PERB Finds Union’s Contention That Pension Cost-Sharing Is Non-Negotiable “A Viable Theory Of Law”

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In United Professional Firefighters, Local 1230 v. City of Pinole, a pre-AB 340/AB 197 case, PERB decided the union’s legal theory that pension related Government Code sections establish a statutorily fixed and immutable employee contribution was sufficiently viable to send the matter to a hearing before an Administrative Law Judge (“ALJ”). The union contended that the city’s bargaining proposal requiring firefighters to pay more than the 9.0% employee contribution was not subject to bargaining.

Factual Background

Before the 2011 negotiations, the MOU required the city to pay the 9.0% employer-paid member contribution (“EPMC”), the city’s normal 11.5% pension contribution, and 4.7876% of the 9.5752% recent increase in the city’s cost. Firefighters had agreed to pay one-half of the city’s increased pension cost.
For the successor MOU, the city proposed the elimination of the EPMC and the continuation of employee payment of the 4.7876% of the 9.5752% increased city cost. In other words, the city’s proposal to eliminate EPMC increased the employees’ contribution toward pension costs to approximately 13.8%−9% employee contribution plus the 4.7876% share of the city’s costs.

When the parties were unable to reach agreement, the city made a last, best, and final offer (“LBFO”) that required the firefighters to pay the full 9% members’ statutory contribution, plus the 4.7876% employer contribution. When the union rejected the offer, the city unilaterally imposed the LBFO.

Firefighters, Local 1230’s Unfair Practice Charge

The Firefighters, Local 1230 unfair practice claim included five primary charges: (1) surface bargaining; (2) unilateral change regarding a practice of firefighters attending city council meetings; (3) refusal to provide information regarding the monetary value and the fiscal impact of concessions; (4) retroactive implementation not matching the LBFO; and (5) insisting to impasse on a non-mandatory subject (requiring the employees to continue paying 4.7876% of the city’s 9.5752% increased cost).

PERB dismissed the first four elements of the unfair practice charge, finding that Firefighters, Local 1230’s unfair failed to state a prima facie case in each instance. On the charge alleging the city unlawfully insisted to impasse on a non-mandatory subject, PERB decided the union had stated a prima facie case.

PERB decided that Firefighters, Local 1230 stated a “viable theory of law” by alleging: (1) the city’s proposal was outside the scope of bargaining because Government Code Sections 20469, 20474, 20678 and 20710 placed a 9.0% inflexible limit on employee contributions to pension; and (2) the city’s proposal to require the employees to pay one-half of the city’s 9.5752% increased cost would force employees to waive their statutory right to pay no more than 9.0%.

PERB did not decide the issue of whether or not employee payment of a portion of the city’s pension cost was a mandatory subject. Instead, PERB determined only that: (1) Firefighters, Local 1230’s argument stated a reasonable theory of law sufficient to require a hearing before an ALJ; and (2) the city must defend at the ALJ hearing its contention that employees paying a portion of the city’s pension cost was a mandatory subject of bargaining because nothing in the Government Code prohibited negotiations above the 9.0%.
Learning Opportunities

First, this PERB decision did not consider the new cost-sharing provisions of PERL (Government Code Sections 20516, 20516.5) and CERL/1937Act (Government Code Sections 31461, 31631, 31631.5). Pension reform legislation, AB 340/AB 197, will not be effective until January 1, 2013, and this case involves 2011 negotiations.

Second, PERB’s interpretation of existing pension statutes may illustrate PERB’s likely post-2013 interpretation of the new pension legislation enacted in AB 340/AB 197. To determine if an employee contribution toward an employer’s pension costs is a mandatory subject, this PERB decision focused on an analysis of whether PERS Government Code sections establish a minimum member contribution above which the parties are free to negotiate or a statutorily fixed and immutable employee contribution (i.e., 9% for firefighters) that is not subject to bargaining. If PERB determines the relevant Government Code sections establish a minimum member contribution above which the parties are free to negotiate, the city would have lawfully bargained to impasse. Otherwise, if the relevant Government Code sections establish a statutorily fixed and immutable employee contribution, the city would have unlawfully insisted to impasse on a non-mandatory subject.

Third, PERB ruled there is a “viable theory of law” that Government Code sections establish a statutorily fixed and immutable employee contribution (i.e., 9% for firefighters) that are not subject to bargaining. In finding this theory of law deserves to be considered in an administrative hearing, PERB refused to accept, as a matter of law, the city’s legal theory that PERS Government Code sections establish a minimum member contribution above which the parties are free to negotiate. Remember, at this stage of the proceedings, PERB has not decided whether the pension statutory provisions create a minimum floor or an immutable and fixed amount.

Learn How To Lawfully Negotiate Pension Cost Sharing

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Labor Relations Academy 8: Negotiating And Implementing The Pension Reform Act. This full day program focuses both on understanding the legal mandates of the California Public Employees Pension Reform Act (PEPRA), AB 340/AB 197 and on the practical negotiations and legal issues this complex legislation raises. Academy 8 is scheduled for Monday, December 3, in Monterey, during the week of CALPELRA’s Annual Conference.

2. The facts of this case do not tell us whether the MOU existing prior to the 2011 negotiations was negotiated using Government Code Section 20516, which allows such cost-sharing upon reaching an actual agreement or whether the 50/50 split was based upon a belief that nothing in the Government Code prohibited negotiations beyond the statutory minimums. These facts could make a difference in the eventual outcome.