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SPECIAL UPDATE

PUBLIC SECTOR LABOR

February 1, 2016

County of Riverside v. PERB and SEIU

Legal Challenge to Strike Down AB 646

Oral Argument Scheduled in the California Court of Appeal

1. AB 646

In a long awaited decision since AB 646 was enacted on January 1, 2012, the California Court of Appeals has scheduled oral argument on our client County of Riverside's challenge to strike down AB 646, and the expansive interpretation by PERB.

California Assembly Bill 646 amended public sector collective bargaining rules in 2012 by: (1) granting unions the unilateral right to request PERB oversee a mandatory full evidentiary "factfinding" when a Last Best and Final Offer (LBFO)/impasse is declared after collective bargaining a new agreement; and (2) thus also rescinded a public entity's Constitutional/statutory right to implement its LBFO at the time impasse is declared. If a union requests AB 646 factfinding at impasse, the public entity's LBFO is automatically stayed until the mandatory factfinding process is completed, a *minimum* of 90 days. This newly imposed burdensome and costly post-impasse factfinding process includes selection of a factfinding panel, discovery, investigation, issuance of subpoenas/document demands, evaluation of the public agency's last best final offer against numerous mandatory economic and non-economic factors, a hearing, calling of witnesses, briefing, advisory recommendations, and, a public hearing on the advisory recommendations of the factfinding panel. Only after this process is completed can the public entity implement its LBFO as issued, or as modified in consideration of the advisory recommendations of the factfinding panel. (The Meyers Miliias Brown Act (MMBA) at California Government Code section 3505.4).

Moreover, almost immediately after AB 646 was enacted, public sector unions and PERB attempted to apply AB 646's burdensome and costly factfinding procedures to every single meet and confer issue that a public entity/public employee union may discuss at any time during the life of an MOU/Collective Bargaining Agreement, rather than just at impasse when negotiating a new or successor MOU/Collective Bargaining Agreement. If a public entity/public employee union did not reach agreement on a provision pertaining to dress code, the union could declare "impasse," and request full factfinding procedures over dress code. PERB obliged the unions, and issued numerous rulings holding that AB 646 factfinding procedures applied over every single issue arising at any time when a union declared "impasse" and requested AB 646 factfinding procedures.

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2. Our Case – Meeting and Conferring Over Amendments to an Expanded Background Investigation Policy for I.T./Computer Personnel

In 2011, in compliance with newly implemented State and Federal laws, the County of Riverside expanded the scope of its background investigation for applicants and employees who had access to computer information. The County and SEIU engaged in exhaustive negotiations over the expanded policy for over a year, after which time the policy was unilaterally implemented. In an initial PERB charge, it was found that implementation of the policy was a management right in compliance with law, but that the effects of the policy were subject to meeting and conferring (which was never disputed.) The parties reached a PERB authorized settlement in which it was agreed the parties would undertake four additional good faith meet and confer sessions. When agreement still was not reached, SEIU declared “impasse” over the issue and requested factfinding to PERB. The County opposed/objected to SEIU’s request for factfinding on the grounds that: (1) SEIU (and PERB) had agreed to settle the matter by attending 4 more meet and confer sessions; and (2) the plain language of AB 646 applied the exhaustive post-impasse factfinding procedures to impasse after collective bargaining a new or successor MOU/CBA, and not to every single issue that arises between a public entity/public employee union at any time.

PERB obliged SEIU’s request, ruling that AB 646’s burdensome and costly factfinding procedures are not limited to impasse after negotiating a new or successor MOU, but apply to every single issue that may arise between a public entity and public employee union at any time – at the union’s request. The County filed suit and parties stayed their factfinding over the expanded background investigation policy for IT/computer personnel.

3. The Lawsuit: County of Riverside v. PERB, SEIU (RCSC Case No. 130661)

On behalf of the County of Riverside, our office filed a civil action against PERB and SEIU seeking declaratory, injunctive and mandamus orders: (1) commanding PERB and SEIU to cease all AB 646 factfindings or requests for factfinding over single issues; and (2) declaring that AB 646 factfinding procedures are unconstitutional entirely and under any circumstances, as interfering with the County’s rights under the CA Constitution to exclusive control over its budget/finances and employee compensation.

The County argued: (1) the plain language and logic of AB 646 applies its exhaustive factfinding process and procedures to impasse after collective bargaining for a new agreement, and not to every single issue that may arise at any time; (2) applying AB 646 factfinding processes and procedures to single issues would lead to absurd results (i.e., among other things, AB 646 mandates the factfinding panel to evaluate the LBFO against “the consumer price index,” “the entity’s ability to pay,” and numerous other factors. These factors obviously apply to evaluate a new MOU/CBA, but are absurd to consider over a disputed single issue of an expanded background investigation for IT/computer personnel); and (3) that the extensive and mandatory factfinding procedures of AB 646, the mandatory stay of implementation of the LBFO during the factfinding process (an absolute minimum of 90 days), and the imposition of an advisory recommendation and public hearing on that recommendation, all unlawfully “interfere with” the

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– Labor & Employment Law –

County's exclusive rights under the CA Constitution to exclusive control of its budget and employee compensation. The County also argued that such post-impasse procedures are unlawful in that they interfere with and adversely impact the entire collective bargaining process. Imposing such post impasse procedures promotes bad faith bargaining, and undermines good faith attempts to reach agreement if that agreement is not final and can simply be challenged.

4. PERB's Shocking Counter-Suit Against the County

In response to the County's legal challenge of PERB's decision, PERB shockingly counter-sued the County by filing an Anti-SLAPP motion against the County. PERB astoundingly argued that the County's simple exercise of its numerous rights to appeal a PERB decision unlawfully chilled/interfered with the PERB's First Amendment rights. The County responded by arguing that: (1) the County has numerous express statutory and Constitutional rights to challenge the decision of an administrative agency, as this is the most basic and fundamental process of the United States Judicial system; (2) it is a shocking oligarchical anti-Constitutional abuse of governmental authority for a quasi-judicial agency such as PERB to assert that its decisions are infallible, not appealable, and, that any party who dare even exercise their right to appeal a PERB decision should be punished; and (3) it was thus PERB's Anti-SLAPP motion which unlawfully chilled/challenged the County from exercising its statutory and Constitutional rights to access the courts to seek redress of grievances, and not vice-versa.

5. The Superior Court Rulings

- a. The County Obtains Sweeping Injunctive, Declaratory and Mandamus Orders Precluding PERB from Proceeding with Any and All AB 646 Factfindings over Single Issues**
- b. The Court Issues \$15,000 in Sanctions Against PERB for Filing an Anti-SLAPP Motion Against the County for Simply Exercising its Right to Challenge PERB's Ruling**

After full briefing of the matter, and extensive oral arguments, the Superior Court issued the following orders:

The Superior Court granted the County's motions/claims for Mandamus, Injunctive and Declaratory Relief, and executed three sweeping orders **commanding PERB and SEIU to cease all single issue factfindings, and not request or order any more.** The Court found that PERB's interpretation that AB 646 applies to single issues was "clearly erroneous." Notwithstanding these orders, PERB has continued to grant public employee union's requests for factfinding over single issues.

The Superior Court denied PERB's anti-SLAPP motion against the County, finding that *"no reasonable attorney would have believed that PERB's anti-SLAPP motion had merit."* The Court thus further **ordered PERB to pay the County \$15,000 in attorney's fees for having to oppose PERB's anti-SLAPP motion.** The Court agreed that PERB's anti-SLAPP motion against the County would be comparable to a Judge suing a party for simply exercising their right to appeal the Judge's decision to the Court of Appeal.

The Superior Court denied the County's motion/Constitutional claim to strike down AB 646 entirely as an unconstitutional interference with the County's exclusive rights to control its own budget and

THE ZAPPIA LAW FIRM

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– Labor & Employment Law –

employee compensation. The Court’s initial tentative ruling was that, because AB 646 imposes an “advisory” factfinding opinion, it was not unconstitutional because the County retains the ultimate final decision to implement its LBFO or not. However, after oral arguments the Superior Court modified its final ruling on this point. The County argued that this often repeated argument: (“that under AB 646 the public entity retains the final decision”) is simply not the Constitutional standard. The Constitutional standard is that “the legislature shall pass no law that “*interferes with*” the County’s right to control its own budget and employee compensation. A law need not completely usurp the County’s right to control its budget and employee compensation, it may not in any way “interfere with” these rights. In response, the Superior Court’s final ruling was that AB 646 factfinding procedures are Constitutional because they do not “substantially interfere with” the County’s rights to control its own budget and employee compensation.

The Superior Court denied the County’s motion for attorney’s fees, in a hotly disputed and close call. The Court found that (1) the County was the prevailing party; and (2) the County’s lawsuit conferred a significant benefit to a large class of people. However, the Court found that the County’s interest is not disproportionate to the burden of prosecuting the litigation.

6. The Appeal: County of Riverside v. PERB, SEIU, CA Court of Appeal, Fourth District, Division One, San Diego, Appeal No. D060695

All 4 issues have been appealed, cross-appealed and exhaustively briefed. The League of California Cities and California State Association of Counties have filed amicus briefs in support of the matter.

Oral argument is scheduled on March 14, 2016 at 1:30 p.m. in the California Court of Appeal, Fourth Appellate District, First Division (San Diego).