SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 931 (Leyva)
Version: February 7, 2022
Hearing Date: April 19, 2022
Fiscal: Yes
Urgency: No
TSG

SUBJECT

Deterring union membership: violations

DIGEST

This bill requires the Public Employment Relations Board (PERB) to impose civil penalties on public sector employers if it finds they deterred or discouraged workers from exercising collective bargaining rights. The bill also requires public sector employers to pay the union's attorney's fees and costs if the union prevails in a legal action to enforce those rights.

EXECUTIVE SUMMARY

By law, government employers are not supposed to deter or discourage their workers from joining a union or staying with the union once they have become a member. The idea is to allow public sector employees to make their own decisions about whether or not to belong to the union, free from pressure or coercion from the entity that determines their livelihood. PERB has jurisdiction to hear allegations that a public sector employer has violated these laws. If PERB determines that the allegations are substantiated, then PERB can order the employer to stop, but there are no additional consequences for the employer. With the intent of creating greater deterrence against public sector employer interference with collective bargaining rights, this bill would direct PERB to impose civil penalties on any public sector employer found to have engaged in a violation and to award attorney's fees and costs to the prevailing union. In addition, if PERB itself must expend legal resources to enforce or defend its orders against a public sector employer in court, PERB would also be entitled to an award of attorney's fees and costs from the employer for that.

The bill is sponsored by the American Federation of State, County and Municipal Employees – California; the California Labor Federation; the California Teamsters Public Affairs Council; and the Service Employees International Union State Council. Support comes from public sector organized labor who assert that the laws against interference with collective bargaining rights need more teeth. Opposition, absent amendments, comes from public sector employers who contend that it would be unfair

to penalize them for violating laws that are somewhat subjective. The bill passed out of the Senate Labor, Public Employment and Retirement Committee by a vote of 4-1. If this bill passes out of this Committee, it will next be heard in the Senate Appropriations Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Prohibits a public employer from deterring or discouraging current or prospective public employees from exercising any of the following collective bargaining rights:
   a) becoming or remaining members of an employee organization;
   b) authorizing representation by an employee organization; or
   c) authorizing dues or fee deductions to an employee organization. (Gov. Code § 3550.)

2) Assigns PERB jurisdiction over allegations that a public employer has deterred or discouraged public employees from exercising their collective bargaining rights set forth in (1), above. (Gov. Code § 3551.)

This bill:

1) Authorizes a public employee union to bring a claim against a public employer for violating the existing prohibition against deterring or discouraging current and prospective public employees from exercising their collective bargaining rights.

2) Imposes civil penalties on a public employer of up to $1,000 per each affected employee, not to exceed a total of $100,000, if PERB finds that the public employer deterred or discouraged current or prospective public employees from exercising their collective bargaining rights.

3) Directs PERB to recover any civil penalties awarded pursuant to (2), above, and, upon appropriation, to use the money for PERB administration.

4) Instructs PERB to award attorney's fees and costs to a public sector union if it prevails in an action pursuant to (1), above.

5) Provides that any attorney's fees and costs awarded pursuant to (4), above, shall be calculated from the inception of proceedings before PERB's Division of Administrative Law until final disposition of the claim by the PERB board, but specifies that attorney's fees and costs shall not be awarded for any part of the proceedings before the board that challenge the dismissal of an unfair practice charge by the board's Office of the General Counsel.

6) Requires the superior court to award PERB its attorney's fees and costs if PERB prevails in an action in superior court in which PERB is either enforcing or defending its orders against a public employer.

COMMENTS

1. Evidence of the need for this bill

This bill is premised on the idea that current law does not sufficiently prevent public sector employers from violating the collective bargaining rights of their current and prospective employees. As evidence to support this assertion, the author and sponsors point to the following incidents, among others:

- In late June 2018, the University of California distributed a letter to all employees, providing information about how the University intended to respond to the U.S. Supreme Court's ruling in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* (2018) 585 U.S. ___, 138 S.Ct. 2448. The *Janus* decision prohibited public sector employers from collecting "agency fees" from non-union members despite the fact that the unions have a duty to negotiate on the non-members' behalf. Several of the affected unions responded by filing charges under Government Code Section 3550, arguing that the University's communication tended to deter or discourage workers from joining or remaining part of their union. The cases were consolidated. The University of California argued that Section 3550 should only apply if the speech was coercive. PERB rejected that argument but no financial penalties were imposed on the University. (PERB Decision No. 2755-H).

- In April 2019 in the midst of a Teamsters Local 2010 campaign to organize administrative professionals at the University of California, the University distributed a three-page flyer that follows a question and answer format. Titled "Facts About Union Representation," the flyer goes on to make a series of statements about unionization that are, the Teamsters argued, inaccurate and deliberately intended to cast the union in a bad light. The outcome of this case is still pending. (PERB Case SF-CE-1234-H.)

- Over the course of spring 2019, the management of a series of charter schools sent letters and emails to its employees in response to their employees' efforts to unionize. Some of the communications provide advice and encouragement about how to avoid contact with union organizers. Others express ostensibly personal opinions calling into questions the benefits of union membership and raising concerns about the future success of the schools if the teachers unionize. PERB ultimately concluded that the emails violated Section 3550. (2021 Cal PERB Lexis 22; PERB Decision No. 2795E.)

In these and other incidents, the author and sponsors assert, though the public employer was eventually found to have violated the prohibition on deterring or discouraging workers from joining the union, redress was too slow and the financial penalties were too minimal to act as a serious deterrent against similar violations in the future.

2. Background on PERB procedures

PERB consists of a five-member board appointed by the Governor and supported by approximately 60 staff divided into the following major organizational elements: the Office of the General Counsel, the Division of Administrative Law, the Representation Section, State Mediation & Conciliation Service, and the Division of Administration. The state established PERB in the 1970s, when it authorized public sector collective bargaining, to enforce the statutory duties and rights of public employers and public employee unions. Supporters of this framework contend that PERB provides administrative efficiency and expertise in complicated public sector labor law to provide stability in labor relations and avoid public sector labor disruptions that had previously troubled California. Absent PERB, public employer and public employee unions could only seek recourse for their disputes in superior court through expensive and time-consuming litigation or through disruptive labor unrest.

The PERB labor relations dispute resolution process begins with the filing of an unfair labor practices charge. PERB staff make an initial review of the allegation. If the allegation states a prima facie case for a violation of state public sector bargaining laws, then PERB staff writes the allegation up as an official complaint. (8 C.C.R. 32620 – 32690.) The government employer must respond to this complaint. PERB then seeks to resolve the matter through settlement. If that effort is unsuccessful, the matter proceeds to a hearing before an Administrative Law Judge (ALJ), who then renders a written decision. (8 C.C.R. § 32215.) If either party is dissatisfied with the outcome, it can be appealed to the full PERB board. (8 C.C.R. § 32300.) In the case of such an appeal, the PERB board proceeds to issue its own ruling, which then becomes legal precedent. (8 C.C.R. § 32320.) If PERB's decision is ignored or appealed, PERB itself may take action in court to enforce or defend its decision. (Gov. Code §§ 3509.5 and 3520.)

This bill would require PERB to award attorney's fees to a union if it prevails in a claim before PERB based on Section 3550. The amount of the fee award would be calculated from the inception of proceedings before the administrative law judge through final disposition of the claim by the PERB board. PERB itself would also receive attorney's fees for legal expenses it incurs while successfully defending or enforcing one of its decisions based on a claim pursuant to Section 3550.

3. Policy ramifications of the attorney-fee shifting provisions

Ordinarily, under the so-called "American Rule," each party to a lawsuit must bear its own attorneys' fees and legal costs, regardless of the outcome. (Code of Civ. Proc. § 1021; *Musaelian v. Adams* (2009) 45 Cal.4th 512.) However, the American Rule can be altered by contract or statute. (*Ibid*.) Such changes to the American Rule are known as "fee-shifting provisions."

Fee-shifting provisions may be one-way or two-way. A two-way fee shifting provision entitles the winning party to have its attorney's fees covered by the losing party. A one-way fee-shifting provision only allows one side in a case, usually the plaintiff, to recover attorney's fees, if that side prevails. One-way fee shifting provisions are generally used to help litigants obtain counsel where they might not otherwise be able to afford one. (*Flannery v. Prentice* (2001) 26 Cal.4th 572.) One-way fee-shifting provisions can also be employed to encourage private enforcement of a public policy aim.[1]

This bill proposes a one-way fee shifting provision. If a public sector union prevails in an action against a government employer for violating the workers' collective bargaining rights, then the union would be entitled to recover the legal expenses it incurred. By contrast, if the government employer successfully defends itself against the allegation, it would still have to pay for whatever it spent on that defense. The imposition of a one-way fee shift in this context reflects the belief that the collective bargaining rights of public sector employees are important and that violations of those rights should not be tolerated.

Those against whom a one-way fee shifting provision is being imposed often point out that they have a potentially problematic component: they can be used as leverage to extract settlements even in frivolous cases. Here is the problematic scenario that is usually invoked: a greedy plaintiff and their unscrupulous lawyer bring an extremely weak case against a defendant. The defendant feels pretty confident about winning the case because it has little merit, but because of the one-way fee shifting provision, the defendant knows they will have to spend money to defend the case anyway and that the defendant cannot hope to recover those expenses from the plaintiff. If the defendant will not settle the case right away, the plaintiff may attempt to drag the case out, increasing the costs for the defendant and thereby increasing the pressure on the defendant to pay the plaintiff something to settle the case even though it may have little merit at all.

Opponents of legislation proposing a one-way fee shifting provision often suggest that the attorney's fees shifting provision ought to run both ways, instead, claiming that this will prevent the frivolous lawsuit problem. That is just what the opposition suggests

[1] *See* Krent, *Explaining One Way Fee Shifting* (November 1993) 79 Va. L. Rev. 2039, 2044.

should happen with this bill. Such arguments may not adequately account for three things, however.

First, a two-way fee shifting provision will serve to deter plaintiffs from bringing suit to enforce their rights, since they would then have to consider the significant financial consequences of paying the defendant's attorney's fees and costs if the plaintiff loses. Where public policy favors enforcement of those rights, the resulting incentive structure would be counterproductive to the public policy aim.

Second, courts already enjoy ample authority to dispose of frivolous cases. The State Bar has the power to discipline lawyers who bring them repeatedly.

Finally, there may be a simpler solution to the frivolous lawsuit scenario; one frequently employed in the context of civil rights law. That solution is to retain the one-way fee shifting provision, but add a clause indicating that, notwithstanding the one-way fee shifting provision, a court can award the defendant attorney's fees and costs if it determines that the plaintiff's case was purely frivolous from the state or that the plaintiff continued to litigate the case once it became obvious that the case was completely without merit.

In light of the relative simplicity of this solution, the Committee may wish to consider amending the bill to insert such a clause.

4. Opposition concerns and proposed amendments

In addition to their objections to the one-way fee shifting provisions in the bill, the opponents also criticize the bill for imposing stiff penalties on violations of a law that, they contend, is both relatively new and quite subjective. They would prefer any penalties to be tied to more specific duties to meet and confer with the relevant union before distributing labor-related communications to the workers. As the University of California, one of the public sector employers opposed to the bill, expresses the point:

> The measure would authorize an employee organization to file a claim with PERB alleging a violation of Government Code Section 3550. That section was added in 2018 and says a public employer shall not "deter or discourage" union membership but does not define these terms. A confirmed violation would lead to a penalty of $1,000 for each affected employee, up to $100,000. Given the still-new and subjective language in GOV 3550, the University requests the bill be amended to apply to violations of GOV 3553. Section 3553 specifically requires public employers to meet and confer with unions on the content of any mass communications to employees, whether written, oral or recorded. Through this process, unions have the ability to correct problematic language or require the

> employer to distribute, at the same time, a communication directly from the union.

It is true that the language of Government Code Section 3550 is quite broad and does not necessarily provide precise guidance for how government employers are supposed to deal with every situation. It is also fair to point out that Government Code Section 3550 is relatively new. The Legislature only enacted Government Code Section 3550's present language in 2018 (SB 866, Committee on Budget and Fiscal Review, Ch. 53, Stats. 2018), and PERB's first precedential decision interpreting its meaning did not come out until spring 2021. Moreover, although the statute itself states that it is declaratory of existing law, that initial precedent indicates that there is little more to it. "Section 3550 […] does not merely duplicate the existing interference standard; it creates a new and more robust protection […]." (PERB Decision No. 2755-H (Mar. 1, 2021.) In this regard, tying the penalties and attorney's fee awards to a statute like Government Code 3553, where the precise nature of the duty involved is more defined, has some public policy appeal.

On the other hand, a big part of the evident purpose behind this bill is to discourage public employers from constantly pushing up against and across the limits of what Government Code Section 3550 means. In backing Government Code Section 3550 with an enforcement mechanism including a one-way fee shifting provision, the bill's practical effect will be to force public sector employers to take the statute seriously and interpret its meaning broadly. Under existing law, where there is not much of a serious consequence for doing so, public sector employers may be tempted to try out various tactics. If the tactic is challenged by a public sector union, the worst that happens, from the government employer's point of view, is that PERB eventually tells them to stop.

Under this proposal, the financial consequences for pushing the envelope would include paying civil penalties to PERB and paying attorney's fees to the union. With those potential consequences in mind, public employers are not nearly as likely to test the limits. As a result, public employees should have an even more unfettered space in which to determine whether they prefer to join or remain part of the union that represents them.

5. Proposed amendments

In order to address the issues set forth in the Comments, above, the Committee may wish to consider incorporating amendments into the bill that would:

- prevent public sector unions from obtaining an attorney's fees award if PERB finds that the union's claim was frivolous, unreasonable, or groundless when brought, or the employee organization continued to litigate after it clearly became so.

A mock-up of the amendments in context is attached to this analysis.

6. Arguments in support of the bill

According to the author:

> When an employee organization succeeds in petitioning the Public Employee Relations Board (PERB) to grant an unfair labor practice charge, PERB can only issue a cease-and-desist order requiring the employer to post notice of the violation. By the time of notice, the damage is done. It is obvious that some public employers are undeterred from breaking the law and will continue to violate their employees' right to organize unless the Legislature acts to provide meaningful consequences. SB 931 will impose a $1000 penalty per violation, per affected employee, not to exceed $100,000. By creating a financial penalty for violating Section 3550 of the Government Code, employers will hopefully think carefully before intentionally discouraging union activity in the public sector.

As one of the sponsors of the bill, the American Federation of State, County and Municipal Employees writes:

> Current law gives public sector employee organizations the authority to bring unfair labor practice (ULP) charges through the Public Employee Relations Board (PERB) for actions like intimidation or coercion. While this measure is a significant step in progress, it still is not enough to deter public employees from using these tactics. That is why this bill is imperative to the protection of public employee rights.

In support, the California Professional Firefighters write:

> Existing California law has clearly established that public employers are prohibited from taking actions that deter their employees from union membership, whether those employees are current or even prospective. However, despite the passage of this law clearly prohibiting these practices, various public employers have taken actions to deter their employees from seeking out union membership. These practices have included letters and other persuasive tactics from management to employees indicating that joining a union would reduce their ability to negotiate, or even issuing warnings about pay freezes based on the labor actions taken at other locations. These tactics are in clear violation of the law, and yet there are no enforcement mechanisms for organized labor or the state other than a cease-and-desist letter that comes long after the unlawful actions have already been taken.

> SB 931 will institute penalties for violations of these important labor laws […].

7. Arguments in opposition to the bill

In opposition to the bill unless amended, a coalition of ten organizations representing public sector employers writes:

> This new punitive authority under PERB could expose public entities, even those acting in good faith, to significant new liabilities.

In opposition to the bill unless it is amended, the University of California writes:

> We honor collective bargaining and respect the rights of employees to be represented. We also take seriously our responsibility as a public employer, to unlock the doors of economic opportunity and reduce income inequality. Unfortunately, the University must respectfully oppose Senate Bill 931 (Leyva), unless the bill is amended to apply the penalties only to mass communications and to award attorney's fees to either prevailing party. Senate Bill 931 creates a new punitive authority at the Public Employment Relations Board (PERB) and could expose public entities to significant new liabilities in an area of law where the interpretation and application remains uncertain and subjective.

SUPPORT

American Federation of State, County and Municipal Employees - California (sponsor)
California Labor Federation (sponsor)
California Teamsters Public Affairs Council (sponsor)
Service Employees International Union - California State Council (sponsor)
Arcadia Police Officers Association
Burbank Police Officers' Association
California Association of Professional Scientists
California Coalition of School Safety Professionals
California Labor Federation
California Professional Firefighters
California State Association of Electrical Workers
California State Legislative Board SMART-Transportation Division
California State Pipe Trades Council
California Teachers Association
Claremont Police Officers Association
Corona Police Officers Association
Culver City Police Officers' Association

Fullerton Police Officers' Association
Inglewood Police Officers Association
International Union of Elevator Constructors
Los Angeles School Police Officers Association
Newport Beach Police Association
Orange County Employees Association
Palos Verdes Police Officers Association
Peace Officers Research Association of California
Placer County Deputy Sheriffs' Association
Pomona Police Officer Association
Professional Engineers in California Government
Riverside Police Officers Association
Riverside Sheriffs' Association
Santa Ana Police Officers Political Action Committee
United Auto Workers Local 2865
United Auto Workers Local 4123
United Auto Workers Local 5810
United Public Employees
Upland Police Officers Association
Western States Council of Sheet Metal Workers

OPPOSITION

Association of California Healthcare Districts
Association of California School Administrators
California Association of Joint Powers Authorities
California Hospital Association
California School Boards Association
California Special Districts Association
California State Association of Counties
League of California Cities
Office of the Riverside County Superintendent of Schools
Rural County Representatives of California
Urban Counties of California
University of California

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 3096 (Chiu, 2020) was similar to this bill but narrower in scope to only apply to the University of California. AB 3096 died in the Senate Labor, Public Employment and Retirement Committee.

SB 866 (Committee on Budget and Fiscal Review, Ch. 53, Stats. 2018) codified existing law prohibiting public sector employers from deterring or discouraging their current and prospective workers from exercising their collective bargaining rights and gave PERB jurisdiction to adjudicate allegations of violations of that prohibition.

SB 285 (Atkins, Ch. 567, Stats. 2017) prohibited a public employer from deterring or discouraging public employees from becoming or remaining members of an employee organization.

AB 1889 (Cedillo, Ch. 872, Stats. 2000) prohibited grant recipients, specified state contractors, public employers, or private employers who receive state funds and meet other requirements from using state funds to assist, promote, or deter union organizing.

PRIOR VOTES:

Senate Labor, Public Employment and Retirement Committee (Ayes 4, Noes 1)

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Amended Mock-up for 2021-2022 SB-931 (Leyva (S))

Mock-up based on Version Number 99 - Introduced 2/7/22

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 3551.5 is added to the Government Code, to read:

3551.5. (a) An employee organization that is subject to the jurisdiction of the Public Employment Relations Board may bring a claim before the board alleging that a public employer violated Section 3550. Upon a finding by the board that the public employer violated Section 3550, the employer shall be subject to a civil penalty of up to one thousand dollars ($1,000) per each affected employee, not to exceed one hundred thousand dollars ($100,000) in total, and shall be subject to attorney's fees and costs, as described in subdivision (c).

(b) The civil penalty shall be recoverable by the Public Employment Relations Board and shall be used, upon appropriation, for further administration of this chapter.

(c) (1) The Public Employment Relations Board shall award attorney's fees and costs to a prevailing employee organization unless the board finds the claim was frivolous, unreasonable, or groundless when brought, or the employee organization continued to litigate after it clearly became so. The attorney's fees and costs shall be calculated from the inception of proceedings before the board's Division of Administrative Law until final disposition of the claim by the board.

(2) Notwithstanding paragraph (1), the board shall not award attorney's fees and costs under this section for any proceedings before the board that challenge the dismissal of an unfair practice charge by the board's Office of the General Counsel.

(3) If the board initiates proceedings with the superior court to enforce or achieve compliance with a board order pursuant to this section or is required to defend a decision of the board involving this section after an employer seeks judicial review, the court shall award the board attorney's fees and costs if the board is the prevailing party.