

IAFF Local 188 v. PERB (Richmond): Expanding Appellate Review of PERB Decisions and Limiting Meet and Confer Rights on Layoffs

By Rocky Lucia and Peter Hoffmann

Introduction

On March 18, 2009, the First Appellate District of California issued its decision in *International Association of Firefighters, Local 188 v. Public Employment Relations Board (City of Richmond)* (“*Richmond*”),¹ clarifying a fairly well-established and accepted principle that public employers are not required to meet and confer on the decision to lay off employees. In addition, the court expanded on what has been, heretofore, considered a limited right to appeal Public Employment Relations Board (“PERB” or “Board”) decisions *not* to file an unfair labor practice charge.

The court’s opinion relied upon two prior decisions of the California Supreme Court, *Vallejo Firefighters’ Union v. City of Vallejo* (“*Vallejo*”)² and *Belridge Farms v. Agricultural Labor Relations Board*.³ As to the obligation to meet and confer on layoffs, the court offered a broad interpretation of *Vallejo*, thereby empowering employers in nearly every circumstance where layoffs are implemented. The court then provided an equally expansive reading of the holding in *Belridge Farms*, significantly enhancing a party’s ability to appeal a PERB refusal to file an unfair practices complaint.

On July 8, 2009, the California Supreme Court granted petitions for review filed by both parties,⁴ providing the court with an opportunity to offer guidance and instruction on the very topical issues of layoffs and PERB’s denial of requests to file unfair labor practices complaints.

Factual Background

The City of Richmond (the “City”) is a local public agency subject to the provisions of the Meyers-Milias-Brown Act (“MMBA”).⁵ Firefighters employed by the

City and represented by the International Association of Fire Fighters, Local 188 (“Local 188” or the “Union”) negotiated a Memorandum of Understanding (“MOU”) that expired on June 30, 2003. The MOU contained various provisions regarding layoff procedures. Additionally, the City’s personnel rules, incorporated by reference into the MOU, gave the City’s management discretion to make layoffs.

In fiscal year 2003–2004, the City faced a shortfall of 9.5 million dollars and, as a result, recommended layoffs of 78 employees, 18 of whom were firefighters. Once the City made the decision to lay off the employees, it notified Local 188 that it would meet to bargain over the *effects* of the layoffs.

The City met with Local 188 to discuss the effects of the proposed layoffs and other staffing issues. At those meetings, Local 188 asserted its right to meet and confer over the *decision* to lay off firefighters. At a fourth and final meeting, Local 188 presented verbal proposals regarding compensation-related issues, but continued to refuse to negotiate on the *effects* of the layoff decision. Local 188 asserted that the proposed layoffs concerned modifications to daily firefighter staffing levels, resulting in a change in working conditions, and prompting the obligation to meet and confer over the decision to modify those staffing levels.

Procedural Background

On January 12, 2004, Local 188 sought relief from PERB by filing an unfair practice charge. Shortly thereafter, Local 188 filed a request for injunctive relief with PERB to prevent reductions in staffing levels. PERB denied the request several weeks later.

Within days of filing the request for injunctive relief, PERB’s regional counsel issued a “partial warning letter” to Local 188 indicating that the complaint lacked merit. PERB took the position that the layoffs were not subject to bargaining under the MMBA, as they fell within local government management prerogative.⁶ PERB rejected Local 188’s argument

¹ 172 Cal. App. 4th 265 (2009).

² 12 Cal. 3d 608 (1974).

³ 21 Cal. 3d 551 (1978).

⁴ Int’l Ass’n of Firefighters v. PERB, No. S172377, 2009 Cal. LEXIS 7262 (July 8, 2009).

⁵ Cal. Gov’t Code § 3500 et seq.

⁶ *Richmond*, 172 Cal. App. 4th at 273.

that "the layoff plan constituted a change in 'staffing levels or shift assignments,'" stating that "staffing levels is simply another way of describing the number of employees on the City's payroll."⁷

PERB declined to issue the complaint, indicating that the allegations failed to state a *prima facie* case for relief, and stating that the decision to layoff firefighters is not subject to bargaining under the MMBA. In its denial, PERB stated that, while the decision to lay off is non-negotiable, *effects* of that decision are within the scope of representation.⁸ PERB also held that Local 188's refusal to bargain over the effects of the layoff were deemed to be a waiver of its right to do so.⁹

On December 13, 2004, a three-member PERB panel issued a decision upholding the dismissal of Local 188's unfair practice charge. In support of its decision, the Board relied on the "plain language" of the California Supreme Court's opinion in *Vallejo* and disagreed with Local 188's interpretation of the holding as requiring a public entity "to meet and confer over a decision to lay off employees when this decision affects the workload and safety of the remaining employees."¹⁰

In response to PERB's refusal to issue the complaint, Local 188 filed a petition for writ of mandate with the First District Court of Appeal on January 11, 2005. The petition was rejected without prejudice, to be refiled in Contra Costa County Superior Court. Thereafter, Local 188 filed a petition for writ of mandate in Contra Costa County Superior Court, alleging that "PERB had misinterpreted and misapplied" *Vallejo*. Local 188 requested that the court direct PERB "to issue a complaint against the City alleging it had violated the MMBA by unilaterally implementing changes in firefighter shift staffing levels."¹¹

PERB and the City opposed the petition, arguing that (1) the trial court lacked jurisdiction because the MMBA prohibits judicial review of a PERB decision not to issue a complaint, and (2) Local 188 failed to state a *prima facie* claim for violation of the MMBA based on *Vallejo's* holding that layoffs are not subject to bargaining.

Although the superior court held that it had jurisdiction to review a PERB decision not to issue an unfair labor

practices complaint, it ultimately denied the petition, finding that PERB had correctly interpreted *Vallejo*.¹² Local 188 appealed the superior court's judgment.

Issues Considered by the Court of Appeal

The court of appeal framed the opinion on two fundamental questions: (1) Does the court have jurisdiction to review a PERB decision not to issue an unfair practices complaint; and (2) Is a local government agency's decision to lay off firefighters a mandatory subject of bargaining under the MMBA?¹³

A PERB Decision Not to Issue an Unfair Practices Complaint is Subject to Judicial Review Under Certain Circumstances

The court's analysis of the issue of judicial review relies almost exclusively on the holding in *Belridge Farms*, which did not consider the statutory framework of the MMBA. Instead, *Belridge Farms* involved interpretation of the Agricultural Labor Relations Act ("ALRA"),¹⁴ as well as relevant provisions of the National Labor Relations Act ("NLRA").¹⁵ In *Richmond*, however, the court specifically addressed the interplay between sections 3509, 3509.5, and 3510 of the MMBA.

First, the court affirmed PERB's exclusive jurisdiction over charges that a local government agency or employee organization had violated the MMBA, finding that the "initial determination" as to whether an unfair labor practice charge is justified, and the appropriate remedy to effectuate the purposes of MMBA is within the scope of PERB.¹⁶ The court also observed that in making that determination, PERB is required to interpret and apply the MMBA "consistent with and in accordance with the judicial interpretations of [the MMBA]."¹⁷ Indeed, the Government Code specifically provides that the Board is specifically required to issue its rulings on MMBA and unfair labor practices "consistent with existing judicial interpretations. . . ."¹⁸

¹² *Id.* at 274.

¹³ Cal. Gov't Code § 3500 et seq.

¹⁴ Cal. Lab. Code § 1140 et seq.

¹⁵ 29 U.S.C. § 151 et seq.

¹⁶ *Richmond*, 172 Cal. App. 4th at 275; see Cal. Gov't Code § 3509(b).

¹⁷ *Richmond*, 172 Cal. App. 4th at 276 (Cal. Gov't Code § 3510(a)).

¹⁸ Cal. Gov't Code § 3509(b).

⁷ *Id.* at 272.

⁸ *Id.* at 273.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

Next, the court noted that Government Code section 3509.5 delineates the jurisdiction of the courts to hear a challenge of a “final decision or order of the Board in an unfair practice case” by petitioning the court for a writ of extraordinary relief.¹⁹ However, the court also confirmed that “[t]he plain language of Section 3509.5(a)—which specifically states that “a charging party, respondent or intervener may challenge a final decision or order of the Board on an unfair practice charge,” *except* for a “decision of the Board not to issue a complaint” in an unfair practice case—establishes that a PERB decision upholding a refusal to issue a complaint is not reviewable under that statute.”²⁰ Accordingly, the central issue for the court was “whether the express exclusion of such decisions from the scope of judicial review in Section 3509.5 entirely deprives the courts of jurisdiction to consider a challenge to such decisions in *any context*.”²¹

The court ultimately held that despite the express prohibition of appellate review in Section 3509.5, the decision *not* to file an unfair labor practice charge is reviewable under certain conditions. In support of this conclusion, the court cited to *Belridge Farms*, which held that “the [c]ourt’s authority to review a decision not to issue a complaint is limited to a determination of whether the decision violates a Constitutional right, exceeds a specific grant of authority, or is based on an erroneous construction of an applicable statute.”²² The *Richmond* Court noted, however, that PERB’s interpretation of its statutory authority “will generally be followed unless it is clearly erroneous.”²³

The court explained that in the case before it, PERB had issued its decision based on its interpretation of the California Supreme Court’s decision in *Vallejo*²⁴—where the court “addressed whether firefighter personnel and manning decisions are properly the

subject of collective bargaining”²⁵—and affirmed the obligation of PERB to “apply and interpret unfair labor practice cases consistent with existing judicial interpretations of [the MMBA].”²⁶

In sum, while the *Richmond* Court has created a new level of review on PERB’s denial of unfair practice complaints, it did not provide any further guidance beyond the *Belridge Farms* holding. The California Supreme Court will now have the opportunity to reconcile the newly created judicial exception to the statutory prohibition of review under Section 3509.5. Depending upon the supreme court’s analysis, the decision not to file an unfair labor practice in a case with a nexus to a legitimate legal analysis, and perhaps ambiguous question of law, may find its way into the judicial process.

The Decision by a Local Government Agency to Lay off Employees is not a Mandatory Subject of Bargaining Under the MMBA

Having determined that the parties’ dispute concerned the proper interpretation of *Vallejo*—thus, granting the court jurisdiction to review the firefighters’ claim that PERB erroneously interpreted the supreme court’s decision—the *Richmond* Court turned its attention to the substantive arguments of the parties. The court noted that the dispute over the proper interpretation of *Vallejo* arises from the following segment of the supreme court’s opinion:

Because of the nature of fire fighting, a reduction of personnel may affect the firefighters’ working conditions by increasing their workload and endangering their safety in the same way that general manning provisions affect workload and safety. To the extent, therefore, that the decision to lay off some employees affects the workload and safety of the remaining workers, it is subject to bargaining and arbitration. . . .²⁷

While the *Vallejo* Court unequivocally set forth the notion that “[a] reduction of the entire fire fighting force based on the city’s decision that as a matter of policy of fire prevention the force was too large would not be arbitrable in that it is an issue involving the organization of the service,”²⁸ Local 188 argued that

¹⁹ Cal. Gov’t Code § 3509.5(a); *Richmond*, 172 Cal. App. 4th at 276.

²⁰ *Richmond*, 172 Cal. App. 4th at 276; Cal. Gov’t Code § 3509.5(a).

²¹ *Richmond*, 172 Cal. App. at 276 (emphasis added).

²² *Belridge Farms*, 21 Cal. 3d at 556–57.

²³ *Richmond*, 172 Cal. App. 4th at 280 (citing *Banning Teachers Association v. PERB*, 44 Cal. 3d 799, 804 (1988)).

²⁴ Interestingly, it was likely the court’s application of the *Vallejo* case, which all parties agreed was a fundamental issue in the PERB analysis, that vaulted the court into applying the *Belridge Farms* test concerning PERB’s interpretation of an alleged “erroneous construction of an applicable statute.”

²⁵ *Id.* at 281 (citing *Vallejo*, 12 Cal.3d at 618–23).

²⁶ *Id.*; Cal. Gov’t Code § 3509(b).

²⁷ *Richmond*, 172 Cal. App. 4th at 285 (citing *Vallejo*, 12 Cal. 3d at 622).

²⁸ *Vallejo*, 12 Cal. 3d at 621.

the above-cited paragraph limited management's authority when workload and safety would suffer as a result of proposed layoffs.²⁹

The *Richmond* Court, however, relied on an alternative understanding of the *Vallejo* ruling. In ruling in favor of PERB, the court held that:

As a practical matter, if we were to accept Local 188's argument that workload and safety concerns associated with staffing levels dictate whether a layoff decision is negotiable, a layoff decision would almost always be subject to collective bargaining. . . . Focusing on staffing levels would entirely undermine the rule that layoffs are not subject to negotiation.³⁰

By its ruling, the court definitively established that the *decision* to lay off firefighters is not subject to negotiation, however, the *effects* of that decision, including matters of seniority, reinstatement, and the workload and safety of the remaining employees, are properly the subject of collective bargaining.

A Review of the Richmond Analysis: Do Vallejo and the Realities of Public Safety Support the Interpretation of the Court of Appeal?

Having firmly established the non-negotiability of the decision to lay off firefighters, only one question remains: Did *Richmond* get it right? A thorough analysis of the court's opinion suggests that the three-member panel may have expanded the employer's authority under the MMBA.

The Court of Appeal's Decision Seemingly Implies that All Layoffs Impact Workload and Safety

In dismissing the firefighters' argument that workload and safety concerns associated with staffing levels dictate whether a layoff decision is negotiable, the *Richmond* Court summarily concludes that under such an analysis a layoff decision would "almost always be subject to collective bargaining."³¹ While the potential for layoffs to impact staffing is undoubtedly plausible, it is hardly a foregone conclusion. Quite simply, a reduction in personnel does not necessarily result in reduced *shift* staffing—an issue that would inevitably affect

employee workload and safety, particularly in a profession where the primary concern is public safety.³²

While the *Richmond* Court interpreted *Vallejo* as only requiring an employer to engage in bargaining regarding the *effects* of the decision to layoff, when read in light of the entire holding, a more reasonable interpretation would require the employer to bargain regarding the layoff decision in the event that the *proposed* layoffs would affect shift staffing. Indeed, the plain language of *Vallejo* supports this alternative conclusion:

On the other hand, because of the nature of fire fighting, a reduction of personnel *may* affect the firefighters' working conditions by increasing their workload and endangering their safety in the same way that general manning provisions affect workload and safety. *To the extent*, therefore, that the decision to lay off some employees affects the workload and safety of the remaining workers, it is subject to bargaining and arbitration *for the same reasons indicated in the prior discussion of the manning proposal*.³³

In reaching its opinion, the *Richmond* Court stated that "[the supreme court's] intent is clear in [*Vallejo's*] disposition, where it specified the personnel reduction proposal was 'arbitrable *only insofar* as it affects the working conditions and safety of the remaining employees.'"³⁴ Again, this statement does not suggest that only the effects of layoffs are subject to collective bargaining, but instead suggests that the decision to layoff is subject to bargaining when the layoffs will affect working conditions and safety of the remaining employees by reducing shift staffing. Indeed, the *Vallejo* Court implicitly recognized that the possibility that layoffs would affect the working conditions and safety of the remaining employees was not inevitable.

²⁹ *Richmond*, 172 Cal. App. 4th at 286.

³⁰ *Id.*

³¹ *Id.*

³² In its modification of opinion, filed on April 8, 2009, the court advances this striking assertion in stating that "to suggest the City would have to maintain constant shift staffing levels after the layoffs, either by allowing the remaining firefighters to work overtime or by hiring new firefighters, would render the City's power to lay off firefighters meaningless. *Int'l Ass'n of Fire Fighters v. Richmond*, No. A114959, 2009 Cal. App. LEXIS 495, *1-2 (Apr. 8, 2009).

³³ *Vallejo*, 12 Cal. 3d at 622 (emphasis added).

³⁴ *Richmond*, 172 Cal. App. 4th at 286 (citing *Vallejo*, 12 Cal. 3d at 623 (emphasis added in *Richmond*)).

The potential problem created by the *Richmond* Court's interpretation of *Vallejo* is best evidenced when viewed under extreme circumstances not present in that case. Simply put, the assertion that an employer could simply layoff an extraordinary number of employees, thereby creating a perilously dangerous working condition, and then leave employees to negotiate with the employer as to how the parties could best limit the increased danger to the remaining employees, can hardly be contemplated by "the strong public policy in California favoring peaceful resolution of employment disputes."³⁵

Did the Court of Appeal Expand the California Supreme Court's Holding in Vallejo?

In order to justify its conclusion, the *Richmond* Court inexplicably broadens the *Vallejo* ruling by creating a new category of staffing levels not contemplated by the California Supreme Court. The court admits as much when it states that "[a]lthough the *Vallejo* court did not focus on the distinction between shift staffing and equipment staffing, an examination of the opinion reveals that the constant manning procedure involved equipment staffing, or the number of personnel assigned to each piece of equipment."³⁶ Notably, the court omits the very next sentence of the *Vallejo* decision, wherein the supreme court recognized one additional concern: "Moreover, because of the hazardous nature of the job, the union also claims that the number of persons available to fight the fire directly affects the *safety* of each fire fighter."³⁷ Clearly, any assertion that the *Vallejo* Court sought to distinguish between *shift* staffing and *equipment* staffing is patently erroneous. As noted by the *Richmond* Court, in *Vallejo* the supreme court properly concluded that with respect to the manpower proposal—one which involved the staffing of a given *shift*—the decision itself was subject to bargaining if it primarily involved workload and safety rather the City's policy of fire prevention and, thus, submitted the issue to the arbitrators so that a factual record could be established.³⁸ Rather than following this same procedure, the *Richmond* Court ineptly evaluates the firefighters' working conditions and then, relying on the holdings of foreign jurisdictions, artfully carves out

a new subcategory of staffing to justify its ultimate conclusion.³⁹

The Court of Appeal Decision Effectively Trivializes the Importance of Backup in the Arena of Public Safety

While the court of appeal acknowledges the inherent dangers of the firefighters' profession, the substance of its opinion ignores, or is indifferent to, the realities of working conditions in the realm of public safety:

It goes without saying that firefighters have an extremely dangerous job, and we do not mean to suggest that workload and safety issues are inconsequential when shift staffing levels are reduced. Nevertheless, changes in shift staffing plainly have a less significant impact upon workload and safety than changes in equipment staffing.⁴⁰

The court makes this assertion seemingly without having considered a thorough factual record, as it notes that "[t]his distinction is important because a change in the number of personnel assigned to each engine or truck *presumably* has a much greater impact on workload and safety than the number of firefighters on duty throughout the City."⁴¹ It is clear that such statements apply a narrow understanding of the term "equipment," by looking strictly at the capabilities and production of one engine, rather than the function and availability of multiple engines. While it is unquestionable that each unit must be sufficiently staffed, the availability of additional (backup) units is equally important, particularly when considering the workload and welfare of public safety employees such as firefighters.

Conclusion

While the appellate court has apparently sanctioned, and clearly identified, the opportunities for appeal of PERB decisions not to file an unfair labor practice charge, it has not provided the same clarity on the issues of layoffs, at least in terms of public safety employees. The court did confirm a long-standing and accepted principle that the decision to lay off

³⁵ *Vallejo*, 12 Cal. 3d at 622.

³⁶ *Richmond*, 172 Cal. App. 4th at 288.

³⁷ *Vallejo*, 12 Cal. 3d at 619.

³⁸ *See id.* at 620.

³⁹ *Richmond*, 172 Cal. App. 4th at 288 (citing *Fire Fighters Local 1052 v. PERC*, 113 Wn. 2d 197, 778 P.2d 32 (1989); *Int'l Ass'n of Firefighters v. City of Salem*, 68 Or. App. 793, 798, 684 P.2d 605, 607-08 (1984); *Manistee v. Local 645, IAFF*, 174 Mich. App. 118, 435 N.W.2d 778 (1989).

⁴⁰ *Id.* at 287.

⁴¹ *Id.* (emphasis added).

employees is not a mandatory subject to bargaining. Yet it did not shed as bright a light on the interpretation of *Vallejo* vis-à-vis public safety employees. As a result, the California Supreme Court now has an opportunity to clarify and expand on its ruling in *Vallejo*.

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