

**STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD**



SAN MATEO COUNTY SUPERIOR COURT,

Charging Party,

v.

SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 521,

Respondent.

Case No. SF-CO-7-C

PERB Order No. IR-60-C

February 20, 2019

Appearance: Wiley Price & Radulovich by Monna R. Radulovich, Attorney, for San Mateo County Superior Court.

Before Banks, Shiners, and Krantz, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request for injunctive relief that Charging Party San Mateo County Superior Court (Employer) filed on October 9, 2018, in response to notice from Respondent Service Employees International Union Local 521 (SEIU) that it was calling a strike beginning on October 15, 2018. The Employer asked PERB to file suit in superior court and seek an injunction requiring SEIU to exclude from the strike a number of positions Employer claimed are essential to public health or safety. SEIU did not oppose the Employer's request. After we granted the Employer's request, in part, and on the morning of October 11, 2018, PERB's Office of the General Counsel (OGC) e-mailed the parties a determination letter containing the following notification:

By direction of the Board, the request for injunctive relief in the above-entitled matter is granted, in part, as to [five positions] with the understanding that Office of the General Counsel will not request an injunction as to any of the five positions that SEIU agrees, by 4:00 p.m. today, will not participate in the strike.

In this decision, we explain our reasons for granting the Employer's request in this conditional manner.

### DISCUSSION

Because the right to strike “goes to the essence of labor law,” *Fresno Unified School Dist. v. National Education Assn.* (1981) 125 Cal.App.3d 259, 268, if a PERB-covered employer believes a strike should be enjoined, it usually must ask PERB to seek an injunction on its behalf. (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 611 (*City of San Jose*) [city could not establish exception to rule requiring it to seek injunctive relief through PERB, because union gave city 72 hours' notice of upcoming strike, which was sufficient time for PERB to determine whether to seek injunctive relief and to obtain such relief if warranted]; see *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 13 [recognizing that PERB has “discretion to withhold as well as pursue” a strike injunction]; accord, *Ahearn ex rel. NLRB v. International Longshore and Warehouse Union, Locals 21 and 4* (9th Cir. 2013) 721 F.3d 1122, 1130 [private sector employer seeking to enjoin union activity must pursue injunction through the National Labor Relations Board (NLRB)].)

PERB cannot seek an injunction unless it finds (1) “reasonable cause” to believe an unfair practice has been or will be committed; and (2) that injunctive relief is “just and proper.” (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 895-896 (*Modesto*); *City of Fremont* (2013) PERB Order No. IR-57-M, p. 17.) Courts considering PERB's injunctive relief requests have recognized that PERB's

preliminary determinations are generally afforded deference because PERB is California's expert public sector labor relations agency, is experienced in assessing complex labor disputes and their impact on the public, and has a dedicated staff of attorneys to study the parties' submissions in light of previous experience, precedent, and competing interests. (See, e.g., *El Rancho Unified School Dist. v. National Educational Assn.* (1983) 33 Cal.3d 946, 958 [PERB's mission is squarely focused on the public's interest, which includes both protecting employee rights and protecting the public]; *Modesto, supra*, 136 Cal.App.3d at p. 893 [PERB's initial exclusive jurisdiction is modeled on National Labor Relations Act preemption, and based on the "perceived incapacity of [the judicial and legislative branches], acting alone, to prove an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power . . . to further the common good."].)<sup>1</sup>

In its request, the Employer alleged that SEIU's planned strike would constitute an unfair practice because it included employees the Employer believed provide services essential to public health and safety. A union violates its duty to bargain in good faith if it causes a strike by one or more employees whose absence from work imminently and substantially threatens public health or safety. (*City of San Jose, supra*, 49 Cal.4th at pp. 606-608; *Sacramento County Superior Court (United Public Employees Local 1)* (2015) PERB Order No. IR-59-C, p. 2 (*Sacramento County Superior Court*).)<sup>2</sup>

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<sup>1</sup> At later stages of litigation, including at an evidentiary hearing following issuance of a complaint and in subsequent proceedings thereafter, neither PERB nor the parties are bound by preliminary determinations PERB made based upon the parties' written submissions at the injunctive relief stage. (*City of Fremont, supra*, PERB Order No. IR-57-M, p. 19, fn. 8.)

<sup>2</sup> This "essential employee" standard derives from *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564 (*County Sanitation*), and we therefore refer to it herein as the *County Sanitation* standard.

When an employer asks PERB to seek an injunction against a strike that includes allegedly essential employees, we are called upon to make a preliminary determination as to whether certain positions satisfy the *County Sanitation* standard. (*Sacramento County Superior Court, supra*, PERB Order No. IR-59-C, pp. 3-4.) In doing so, we assess each position on a case by case basis.

We consider the nature of the services the alleged essential employees perform and whether the employer has clearly demonstrated that disruption of such services for the length of the strike would imminently and substantially threaten public health or safety. (*Sacramento County Superior Court, supra*, PERB Decision No. IR-59-C, pp. 2-3.) If the employer has made this showing, we next consider whether the employer has clearly demonstrated that it requires an injunction to protect the public even after fully accounting for all possible service reductions and coverage options, including: (1) planning to use supervisors, managers, non-bargaining unit personnel, and bargaining unit employees that the union has exempted from the strike or who have affirmatively indicated that they plan to work during the strike; (2) contacting all companies or other entities potentially able to provide replacement employees or services, and contracting with such entities if they indicate they can provide replacements; and (3) documenting the extent to which each of the aforementioned options may or may not be feasible, including the available companies or agencies offering temporary replacements, their responses when contacted, and any resulting contracts. (*Id.* at pp. 3-4; *San Francisco County Superior Court & Region 2 Court Interpreter Employment Relations Committee* (2018) PERB Decision No. 2609-I, p. 13.) Finally, for those employees that we preliminarily determine to be essential to public health or safety based on the above-described analysis, we must consider

what arrangements will protect the public while infringing as little as possible on employees' protected rights.<sup>3</sup>

However, under the *County Sanitation* and *Modesto* standards described above, if a union exempts from a planned strike certain employees or positions that PERB has preliminarily found to be essential, such an exemption will normally mean that (1) there is no "reasonable cause" to believe that the union is threatening an unfair practice as to those positions, and (2) injunctive relief is not "just and proper" as to those positions. Nonetheless, both of these criteria may be satisfied—notwithstanding the union's commitment to exempt certain positions from its strike—if the employer demonstrates that the union has violated or threatened to violate its commitment, or has offered an exemption that is insufficiently broad to protect public health and safety.<sup>4</sup>

We have treated union requests for injunctive relief against employers in the same manner, affording such employer respondents the opportunity to avoid injunctive relief, or to narrow the scope of the injunction that PERB seeks, by offering voluntarily to refrain from certain conduct. To the extent that an employer fully or partially moots a union's requested injunction by promising either to refrain from taking one or more of the threatened actions at

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<sup>3</sup> In some cases, the public may be sufficiently protected if the employees are on call, i.e., ready to cross the picket line if needed in the event of an emergency. In other instances, one or more employees may need to be at work for their entire shift in order to protect the public. Like all determinations under *County Sanitation*, we resolve these issues on a case by case basis, considering declarations and other information the parties submit.

<sup>4</sup> Exemptions, which some unions refer to as "line passes," take a variety of forms. Consistent with the discussion in footnote 3, *ante*, unions have at times issued only partial exemptions, indicating that certain employees will stand ready to cross the picket line and assist in the event of an emergency. In those instances in which the exemption only indicates that one or more employees stand ready to cross a picket line in the event of an emergency, PERB must determine if that level of exemption is sufficient to protect the public.

issue, or, in certain cases, to partially or fully restore the status quo and make affected parties whole as an interim measure, the burden shifts to the union to show why we should seek an injunction to require that which the employer is offering voluntarily.<sup>5</sup>

The instant case well illustrates these principles. After receiving the Employer's injunctive relief request, SEIU had an opportunity to contest the Employer's request, but declined to do so. When SEIU's briefing window elapsed and PERB thereafter partially granted the Employer's request, there was sufficient time to allow SEIU an opportunity to exempt certain employees that PERB preliminarily found to be essential and thereby forestall completely, or at least narrow, the need for PERB to file suit for injunctive relief. Because there were only two business days remaining before the strike was set to commence, the available time window for SEIU to make such an offer was relatively short. Nonetheless, we directed OGC to permit SEIU such an opportunity, and SEIU agreed to exempt from the strike each position that we preliminarily determined to be essential under *County Sanitation*. Accordingly, there was no reasonable cause to believe the strike would constitute an unfair practice and no basis to seek injunctive relief. As a result, we did not initiate injunction proceedings.

Three final points are worth noting. First, if SEIU had not, by the deadline OGC established, exempted all of the positions that we preliminarily determined to be essential, our order required OGC to file an ex parte application for a temporary restraining order as to the

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<sup>5</sup> The NLRB follows similar procedures when it considers whether to seek temporary injunctive relief against unions and employers alike. (See, e.g., NLRB Case Handling Manual, Part I, Unfair Labor Practice Proceedings (rev. 2018), §10238 [“[I]f the charged union ceases the alleged unlawful conduct and the Regional Office is satisfied that the conduct will not resume, the Regional Office should defer filing [an injunctive relief action]”]; *Id.* at §10320 [Regional Office should not seek injunction where changed circumstances render such action unnecessary].) These provisions of the NLRB Case Handling Manual are available at: <http://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/ulpmanual-september2018.pdf>.

non-exempted essential positions. In other words, we directed OGC to exclude from its injunctive relief request any positions that SEIU exempted from the strike, even if SEIU's offer covered only some of the positions we preliminarily found to be essential and OGC needed to file for injunctive relief as to the others.<sup>6</sup>

Second, our direction to OGC did not mandate that SEIU use any particular format in notifying PERB, the employer, and the affected employees if the union decided to narrow the scope of its planned strike. While OGC was available to help the parties reach a jointly negotiated and signed stipulation or agreement, our direction to OGC recognized that a joint agreement may not be feasible in every strike situation, due to time constraints, mutual mistrust, and other factors. In those circumstances, a letter from the union to PERB and the employer is often the clearest and most expeditious means to exempt from a strike certain positions that PERB has preliminarily found to be essential.

Lastly, if, following SEIU's offer, the Employer had presented information that SEIU violated or threatened to violate its agreement, OGC was authorized to seek injunctive relief immediately by appearing *ex parte* in superior court and notifying the court that exceptional circumstances prevented PERB from providing notice by 10:00 a.m. the previous day. (See Cal. Rules of Court, rule 3.1204(c).)<sup>7</sup>

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<sup>6</sup> This case did not involve an instance in which a respondent makes an offer after PERB has already initiated injunction proceedings in superior court, in which case we are called upon to decide whether to continue seeking injunctive relief considering the level of resources that OGC has already expended in pursuing an injunction, any reasons offered for the respondent's delayed decision, the interests of labor stability, and any other relevant facts or circumstances.

<sup>7</sup> PERB Regulation 32460 dictates that upon receipt of a request for injunctive relief, OGC must make a recommendation to the Board itself within 120 hours after receiving the request, and within 24 hours if a work stoppage or lockout is ongoing. (PERB Regulations are codified at Cal. Code Regs, tit. 8, § 31001 et seq.) The 120-hour and 24-hour timeframes

In sum, because SEIU voluntarily offered to exempt certain allegedly essential positions from its strike, we find no cause to seek extraordinary injunctive relief as to those positions. This conclusion conserves the parties' and PERB's resources and, over time, tends to promote harmonious labor relations under the statutes PERB administers.

### ORDER

Based on the foregoing findings and conclusions, and the entire record in this case, the Board GRANTS IN PART the request to seek injunctive relief in Case No. SF-CO-7-C.

Members Banks and Shiners joined in this Decision.

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establish the maximum amount of time that OGC may spend preliminarily analyzing the case and developing its recommendation to the Board. This case illustrates that, in practice, OGC further expedites its process to the extent necessitated by an imminently threatened strike, and the Board similarly acts on OGC's recommendation as quickly as possible to preserve PERB's ability to seek injunctive relief before a threatened strike commences, or as early as possible thereafter if a strike is already in progress. As noted *ante*, the Employer filed its request for injunctive relief on October 9, 2018, and OGC notified the parties that the Board had partially granted the injunctive relief request on the morning of October 11, 2018. OGC established strict timelines—including the parties' briefing deadlines, a deadline for OGC's recommendation to the Board, and a deadline for SEIU to narrow its strike—by working backward from the strike date and considering all relevant factors, including notice and calendaring requirements established under the California Rules of Court and local court rules.