

1999

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Joseph R. Grodin

UC Hastings College of the Law, grodinj@uchastings.edu

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Recommended Citation

Joseph R. Grodin, *Author's Comments to Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts*, 50 *Hastings L.J.* 761 (1999).

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Author: Joseph R. Grodin
Source: Hastings Law Journal
Citation: 50 Hastings L.J. 761 (1999).
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Author's Comments to *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts*

by
JOSEPH GRODIN*

It is more than a quarter of a century since I wrote my piece on the Meyers-Milias-Brown Act ("MMBA"),¹ and what is most surprising is how little has changed. The situation is particularly remarkable in light of sweeping changes that have occurred elsewhere in California public sector labor relations law. In place of the antiquated Brown Act² discussed in my article, we now have separate statutes governing labor relations for state employees,³ higher education employees,⁴ and employees of local school boards,⁵ and all three statutes are administered by a single agency, the Public Employment Relations Board ("PERB").⁶ But so far as cities, counties, and special districts are concerned, their labor relations remain governed by the MMBA, a statute which remains sketchy in its essential terms, and dependent upon the courts for its interpretation and enforcement.

There have been a few amendments to the statute. While at the time of my article the status of union security arrangements was unclear, agency shop arrangements (requiring payment of a service fee to a recognized employee organization as a condition of continued

* John F. Digardi Distinguished Professor of Law, University of California—Hastings College of the Law; Associate Justice of the California Supreme Court, 1982-1987.

1. See Joseph Grodin, *Public Employee Bargaining in California*, 23 HASTINGS L.J. 719 (1972). See generally CAL. GOV'T CODE §§ 3500-3511 (West 1995 & West Supp. 1999).

2. See CAL. GOV'T CODE §§ 54950-54962 (West 1995 & West Supp. 1999).

3. See *id.* §§ 3512-3524.

4. See *id.* §§ 3560-3599.

5. See *id.* §§ 3540-3549.3.

6. See *id.* § 3541.

employment) are now explicitly authorized and regulated,⁷ and the right of public employees to authorize dues deductions is confirmed.⁸ And, the application of the statute to local court employees has been clarified.⁹ But those are relatively minor changes given the passage of time.

The fact that the MMBA has endured for so long without significant change is attributable in major part to the work of the courts.¹⁰ At the time I undertook the writing of my earlier article there were no appellate decisions under the statute, and by the time I finished there was only one.¹¹ My research, of necessity, was based entirely upon the decisions of trial courts, upon the statutory language and what was known of its background, and upon certain parallels with the National Labor Relations Act.¹² Since then there have been well over 100 appellate decisions, including a dozen or so by the California Supreme Court.¹³ While recognizing the implications of personal immodesty implicit in the judgment, I would say that on the whole the courts have done quite a good job in filling the statutory gaps.¹⁴

It was obvious from the outset that the MMBA was modeled to considerable extent after the National Labor Relations Act ("NLRA"), and the courts have frequently resorted to that statute and its interpretations as a guide with respect to many of the issues that have arisen.¹⁵ This is true, for example, with respect to the duty to "meet and

7. See CAL. GOV'T CODE § 3502.5 (added in 1981).

8. See *id.* § 3508.5 (added in 1981).

9. See *id.* § 3501.5 (added in 1988). Section 3501.5 provides generally that employees of superior or municipal courts are "public employees" of the county, entitled to representation under the statute. *Id.*

10. Credit is also shared by representatives of public entities and employee organizations, whose cooperation has resolved many problems that might otherwise have been subject to litigation.

11. See Joseph Grodin, *California Public Employee Bargaining Revisited: The MMB Act in the Appellate Courts*, 21 CAL. PUB. EMPLOYEE REL. 2 (1974) (updating my first article with appellate decisions issued since its original publication).

12. 29 U.S.C. §§ 1511-1699 (1994).

13. See generally CAL. PUB. EMPLOYEE RELATIONS, UNIV. OF CAL. AT BERKELEY, POCKET GUIDE TO THE MEYERS-MILIAS-BROWN ACT (1985).

14. Actually, I had few occasions on the bench to deal with the MMBA. My immodesty derives from the fact that the courts have frequently relied upon my earlier article in their analysis of the statute.

15. For example, in its first case under the MMBA, the California Supreme Court observed: "Federal labor relation legislation has, of course, frequently been the prototype for California labor enactments, and, accordingly, in the past we have often looked to federal law for guidance in interpreting state provisions whose language parallels that of the federal statutes." *Social Workers' Union, Local 535 v. Alameda County Welfare Dep't*, 521 P.2d 453, 459 (Cal. 1974).

confer,"¹⁶ which is initially defined in section 3505 of the MMBA in even broader terms than the scope of bargaining under the NLRA.¹⁷ The last part of section 3504, however, excepts from the scope of representation "consideration of the merits, necessity, or organization of any service or activity provided by law or executive order."¹⁸ In *Fire Fighters Union, Local 1186 v. City of Vallejo*,¹⁹ the city relied upon that language to argue that the staffing levels at firehouses were not within the scope of bargaining; but the California Supreme Court applied federal precedent by analogy to hold that a city was required to bargain over staffing levels and personnel reduction to the extent they affected workload and safety.²⁰

Similarly, in *Building Material & Construction Teamsters' Union, Local 216 v. Farrell*,²¹ the California Supreme Court followed NLRA precedent to hold that it was unlawful for an employer to take unilateral action with respect to a bargainable subject, absent a "clear and

16. CAL. GOV'T CODE § 3505 (West 1995).

17. Under federal law, the scope of bargaining is defined as "wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(d) (1994). In the MMBA, this language is preceded by the phrase "including, but not limited to." CAL. GOV'T CODE § 3504. In *Social Workers' Union*, the court, referring to the suggestion in my original article that this phrasing suggests the scope of bargaining might be even broader under the MMBA, stated: "[T]hus, while the federal authorities undoubtedly provide a useful starting point in interpreting the scope of our state provision, they do not necessarily establish the limits of California public employees' representational rights." 521 P.2d at 459.

18. CAL. GOV'T CODE § 3504.

19. 526 P.2d 971 (Cal. 1974).

20. See *id.* at 978-80. The question in *City of Vallejo* was whether disputes over staffing levels and reductions in force were subject to the interest arbitration procedure established by the city's charter, but the court found that the scope of arbitration under the charter was identical to the scope of representation under the Act. See *id.* at 977. See also *Los Angeles County, Civil Serv. Comm'n v. Superior Court of Los Angeles*, 588 P.2d 249 (Cal. 1978) (holding, in line with federal precedent, that a county civil service commission had a duty to bargain over layoff procedures, though not the layoff itself).

Since *City of Vallejo*, lower courts have held that a local entity has a duty to bargain over such matters as: wages for employees participating in volunteer work, see *American Fed'n of State, County, Mun. Employees, Local 101 v. City of Santa Clara*, 160 Cal. App. 3d 1006, (1984); assignment of overtime work, see *Dublin Prof'l Firefighters v. Valley Community Serv. Dist.*, 45 Cal. App. 3d 116 (1975); drug testing, see *Holliday v. City of Modesto*, 229 Cal. App. 3d 528 (1991); shift changes, see *Indep. Union of Serv. Employees v. County of Sacramento*, 147 Cal. App. 3d 482 (1983); employee parking fees, see *Los Angeles Police Protective League v. City of Los Angeles*, 166 Cal. App. 3d 55 (1985); safety rules, including policy on motorcycle use, see *Solano Co. Employees Ass'n v. County of Solano*, 136 Cal. App. 3d 62 (1982); and the adoption of a rule prohibiting personal use of city facilities, see *Vernon Fire Fighters v. City of Vernon*, 107 Cal. App. 3d 802 (1980).

21. 715 P.2d 648 (Cal. 1986).

unmistakable” waiver by the union of the right to bargain.²² Federal precedent has also played a primary role in cases holding that a Memorandum of Understanding (“MOU”) negotiated under the MMBA and adopted by the governing body of the public entity is a binding contract;²³ that individual employees have a right to union representation at even informal disciplinary proceedings;²⁴ and that arbitration is a permissible mode of resolving grievances, including in disputes over employee discipline.²⁵

Issues involving bargaining units and recognition of unions have not given rise to as much appellate litigation as might have been predicted, given the lack of a statewide administrative agency to decide such matters, but the fact that some large cities and counties have developed their own agencies to deal with such issues has no doubt relieved much of the pressure. While the relationship between local rules governing such matters and the MMBA was debatable at the time of my earlier article, the California Supreme Court has since made clear that local rules may not conflict with the requirements of the statute.²⁶

22. *Id.* at 658.

23. *See* Glendale City Employees’ Ass’n v. City of Glendale, 540 P.2d 609, 615 (Cal. 1975).

24. *See* Civil Service Ass’n, Local 400 v. City and County of San Francisco, 586 P.2d 162, 171 (Cal. 1978); *see also* Social Workers’ Union, Local 535 v. Alameda County Welfare Dep’t, 521 P.2d 453, 456 (Cal. 1974) (holding that an employee has a right to union representation at an interview that the employee believes involves union activity and reasonably anticipates may lead to discipline).

25. *See* Taylor v. Crane, 595 P.2d 129, 136 (Cal. 1979). Courts have continued to follow federal precedent in connection with enforcement of an agreement to arbitrate, *see e.g.*, Serv. Employees Union Local 347 v. City of Los Angeles, 42 Cal. App. 4th 1546 (1996) (dispute over whether the city’s premium pay ordinance applied to union members was arbitrable issue); and in connection with the enforcement of arbitration awards, *see e.g.*, Social Servs. Union v. Alameda County Training and Employment Bd., 207 Cal. App. 3d 1458 (1989) (arbitrator did not exceed his authority when he ordered the agency to promote a public employee as a remedy for violation of the MOU).

26. “The extent of local government powers under the act was a subject of early dispute, spurred by language in the preamble which, if read literally, might have suggested that the statute was not intended to be binding on local governments that chose to adopt rules and regulations contrary to its provisions.” [citing the principal article at pp. 723-725]. However, as Professor (now Justice) Grodin explained, “Such an interpretation is inconsistent with the general objectives of the statute as declared [elsewhere] in the preamble and with the mandatory language which appears in many of the sections. [citing the principal article]. Accordingly, it is now well settled that the Legislature intended that the MMBA ‘set forth reasonable, proper and necessary principles which public agencies must follow in their rules and regulations for administering their employer-employee relations . . .’ and that ‘if the rules and regulations of a public agency do not meet the standard established by the Legislature, the deficiencies of those rules and regulations as to rights, dues and obligations of the employer, the employee, and employee organization, are supplied by the appropriate provisions of the act” *International Bhd. of Electrical Workers v. City of Gridley*, 666 P.2d 960 (Cal. 1983).

Public entities have not generally been inclined to resist unionization in the way that private employers often do, a fact which may help explain why unions have made such headway in organizing public employees during a period in which organization in the private sector has declined. Consequently, there are few reported cases involving discrimination against individuals for union membership or activity.²⁷ There are, however, several cases in which public entities have been found to have engaged in group discrimination by treating employees represented by a union, or by a particular union, less favorably than other employees.²⁸

All of this case law followed, more or less closely, federal precedent. It soon became apparent, however, that the private sector labor law model could not answer all the questions raised by the transplantation of collective bargaining to the public sector. For one thing, the public sector came to the bargaining process carrying a baggage of customs, institutions, and expectations that were to some extent resistant to total transplantation. There were the civil service systems, which came into being as a means of avoiding political favoritism, but which over time had established hegemony over nearly all aspects of the employment relationship. There were the civil service associations accustomed to representing public employees at all levels—from rank-and-file to top management—through the political process rather than through any sort of collective bargaining. And there was the tradition, backed to some extent by law, that strikes in the public sector were not acceptable—a tradition which public sector unions regarded as reducing the negotiation process to “collective begging.”

Moreover, underlying this more or less malleable divergence in customs and traditions between the private and public sectors there exists a core of unmodifiable distinction: the public sector is governed by a political process ultimately responsible to the electorate. That fact does not diminish the appropriateness of collective bargaining in the public sector,²⁹ but it does unavoidably play a role in structuring the

27. *Santa Clara Counsel Attorneys Ass'n v. Woodside*, 869 P.2d 1142 (Cal. 1994), was such a case, but the facts were unusual; at issue was the right of a deputy county counsel to sue the county under the MMBA.

28. *Campbell Mun. Employees Ass'n v. City of Campbell*, 131 Cal. App. 3d 416 (1982) (per Grodin, J., holding that the City Council had discriminated against plaintiff organization and its members by fixing retroactivity of wage increases at a date less favorable than that fixed for other employees); *Los Angeles County Employees Ass'n v. County of Los Angeles*, 168 Cal. App. 3d 683 (1985) (similar); *San Leandro Police Officers Ass'n v. City of San Leandro*, 55 Cal. App. 3d 553 (1976) (granting of incentive benefits to nonunion employees and not to union employees constituted unlawful discrimination).

29. Cf. Harry H. Wellington & Ralph K. Winter, Jr., *The Limits of Collective Bargaining*

bilateral process of collective bargaining to accommodate the requirements of polity.

Some of these tensions came to the supreme court's attention in *Los Angeles County Civil Service Commission v. Superior Court of Los Angeles*.³⁰ The Los Angeles County Civil Service Commission, after a public hearing at which union representatives were allowed to speak, but without bargaining with the unions, adopted certain amendments to rules concerning layoffs and reductions in lieu of layoff.³¹ The Commission defended its refusal to bargain with the unions on the ground that the MMBA reflects a legislative determination to exempt counties with civil service systems from its meet-and-confer requirements,³² and on the ground that the county charter directs the Commission to prescribe, amend, and enforce rules for the classified service on the basis of a public hearing.³³ The court, after concluding that the Legislature did not intend to exempt civil service counties from the requirements of the statute,³⁴ held that the public hearing provision of the county charter was not incompatible with the statutory requirement to meet and confer on a bilateral basis, and that the commission could bargain with the unions and hold a public hearing as well.³⁵ In light of that ruling, it was not necessary for the court to decide whether the MMBA could override conflicting provisions of a county charter.

Similar but more dramatic confrontations between the bargaining process and the political process are posed when an issue concerning matters within the scope of MMBA bargaining are presented to the electorate in the form of an initiative or referendum. The Supreme Court has held that a city has a duty under the MMBA to bargain with a recognized union over *whether* the city should submit to voters charter amendments pertaining to matters within the scope of bargaining.³⁶ It has also recognized that if collective

in Public Employment, YALE L.J. 1107 (1969), arguing that the importation of collective bargaining into the public sector, when added to political access, would unduly enhance the power of unions. The argument assumes that governing bodies and their constituencies will be pushovers for union pressure, an argument that has not withstood the test of time.

30. 588 P.2d 249 (Cal. 1978).

31. *See id.* at 251.

32. *See id.* at 254.

33. *See id.* at 254-55.

34. *See id.* at 253.

35. *See id.* at 255.

36. *See People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach*, 685 P.2d 1145, 1152 (Cal. 1984). In *Fresno v. People ex rel. Fresno Firefighters*, 71 Cal. App. 4th 82 (1999), the Court of Appeal for the Fifth District recently held that a charter provision which

bargaining is to be meaningful in the public sector, a voter referendum may not be used to block a county ordinance implementing a MOU.³⁷

The political nature of the public sector may also justify consideration of public policy limitations on the scope of bargaining. Lower courts have read into the scope of bargaining under the MMBA an exemption for “fundamental policy decisions”, holding that a city need not bargain over a change of policy concerning the use of deadly force by its police in situations in which a life is at stake³⁸ or over a decision to allow a member of the citizen’s police review commission to attend police department hearings regarding citizen complaints against police and to send a member of the department review commission meetings.³⁹ The Supreme Court has cited these cases with apparent approval, but distinguished them from a decision to transfer positions from one bargaining unit to another for reasons of economy and efficiency on the ground that “[d]ecisions involving the betterment of police-community relations and the avoidance of unnecessary deadly force are of obvious importance, and directly affect the quality and nature of public services.”⁴⁰

Possibly the most important issue to confront the courts under the MMBA concerned the statute’s impact upon the right to strike. There had been suggestions in the lower courts prior to the MMBA that as a matter of common law public employees could not strike, but those decisions seemed to rest upon the premise that collective bargaining was inappropriate for the public sector. The MMBA

set forth criteria for calculating minimum salary levels was not a matter within the scope of representation, and that the city was not required to bargain over its repeal. The court distinguished the provision under consideration from a charter provision setting salary. Judge Ardaiz dissented, arguing forcefully (and persuasively) that the distinction was without merit.

37. *See* *Voters for Responsible Retirement v. Bd. of Supervisors of Trinity County*, 884 P.2d 645, 652 (Cal. 1994). The court’s holding was limited to the use of a referendum to block a county ordinance, and on that ground the court found it unnecessary to consider *United Pub. Employees, Local 390/400 v. City and County of San Francisco*, 235 Cal. Rptr. 477 (Ct. App. 1987). The *United Pub. Employees* court held that a charter provision requiring that all increases in employee benefits be subject to voter approval was compatible with the MMBA. *See id.* at 481. The *Responsible Retirement* court did observe, however, that “the decision understated the problematic nature of the relationship between the MMBA and local referendum power. . . . If the bargaining process and ultimate ratification of the fruits of this dispute resolution procedure by the governing body is to have its purpose fulfilled, then the decision of the governing body to approve the MOU must be binding and not subject to the uncertainty of referendum.” *Id.* at 655.

38. *San Jose Peace Officers’ Ass’n v. City of San Jose*, 78 Cal. App. 3d 935 (1978).

39. *Berkeley Police Ass’n v. City of Berkeley*, 76 Cal. App. 3d 931 (1977).

40. 715 P.2d at 655.

reversed that premise but was silent on the right to strike, most likely because the Legislature found that issue politically too hot to handle. When the issue came to the California Supreme Court in *County Sanitation District No. 2 of Los Angeles v. Los Angeles County Employees Ass'n, Local 660*,⁴¹ the court examined the various alternative arguments for denying public employees the right to strike even within a collective bargaining regime, and found them lacking in persuasive force.⁴² The one argument the court found to have partial merit was the necessity for protecting public health and safety,⁴³ but that argument was obviously overly broad as applied to all public employees. Confronting the question as a matter of statutory interpretation, the court held that under the MMBA a strike by public employees to improve wages and working conditions is not unlawful unless it poses an "imminent threat to public health or safety."⁴⁴

There are a number of issues under the MMBA which remain in need of clarification. For example, it seems to be unclear whether a union which represents employees in a defined bargaining unit on an exclusive basis has a duty to represent them fairly and without discrimination,⁴⁵ even though such an obligation would seem to follow from the analogy of federal precedent and its underlying reasoning.⁴⁶ Along similar lines, there appears to be some question as to the scope of a union's authority to bind employees within a bargaining unit to an agreement which waives or modified pre-

41. 699 P.2d 835 (Cal. 1985).

42. *See id.* at 846.

43. *See id.* at 849.

44. *Id.* at 854. Subsequently, the court held that a strike, even if illegal under *County Sanitation*, is not a tort for which damages may be awarded. *See City and County of San Francisco v. Plumbers Union Local No. 38*, 726 P.2d 538 (1986). The Court of Appeal has held, following *County Sanitation*, that work stoppages by police are illegal even without specific proof of imminent threat to public health or safety. *City of Santa Ana v. Santa Ana Police Benevolent Ass'n*, 207 Cal. App. 3d 1568 (1989).

45. *Andrews v. Bd. of Supervisors*, 134 Cal. App. 3d 274 (1982), (suggesting that no duty of fair representation exists under the MMBA because its terms permit employees to represent themselves). *Compare with Lane v. Stationary Eng'rs Local 39*, 212 Cal. App. 3d 164 (1989), (holding that a union owes its members a duty of fair representation, defined in accordance with federal principles, on the basis of the contractual relationship between a union and its members).

46. *See Winograd, California Public Employees and the Developing Duty of Fair Representation*, 9 INDUS. REL. L.J. 410, 413-14 (1987). The Court of Appeal has held, in accordance with federal precedent, that the MMBA does not contemplate individual bargaining in the face of exclusive recognition. *Relyea v. Ventura County Fire Protection Dist.*, 2 Cal. App. 4th 875 (1992).

existing contractual rights.⁴⁷ And, question exists with respect to the right of a public entity, once a bargaining impasse has been reached, to impose a solution that defers its obligation to bargain for extended periods of time.⁴⁸

These are questions which presumably will be resolved in the due course of litigation, but they are examples of the sort of question which, in the federal arena and under the statutes subject to PERB jurisdiction, would be addressed in the first instance by an administrative agency that has some background and experience in dealing with labor relations matters. The continued lack of administrative guidance remains a problem under the MMBA, as does the cost and time entailed in litigation. For a union with scarce resources (or, for that matter a public entity with scarce resources) the lack of an expeditious method of resolving disputes arising out of the statute represents a substantial impediment to the effectuation of its policies. There have been proposals, in recent years, to bring PERB and its facilities into administration of the MMBA, and it is about time they were acted upon.

47. In *San Bernardino Public Employees Ass'n v. City of Fontana*, 67 Cal. App. 4th 1215 (1998) an employee organization which negotiated an agreement that relinquished certain rights established by prior agreements in return for a wage increase then sued the city contending that the rights it agreed to relinquish (personal leave accrual, longevity pay, and retirement health benefits) were "fundamental vested rights" that could not be bargained away through the collective bargaining process. The Court of Appeal concluded that personal leave and longevity pay benefits are "simply terms and conditions of employment subject to negotiation in the collective bargaining process," and that the issue with respect to retirement health benefits was not ripe for review. The opinion makes no reference to the duty of fair representation, and its relationship to the concept of "fundamental vested rights."

48. The Supreme Court ordered unpublished a decision of the Court of Appeal, reported at 1661 L.R.R.M. 2889, upholding a city's imposition of an MOU for a period of two and a half years.

