Stone Busailah, LLP
A Partnership of Professional Law Corporations

1055 East Colorado Boulevard, Suite 320, Pasadena, California 91106 Tel (626) 683-5600 Fax (626) 683-5656

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PERB EXPANDS PUBLIC EMPLOYEE RIGHT TO REPRESENTATION

State of California (2018) PERB Decision No. 2598-S

San Bernardino Community College District (2018) PERB Decision No. 2599-E

County of San Joaquin (2018) PERB Decision No. 2619-M

Continuing the expansion that began with *Capistrano Unified School District* (2015) PERB Decision No. 2440-E, where the Public Employment Relations Board (PERB) held that an employee's right to representation under California law is "considerably broader" than federal *Weingarten* representation rights, the PERB has recently issued three decisions that further explain when a public employee is entitled to have a union representative in California. It is important that all public employees, and especially those who represent them, understand that the right to have a representative present can occur outside the formal administrative investigation interview.

State of California (*Department of Corrections and Rehabilitation*), issued 11/26/18

Amy Ximenez was a psychiatric technician working for the Department of Corrections and Rehabilitation (CDCR). Prior to starting her employment with the CDCR, she signed a form acknowledging that she was subject to search at any time while on CDCR grounds. On July 1, 2015, prior to starting her shift at the California State Prison (CSP) Sacramento, she was stopped by members of the Investigative Services Unit, escorted into an interview room and informed, that due to an allegation she was smuggling contraband into the prison, they were going to search her vehicle, her bag, and her person. Ximenez consented to the search of her bag and vehicle, but demanded the presence of a union representative before the search of her person. She was told by the investigators that she did not have a right to a union representative because she was "only

being searched, not questioned." An unclothed body search was conducted, with negative results.

A state employee's right to request that a union representative be present for certain interactions with management derives from the Dills Act, which guarantees employees the right to "participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations". PERB has previously held that the Dills Act guarantees state employees representational rights that are at least as broad as those afforded private-sector employees under the *Weingarten* case, which held that an employer must grant an employee's request to have a union representative present at an investigative interview which the employee reasonably believes may result in discipline.

PERB noted it was undisputed that Ximenez requested union representation at the time she learned she would be subject to an unclothed body search, and the CDCR denied her request. The PERB also noted that an unclothed body search would not be anything other than part of an employer investigation. It is such an unusual and stressful situation, that an employee is likely to volunteer information in an effort at self-defense, and therefore should have a union representation present even if the employer does not intend to ask questions. Here, a union representative could have asked to review the search authorization, (ostensibly signed by Ximenez upon her hiring), advised her on whether to consent to the search (and the range of possible or likely consequences for not consenting), described the search procedural protocols, and ensured or determined if they were followed. Following the search, Ximenez was visibly upset, tearful, agitated, scared and humiliated by the process, so would have also benefitted from a union representative even after the search produced no contraband.

The PERB held that the right to union representation attaches whenever an employer demands that an employee submit to an invasive body search, or subjects an employee to such a search. Because the CDCR continued with the search after Ximenez requested representation, the CDCR effectively denied the request, thereby committing an unfair labor practice.

San Bernardino Community College District, issued 12/15/18

Sergeant Tamayo supervised Adam Lasad, a Community Services Officer in the District's police department. Tamayo began questioning Lasad regarding his whereabouts during his work shift. Lasad, after answering some of Tamayo's questions, requested a union representative. Tamayo contacted his own boss, Chief of Police Galvez, about Lasad's request for representation. Galvaz agreed that Lasad had a right to a representative, but directed Tamayo to have Lasad draft a written statement before he was relieved of duty. Tamayo then told Lasad, "We're not going to question you anymore," but "I need a memo from you explaining where you were." Lasad was then placed alone in an office to draft his statement.

At the PERB hearing, the District agreed Lasad had a right to representation when he invoked it, but argued that there was no violation of his right to representation because the interview ended when Lasad was directed to memorialize in writing his previous responses to the earlier questioning. The District claimed that it should only be foreclosed from seeking

additional information beyond what Lasad had already provided.

PERB concluded that Tamyo's demand for a written statement was a continuation of the interview by other means. **PERB commented that the right to representation applies regardless of whether the employer is seeking additional information or merely attempting to confirm information the employee has already provided**. A subsequent statement may contradict the earlier statement, or it may add or omit facts, thus opening up the employee to impeachment for inconsistency. Even if the subsequent statement mirrors exactly the earlier statement, confirming the information may further commit the employee to his or her previous answers, thereby making it more difficult to change or explain those answers later. Given these possible outcomes, the assistance of a union representative would be no less valuable than if the employee were seeking only new information.

The District also argued there was no violation because Lasad's request for representation was never explicitly denied. PERB noted that when an employer is faced with a valid request for representation, as the District was here, there are three options. It may: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice of proceeding with the interview without union representation or having no interview at all. What the employer may <u>not</u> do, however, is continue the interview without granting the requested union representation unless the employee "voluntarily agrees to remain unrepresented after having been presented by the employer with the choices described above". PERB concluded that "it was incumbent on Tamayo to act upon Lasad's request, either by granting it or terminating the interview, unless it was clear that Lasad was waiving his right to union representation." PERB found, that by continuing with the "interview" without such action, the District denied Lasad his right to a union representative.

County of San Joaquin (*Sheriff's Department*), issued 12/28/18

Joel Madarang was employed by the Department as a Custody Recreation Supervisor. Director Hamilton, Madarang's supervisor, e-mailed Madarang regarding the need to change the start time of weekly bingo games from 1:00 p.m. to 10:30 a.m. Hamilton did not want the inmates attending an entertainment-type of recreational activity instead of a class, given at the same time, which was designed to decrease the recidivism rate of inmates once they were released from the jail.

Mandarang held some of the bingo games in the morning, but held others in the afternoon. Madarang understood that Hamilton had directed him to move the game times, but believed he had discretion to make changes to the recreation schedule without seeking authorization.

Hamilton was eventually apprised of the situation and sent an e-mail to Madarang requesting that he explain why he did not follow her request to change the game time. Madarang responded by stating the unit's correctional officer requested that he move the bingo program to the afternoon so that the inmates could be fed early. Madarang left his desk and did not see Hamilton's follow-up e-mail directing he provide a memo explaining his failure to follow directions. Hamilton asked Madarang for the memo because she wanted to find out why he did

not comply with her directive., Hamilton said she intended to have a conversation with Madarang regarding his thought process so she could correct his behavior.

Hours later, Madarang received a call from Hamilton asking him why he had not responded to her e-mail. Madarang, stated that he had responded to it, thinking she was referring to the first email. Hamilton told him she sent a follow-up e-mail and he needed to respond to it in writing. Madarang told Hamilton that he wanted to speak to a representative first. Hamilton told him that he did not need a union representative, and that he should just write the memo so she could get his side of the story and correct his behavior. Again, Madarang asserted his right to speak to a union representative before writing the memo. Hamilton again him to write the memo and bring it to her. When Madarang again requested representation prior to writing the memo, Hamilton replied, "Well, that is it."

Hamilton reported to her command the fact that Madarang had requested a union representative. She was told he should be allowed to bring one when he brought her the requested memo. Instead of relaying this information to Madarang, however, Hamilton decided to request an IA investigation because Madarang had refused to write the memo and bring it to her office. Mandarng was then placed on administrative leave.

Madarang was notified that he was being investigated for, among other things, "Failing to write a memo to Kristen Hamilton explaining why you failed to follow her prior order and failing to report to her office as directed." During his administrative interview, Madarang was informed that he was the subject of an investigation that included, "his failure to write an explanatory memo and bring it to Hamilton's office." The allegations were all sustained all the allegations against Madarang. The primary concern was Madarang's "failure to follow the directives to prepare the memorandum and report to Hamilton" and he was suspended for 10 working days.

At the Skelly hearing Madarang's representative argued that Hamilton had violated Madarang's *Weingarten* rights, and that this violation should be taken into consideration when assessing the penalty. The Department's response was to strike all allegations concerning Madarang's refusal to follow Hamilton's order to prepare a memorandum and bring it to her office, but uphold the same penalty of a ten-day suspension.

PERB determined that Hamilton's order that Madarang draft the memo and bring it to her, notwithstanding his repeated requests for a representative, was well outside an employer's permissible responses to an employee requesting a representative, and found that Hamilton's conduct violated Madarang's right to be represented.

PERB has previously held that a purge order with make-whole relief may be an appropriate remedy when an employee is denied representational rights. PERB noted that Hamilton had not considered discipline or sought to involve internal affairs before Madarang requested a representative. PERB found that there would have been no IA investigation, and no discipline, absent Madarang's request for representation. Since the discipline was inextricably linked to Madarang's protected activity, PERB ordered the Department to make Madarang "whole", and expunge from any files all documents pertaining to the IA investigation.

Caveat: PERB is a quasi-judicial agency of the State of California charged with administering the provisions of the Meyers-Milias-Brown Act (MMBA) (Gov. Code §§ 3500-3511), which govern labor-management relations in public employment settings. When PERB gained jurisdiction over administration of the MMBA in 2001, an exception was carved out for Penal Code 830.1 peace officers. (Gov. Code, §3511.) Penal Code 830.1 peace officers include all city police officers and county deputy sheriffs. As it currently stands, while Penal Code 830.1 peace officers are subject to the MMBA, they are not subject to PERB's jurisdiction. Therefore, when a peace officer brings an unfair practice charge under the MMBA, he or she must go directly to court. **However, when the question of law involves the interpretation of labor law provisions within the usual jurisdiction of PERB, such as the MMBA, courts usually defer to PERB's interpretation of the law.**

Stay Safe!

Robert Rabe is Stone Busailah, LLP's writs and appeals specialist. His 40 years practicing law include 16 years as a Barrister, Supreme Court of England and Wales, practicing in London, England.