Begging to Differ: *City of San Jose* Clarifies That PERB Has Initial Exclusive Jurisdiction

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IN THE FIRST of a series of expected decisions, the Sixth District Court of Appeal in *City of San Jose v. Operating Engineers Local No. 3*[1] reached the inexorable conclusion that the Public Employment Relations Board's jurisdiction with regard to strikes under the Meyers-Milias-Brown Act[2] is no different than PERB's jurisdiction with respect to strikes that occur under the other public sector labor relations statutes that the agency administers.

Although the MMBA has been on the books since 1961, it was not until legislation adopted in 2000, and effective in July 2001, that the legislature brought the MMBA within PERB's jurisdiction.[3] Until that time, cities and counties seeking to enjoin strike activity properly made application directly to the courts. The issue before the court in *City of San Jose*, then, was whether jurisdiction over local government employee strikes now properly lies with PERB or remains with the superior courts. "By vesting the agency with exclusive initial jurisdiction over the MMBA," the Sixth District correctly concluded, "the Legislature entrusted PERB with determining the permissibility of strikes by essential public employees that implicate the MMBA."[4] Accordingly, the court found that, as with every other statute that PERB administers, the agency has exclusive initial jurisdiction over strikes by public employees in MMBA-covered agencies.[5] As a practical matter, local governments seeking to obtain temporary restraining orders to partially enjoin strikes by their employees may not go directly to court, but rather must ask PERB to seek an injunction.

A Rebuttal to Jeffrey Sloan: Jeff, Lighten Up! Your Fears Are Unfounded

In his recent article in these pages,[6] Jeff Sloan, a former PERB assistant general counsel turned management lawyer, describes his reaction to the *City of San Jose* decision as the visceral one of "angst."[7] Not only, in Sloan's view, is *City of San Jose*

wrongly decided, but the decision, Sloan predicts, "will support and foment surprise strikes against essential public operations and functions."[8] In voicing these fears, Sloan ignores both long-standing California Supreme Court precedent with regard to PERB's role in public sector labor relations, as well as the long history of PERB's involvement with public employee strikes.

A review of Sloan's criticisms demonstrates that his argument really lies with the California Supreme Court's decades-old decision greatly expanding public employees' right to strike and with the legislature's more recent decision vesting jurisdiction over the MMBA in PERB. The *City of San Jose* decision is the logical — and appropriate — result of these earlier developments. The complete breakdown in municipal services prophesized by Sloan, however, is not grounded in fact. Rather, management's perspective on the case is characterized by expedience.

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City of San Jose *Harmonizes* County Sanitation District *and PERB Preemption Principles*

In 1985, the California Supreme Court rejected a long line of cases deeming public employee strikes unlawful, and concluded that "the common law prohibition against all public employee strikes is no longer supportable."[9] As the *County Sanitation* court held, the MMBA "removed many of the underpinnings of the common law *per se* ban against public employee strikes."[10] Therefore, the court found, the MMBA's "implications regarding the traditional common law prohibition [against strikes] are significant."[11] The court noted that the MMBA specifically extended the right to engage in union activities to city and county employees, and "the right to unionize means little unless it is accorded some degree of protection....A creditable right to strike is one means of doing so."[12]

The court acknowledged, however "that there are certain 'essential' public services, the disruption of which would seriously threaten the public health or safety," and thus provided that local government entities could apply to the courts on a case-by-case basis to seek to enjoin from striking those "public employees [who] perform such essential services that a strike would invariably result in imminent danger to public health and safety."[13] At the time that *County Sanitation* was decided, of course, PERB had yet to be vested with exclusive jurisdiction over local agency labor relations.[14] Thus, in June 2006, when the City of San Jose applied directly to the superior court for a restraining order against a work stoppage by employees whom it identified as "essential," the question was joined as to whether the legislative amendments to the MMBA now vest PERB with exclusive initial jurisdiction over requests for such relief.[15]

In parallel developments, beginning in 1979, the California Supreme Court in *San Diego Teachers Assn. v. Superior Court*[16] held that PERB has exclusive initial jurisdiction over a strike injunction action brought by a public employer covered under PERB's jurisdiction. Subsequently, California Supreme Court and Court of Appeal decisions consistently found that PERB is a specialized, quasi-judicial state agency which has exclusive jurisdiction over efforts by employers within its jurisdiction to enjoin strike activity. Indeed, since the creation of PERB in 1976, *every single appellate decision has reached the same conclusion*: If an employer that is covered by PERB jurisdiction raises allegations in court regarding strike activity, the matter is referred to PERB's exclusive initial jurisdiction.[17] Courts have applied this overarching principle of exclusive jurisdiction even when the employer does not allege a violation of any labor relations statute, but rather frames its complaint and allegations so as not to allege a violation of the statute.[18]

Four years after the California Supreme Court's decision in *San Diego Teachers*, the court reaffirmed and further clarified PERB's exclusive jurisdiction in *El Rancho Unified School Dist. v. National Education Assn.*[19] In *El Rancho*, the trial court, following *San Diego Teachers*, sustained the defendant

unions' demurrers to a lawsuit alleging a tort cause of action against the unions' strike.

The Court of Appeal, in contrast, found that PERB had no jurisdiction because the lawsuit was premised on a tort cause of action, and there was no arguable basis on which the strike could be found to constitute an unfair practice under the Educational Employment Relations Act.[20]

The California Supreme Court reversed, adopting the rule developed by the U.S. Supreme Court in determining whether the National Labor Relations Board has exclusive jurisdiction over a private sector labor dispute. Thus, exclusive jurisdiction in PERB exists where the *conduct* at issue is "*arguably protected or prohibited*" by the statute.[21] In *El Rancho*, the court concluded that the issues raised by the strike activity qualified under both prongs — the conduct was both "arguably protected" and "arguably prohibited."[22] It was with this backdrop that the court in *City of San Jose* considered whether the legislature's recent grant to PERB of jurisdiction over employers and unions operating under the MMBA likewise vested PERB with jurisdiction over strike injunctions arising in MMBA-covered entities.

Sloan contends that a strike by assertedly 'essential' employees constitutes only a violation of the common law, and not the MMBA.

A fourth California Supreme Court case, *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.*,[23] signals the answer to this question. In that case, the court considered the legislature's intent in vesting PERB with jurisdiction over the MMBA, and found that by extending PERB's jurisdiction to cover the MMBA, the legislature intended to create a "coherent and harmonious system of public employment relations laws" in the public sector in California.[24] The Supreme Court's determination was well supported, since the legislature, in vesting PERB with jurisdiction over the MMBA, defined PERB's jurisdiction solely by reference to PERB's already existing jurisdiction under EERA.[25]

Accordingly, now that it is established that PERB's jurisdiction with regard to the MMBA is identical to that of the other public sector labor relations statutes under its jurisdiction, the court must find that the *San Diego Teachers* holding that PERB's exclusive jurisdiction extends to claims that a strike will cause irreparable harm to the public, no matter what legal theory or allegation the employer claims it is asserting, applies equally to such claims under the MMBA. It is instructive to note that Sloan does not cite to *Coachella* in his analysis.[26]

Rather, Sloan — and the public employers in these cases — contends that a strike by assertedly "essential" local government employees constitutes *only* a violation of the common law, and does not implicate the MMBA.[27] In *City of San Jose*, however, the Sixth District agreed with the union's position that *San Diego Teachers* is entirely dispositive on this point. The Sixth District noted that in *San Diego Teachers*, the court found that an employer's allegation that strike activity violates the common law also can be framed as an unfair practice, specifically, the failure to negotiate in good faith in violation of EERA, and that such a strike was therefore at least "arguably prohibited" by EERA.[28]

As the union pointed out, in *San Diego Teachers*, the trial court had enjoined the union from striking based on a series of appellate decisions from the late 1960s and early 1970s finding public employee strikes to be illegal under the common law.[29] Thus, the very cause of action which the Supreme Court found to be preempted by PERB's exclusive jurisdiction was in fact a claim that the strike activity should be enjoined based on a *common law rule regarding strikes*. As the *San Diego Teachers* court found, if a union's strike "were held legal it would not constitute a failure to negotiate in good faith. As an illegal pressure tactic, however, its happening could support a finding that good faith was lacking."[30] *City of San Jose* adopts this long-standing reasoning in holding that "[d]espite its label as a common law claim, the underlying activity — an allegedly illegal strike — may run afoul of the MMBA. The 'arguably prohibited' branch of the preemption doctrine thus is satisfied."[31]

The *City of San Jose* court likewise found that the union's strike conduct was arguably protected because "public employees covered by the MMBA enjoy a general right to strike."[32] Regardless of whether the MMBA is the source of the general right to strike, following *County Sanitation*, the *City of San Jose* court found "the statute's 'implications' concerning that right 'are significant.'"[33] The court accordingly concluded, "[t]he threatened strike activity thus is arguably protected under the MMBA."[34] In this sense, the situation here is strikingly parallel to the situation facing school employers in 1979, when the California Supreme Court held that injunctive relief requests to enjoin strikes illegal at common law should be brought before the then-fledgling agency, PERB.

The Legislature Already Made the Policy Decisions With Which Sloan Takes Issue When it Placed the MMBA Under PERB's Jurisdiction

A review of the case law, then, demonstrates that *City of San Jose* was correctly decided. Indeed, as Sloan concedes, "a confluence of many factors" led to the not-unexpected Court of Appeal decision. And, as Sloan's commentary displays, the decision itself is in accord with legal precedent; rather, it is the policy implications of the decision — and of the legislative and judicial decisions on which it rests — with which Sloan takes issue. Each of these policy decisions, however, has been considered — and discarded — by the legislature and the courts, and need not be subject to reconsideration by either body.

Sloan's premise that the courts, rather than PERB, should have exclusive initial jurisdiction over strike injunctions rests not on the law or on the facts, but rather on expedience. Thus, Sloan writes, "[r]equiring this extra layer of bureaucracy just to arrive at the same destination serves no purpose except delay."[35] We beg to differ. Conferring exclusive initial jurisdiction on PERB not only does not unduly delay the issuance of strike injunctions but moreover, ensures a result that better effectuates the purposes of the MMBA, even if less expedient for employers.

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In upholding the adequacy of PERB's remedies, the *City of San Jose* panel rejected the city's argument that PERB is "incapable of providing the kind of immediate relief" sought by the city.[36] Indeed, in *San Diego Teachers*, the California Supreme Court rejected a similar attack on PERB's processes at a time when PERB was in its nascent stages and had not yet written regulations guiding injunctive relief requests.[37] In keeping with this precedent, the Sixth District found that PERB *does* have broad remedial powers, including the right to seek injunctive relief on the request of a local government employer.[38]

Moreover, PERB can — and does — act quickly. Although Sloan states that the facts of the *City of San Jose* case are "extremely odd" and "*sui generis*" in terms of timing,[39] notice of possible strike actions is actually the *norm*, rather than the oddity. Thus, in each of the six cases that went up on appeal, the union provided advance notice of the possible work stoppage, sometimes as much as *weeks* in advance.[40] Further, the court explicitly "[m]oved beyond the facts before [it]," to find that the agency's processes in general are adequate.[41] Indeed, as former PERB General Counsel Robert Thompson related, as a practical matter, in his more than 15 years of supervising the injunction requests, there has not been "a case where parties have sought injunctive relief from our board and gone away wanting. Now, they may have disagreed with what the board's decision was. But we did not grant a request and then find ourselves going to court too late. It never happened."[42] And, tellingly, Sloan did not cite a single instance in which PERB, having made the decision to seek an injunction, arrived at the court too late.

In these circumstances, there could hardly be cause to upset the "adequacy of relief" determination first made by the Supreme Court in 1979, or to impose new and unprecedented restrictions on unions' ability to strike in the guise of protecting the public health and welfare.

Not only are PERB's remedies adequate, but PERB review serves to promote the purposes of the MMBA. First and perhaps foremost, as those of us who practice regularly before PERB know, once PERB personnel are involved, they can often serve to mediate disputes and effect compromises short of seeking court orders.[43]

If PERB does determine to seek a court order, PERB involvement will promote statewide uniformity, and frankly, better-quality decisions. As the *City of San Jose* court recognized, "[a]cknowledging the agency's jurisdiction helps promote the Legislature's purpose in creating an expert administrative body whose responsibility it is to develop and apply a comprehensive, consistent scheme regulating public employer-employee relations."[44]

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"More fundamentally," the court continued, it does not "'serve public policy to have numerous superior courts throughout the state interpreting and implementing statewide labor policy inevitably with conflicting results.'"[45] Indeed, this has been our abiding experience in litigating these cases. Thus, even judges who seriously apply themselves to determining which putatively "essential" employees to enjoin, often arrive at irrational decisions.[46] In the Contra Costa cases, for instance, the superior court enjoined *each and every* nurse working at county facilities from engaging in a work stoppage.[47] The same judge, after earnestly attempting to craft an order based on the paltry information before him, enjoined as essential employees the fellows who clean up after the animals in the animal shelter, the cooks in the detention facility, and the clericals who make the identification bracelets for incoming patients to the hospital, rejecting arguments that those duties could be performed by supervisors or others during the one-day strike.[48]

In Sacramento, the initial judge assigned to the case simply signed the county's proposed order, and enjoined from striking each and every employee designated by the county as "essential."[49] When the case was quickly assigned to a second judge of that court, the order was reconsidered and more narrowly tailored based largely on the same facts and circumstances, demonstrating that there is no uniformity even among judges of the same bench.[50] Moreover, the vagaries of these orders demonstrate that far from being burdensome "bureaucracy," the PERB investigatory process, including collecting declarations regarding employee functions, is itself essential to assisting judges to ultimately make well-reasoned decisions.

Finally, it makes sense for PERB — rather than individual employers — to determine the efficacity of seeking an injunction. Under the *City of San* Jose decision, PERB, which is charged with acting broadly "in the public interest" with respect to municipal services, may, in the first instance, make "the determination of how best to avoid public harm."[51] Thus, as the California Supreme Court held nearly 30 years ago, "PERB may conclude in a particular case that a restraining order or injunction would not hasten the end of a strike...and, on the contrary, would impair the success of the statutorily mandated negotiations between union and employer."[52] Perhaps it is this check on unfettered employer power to which Sloan most objects.

In the end, Sloan does not address the ultimate question of why there should be a different procedure with regard to strike remedies under the MMBA than under EERA, the Dills Act, the Higher Education Employer-Employee Relations Act, or the other statutes that PERB administers. We submit that case law, legislative determinations, and our practical experience with both PERB and the courts, strongly support the Sixth District's finding that PERB, and not the courts, has exclusive initial jurisdiction over strike remedies in MMBA jurisdictions. *

1 *City of San Jose v. Operating Engineers Local No. 3* (2008) 160 Cal.App.4th 951. The decision became final on April 4, 2008, and the City of San Jose filed a Petition for Review in the California Supreme Court on April 14. The authors are counsel of record for the unions in the other cases pending in the First and Third Appellate Districts that involve the same issue. *County of Contra Costa v. Public Employees Union Local One*, A115095 and A11518 (pending before the First District on PERB's and the unions' appeals from the superior court order finding that PERB does not have exclusive initial jurisdiction; case orally argued on February 6, 2008, and on March 10, 2008, the court requested further briefing on the issue of the effect of *City of San Jose* on the matter before it), and *County of Sacramento v. AFSCME Local 146*, C054060 and C054233 (pending in Third District; oral argument is scheduled for June 16, 2008). *County of Santa Clara v. SEIU Local 535*, H030937, the companion case to *City of San* Jose was dismissed as moot in an unpublished decision by the Sixth District in light of the same panel's *City of San Jose* decision issued that day.

2 Gov. Code Secs. 3500-3511.

3 Senate Bill No. 739, enacted in 2000, placed the MMBA under PERB's jurisdiction. See *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1083-1085.

4 *City of San Jose, supra*, 160 Cal.App.4th at 972.

5 The court explained, "[w]here PERB has exclusive initial jurisdiction, 'the courts have only appellate, as opposed to original, jurisdiction to review PERB's decisions.'" *City of San Jose, supra*, 160 Cal.App.4th at 964, citing *International Federation of Professional and Technical Engineers v. Bunch* (1995) 40 Cal.App.4th 670, 677.

6 Jeffrey Sloan, "*City of San Jose v. Operating Engineers Local No. 3*: For Essential Services Strikes, PERB Gets the First Bite, But We Haven't Heard the Last Word," *CPER* No. 189, pp. 13-19 (April 2008).

7 Sloan, at 13.

8 *Id.* at 17.

9 *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564, 567.

10 *Id.* at 576.

11 *Ibid.*

12 *Id.* at 588. The *County Sanitation* court specifically recognized the importance of the right to strike in the public sector, just as in the private sector: "In the absence of some means of equalizing the parties' respective bargaining positions, such as a credible strike threat, both sides are less likely to bargain in good faith." *Id.* at 583; see also *id.* at 589 (noting that "[a] union that never strikes, or which can make no credible threat to strike, may wither away in ineffectiveness" and that "the right to strike is fundamental to the existence of a labor union").

13 *Id.* at 585 (fn. omitted).

14 See note 3, above.

15 On May 30, 2006, the union gave the city 72 hours' notice that job actions could occur any time after June 2, and on June 2, the city appeared in court seeking a TRO. Both the union *and* PERB appeared at the hearing to oppose the city's request for injunctive relief. *City of San Jose, supra*, 160 Cal.App.4th at 958.

16 (1979) 24 Cal.3d 1.

17 See *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946; *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1; *Public Employee Relations Bd. v. Modesto City School Dist. (1982)* 136 Cal.App.3d 881; *Fresno Unified School Dist. v. National Education Assn.* (1981) 125 Cal.App.3d 259.

18 See e.g. *Fresno, supra*, 125 Cal.App.3d 259 (in a lawsuit by an employer challenging strike activity by three labor unions, appellate court held that PERB has exclusive jurisdiction over tort causes of action for conspiracy and interference with contract, and that third cause of action for breach of contract should also be stayed pending PERB's processes).

19 *El Rancho, supra*, 33 Cal.3d 946.

20 *Id.* at 952. EERA, like the MMBA, does not expressly mention strikes, but rather generally protects the right of employees to participate in union activities. See Gov. Code Sec. 3543 (EERA provides protection of the rights of employees) and Gov. Code sec. 3502 (where the MMBA provides similar protection).

21 *El Rancho, supra*, 33 Cal.3d at 953 (emphasis added).

22 *Id.* at 957, 960.

23 (2005) 35 Cal.4th 1072.

24 *Id.* at 1089-1090.

25 See Gov. Code Sec. 3509(a), incorporating by reference EERA, Gov. Code Sec. 3541.3.

26 This omission is particularly glaring in light of the fact that the *City of San Jose* court relied on the Supreme Court's finding in *Coachella* that the 2001 statutory changes constituted a "fundamental change" with respect to jurisdiction over MMBA-related unfair practice charges. *City of San Jose, supra*, 160 Cal.App.4th at 972.

27 Sloan, at 15.

28 *City of San Jose, supra*, 160 Cal.App.4th at 969, citing *San Diego Teachers, supra*, 24 Cal.3d at 8.

29 *Id.* at 6-8.

30 *Id.* at 8.

31 *City of San Jose, supra*, 160 Cal.App.4th at 970.

32 *Id.* at 971, citing *County Sanitation, supra*, 38 Cal.3d at 567.

33 *Id.*, citing *County Sanitation, supra*, 38 Cal.3d at 576.

34 *Id.*

35 Sloan, at 17. The public agency employers use the same refrain. Thus, in its supplemental brief to the First District as to why, in its view, *City of San Jose* should not be relied on in deciding the identical issue pending before that court, Contra Costa County argued that:

> "[t]o determine [that PERB has exclusive initial jurisdiction] would hold the public hostage to the bureaucratic whims of PERB and exacerbate the risk to the public's health and safety that is already threatened in a strike situation. Expediency over bureaucracy is the only way to protect the public interest when health and safety are implicated in a labor crisis."

Respondent Contra Costa County's Supplemental Brief, *County of Contra Costa v. Public Employees Union Local* 1, Court of Appeal Case Nos. A115095 and A115118, at 7-8, filed March 24, 2008.

36 *City of San Jose*, *supra*, 160 Cal.App.4th at 974.

37 *San Diego Teachers*, *supra*, 24 Cal.3d at 9.

38 *City of San Jose*, *supra*, 160 Cal.App.4th at 974.

39 Sloan, at 19, n. 24.

40 *County of Sacramento*, *supra*, Case Nos. C054060 and C054233 (unions gave more than six weeks notice of planned commencement of strike); *see also City of San* Jose, *supra*, 160 Cal.App.4th at 958 (union gave 72 hours notice); *County of Santa Clara v. SEIU Local 535*, *supra*, Case No. H030937 (unpub. opn. filed March 4, 2008) (six-day advance notice of strike); *Contra Costa County v. Public Employee Union Local No. 1*, *supra*, Case Nos. A115095 and A115118 (more than seven days advance notice).

41 *City of San Jose*, *supra*, 160 Cal.App.4th at 974, citing Cal. Code of Regs., tit. 8, sections 32450-32465.

42 *Contra Costa County* v. *Public Employee Union Local No. 1*, Reporter's Transcript of Hearing Before Hon. Terence L. Bruiniers, at 29:15-22 (June 23, 2006).

43 In these authors' experience, unions often seek to enter agreements with MMBA employers with regard to the identity or classification of employees who the parties agree are "essential" and may be prohibited from striking. Such was the case in Contra Costa County. It is when these negotiations break down that employers race to the courts, often seeking overbroad injunctions.

44 *City of San Jose*, *supra*, 160 Cal.App.4th at 972 (citations omitted).

45 *Id.* at 974, quoting *Modesto*, *supra*, 136 Cal.App.3d at 895.

46 This is partially the case because these matters, if brought directly by the local government agency, are *ex parte*, and the judge has little factual information to go by. Indeed, Sloan highlights the summary nature of the review in his commentary, at page 16. This factor again strongly militates *in favor of* administrative review.

47 *Contra Costa County v. California Nurses Assn.*, *supra*, TRO and OSC issued June 23, 2006, by Judge Terence Bruiniers.

48 *Contra Costa County v. Public Employees Union Local No. 1*, *supra*, TRO and OSC issued June 23, 2006 (Exhibit A, enjoining animal center technicians, head cooks, and registration clerks from striking). Whether certain employees were properly designated as "essential" is not raised as an issue in any of the matters on appeal, largely because there is not enough evidence in the appellate records for the appellate panels to base their findings.

49 *County of Sacramento*, *supra*, TRO and OSC issued September 1, 2006, by Judge Shelleyanne Chang.

50 *County of Sacramento*, *supra*, Order Granting Preliminary Injunction issued September 15, 2006, by Judge Loren McMaster.

51 *City of San Jose*, *supra*, 160 Cal.App.4th at 975.

52 *Id.*, quoting *San Diego Teachers*, *supra*, 24 Cal.3d at 13.