expression under the First Amendment.

The problem with this distinction is that elected officials are often involved in citizen initiatives. But unless they are supported by a majority of their governing body, they have no power to place the matter on the ballot. So in government law terms, they are acting merely as citizens. And they have the same free-speech rights as ordinary citizens. To argue otherwise would suggest that a mayor who was unable to get enough city council votes to place a matter on the ballot would also be precluded from championing a citizen initiative individually because of his ties to the government. The sad truth is that often only those who are associated with government have the knowledge to put together a complex initiative and understand the urgency of a complex challenge such as pension reform.

This case reinforces the judicial trend of deferring to PERB's administrative processes on issues, even of constitutional dimension, on which the court and PERB jurisdiction coincide. I think the board's actions here are wrong-headed; while it undoubtedly will continue to erode its credibility by pursuing this case, in the end, the constitution will trump industrial labor law in the public sector.

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