

AMENDED IN ASSEMBLY JUNE 13, 2011

AMENDED IN SENATE APRIL 25, 2011

AMENDED IN SENATE MARCH 24, 2011

SENATE BILL

No. 857

Introduced by Senator Lieu

(Coauthor: Assembly Member Williams)

February 18, 2011

~~An act to add Section 3333.6 to the Civil Code, relating to civil damages. An act to amend Sections 3509, 3514.5, 3541.3, 3563.3, 71639.1, and 71825 of the Government Code, relating to public employment.~~

LEGISLATIVE COUNSEL'S DIGEST

SB 857, as amended, Lieu. ~~Civil damages.~~ *Public employment: unlawful strike damages.*

Existing law establishes the Public Employment Relations Board (PERB). Under existing law, PERB has the power and duty to investigate an unfair practice charge and to determine whether the charge is justified and the appropriate remedy for the unfair practice.

This bill would specify that PERB has no authority, in an action to recover damages due to an unlawful strike, to award strike-preparation expenses as damages, or to award damages for costs, expenses, or revenue losses incurred during, or as a consequence of, an unlawful strike. The bill would state that its provisions are declaratory of existing law and that it does not modify existing law that authorizes a court to award damages for otherwise prohibited conduct committed during a strike.

Existing law provides that for the breach of an obligation arising from contract, the measure of damages is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom, except as specified. Existing law provides that the measure of damages for a breach of an obligation not arising from contract is the amount that will compensate for all the detriment proximately caused:

This bill would prohibit a person, in any action to recover damages due to an unlawful strike, from recovering damages resulting from expenses incurred by the employer in anticipation of, or in preparation for, the strike. The bill would define “unlawful strike” as any strike that has been determined unlawful by the Public Employment Relations Board:

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 3509 of the Government Code is amended
2 to read:
3 3509. (a) The powers and duties of the board described in
4 Section 3541.3 shall also apply, as appropriate, to this chapter and
5 shall include the authority as set forth in subdivisions (b) and (c).
6 Included among the appropriate powers of the board are the power
7 to order elections, to conduct any election the board orders, and
8 to adopt rules to apply in areas where a public agency has no rule.
9 (b) A complaint alleging any violation of this chapter or of any
10 rules and regulations adopted by a public agency pursuant to
11 Section 3507 or 3507.5 shall be processed as an unfair practice
12 charge by the board. The initial determination as to whether the
13 charge of unfair practice is justified and, if so, the appropriate
14 remedy necessary to effectuate the purposes of this chapter, shall
15 be a matter within the exclusive jurisdiction of the board, *except*
16 *that in an action to recover damages due to an unlawful strike,*
17 *the board shall have no authority to award strike-preparation*
18 *expenses as damages, and shall have no authority to award*
19 *damages for costs, expenses, or revenue losses incurred during,*
20 *or as a consequence of, an unlawful strike.* The board shall apply

1 and interpret unfair labor practices consistent with existing judicial
2 interpretations of this chapter.

3 (c) The board shall enforce and apply rules adopted by a public
4 agency concerning unit determinations, representation, recognition,
5 and elections.

6 (d) Notwithstanding subdivisions (a) to (c), inclusive, the
7 employee relations commissions established by, and in effect for,
8 the County of Los Angeles and the City of Los Angeles pursuant
9 to Section 3507 shall have the power and responsibility to take
10 actions on recognition, unit determinations, elections, and all unfair
11 practices, and to issue determinations and orders as the employee
12 relations commissions deem necessary, consistent with and
13 pursuant to the policies of this chapter.

14 (e) Notwithstanding subdivisions (a) to (c), inclusive, consistent
15 with, and pursuant to, the provisions of Sections 3500 and 3505.4,
16 superior courts shall have exclusive jurisdiction over actions
17 involving interest arbitration, as governed by Title 9 (commencing
18 with Section 1280) of Part 3 of the Code of Civil Procedure, when
19 the action involves an employee organization that represents
20 firefighters, as defined in Section 3251.

21 (f) This section shall not apply to employees designated as
22 management employees under Section 3507.5.

23 (g) The board shall not find it an unfair practice for an employee
24 organization to violate a rule or regulation adopted by a public
25 agency if that rule or regulation is itself in violation of this chapter.
26 This subdivision shall not be construed to restrict or expand the
27 board's jurisdiction or authority as set forth in subdivisions (a) to
28 (c), inclusive.

29 *SEC. 2. Section 3514.5 of the Government Code is amended*
30 *to read:*

31 3514.5. The initial determination as to whether the charges of
32 unfair practices are justified, and, if so, what remedy is necessary
33 to effectuate the purposes of this chapter, shall be a matter within
34 the exclusive jurisdiction of the board, *except that in an action to*
35 *recover damages due to an unlawful strike, the board shall have*
36 *no authority to award strike-preparation expenses as damages,*
37 *and shall have no authority to award damages for costs, expenses,*
38 *or revenue losses incurred during, or as a consequence of, an*
39 *unlawful strike. Procedures for investigating, hearing, and deciding*

1 these cases shall be devised and promulgated by the board and
2 shall include all of the following:

3 (a) Any employee, employee organization, or employer shall
4 have the right to file an unfair practice charge, except that the board
5 shall not do either of the following: (1) issue a complaint in respect
6 of any charge based upon an alleged unfair practice occurring more
7 than six months prior to the filing of the charge; (2) issue a
8 complaint against conduct also prohibited by the provisions of the
9 agreement between the parties until the grievance machinery of
10 the agreement, if it exists and covers the matter at issue, has been
11 exhausted, either by settlement or binding arbitration. However,
12 when the charging party demonstrates that resort to contract
13 grievance procedure would be futile, exhaustion shall not be
14 necessary. The board shall have discretionary jurisdiction to review
15 ~~such a~~ settlement or arbitration award reached pursuant to the
16 grievance machinery solely for the purpose of determining whether
17 it is repugnant to the purposes of this chapter. If the board finds
18 that ~~such the~~ settlement or arbitration award is repugnant to the
19 purposes of this chapter, it shall issue a complaint on the basis of
20 a timely filed charge, and hear and decide the case on the merits;
21 otherwise, it shall dismiss the charge. The board shall, in
22 determining whether the charge was timely filed, consider the
23 six-month limitation set forth in this subdivision to have been
24 tolled during the time it took the charging party to exhaust the
25 grievance machinery.

26 (b) The board shall not have authority to enforce agreements
27 between the parties, and shall not issue a complaint on any charge
28 based on alleged violation of such an agreement that would not
29 also constitute an unfair practice under this chapter.

30 (c) The board shall have the power to issue a decision and order
31 directing an offending party to cease and desist from the unfair
32 practice and to take such affirmative action, including but not
33 limited to the reinstatement of employees with or without back
34 pay, as will effectuate the policies of this chapter.

35 *SEC. 3. Section 3541.3 of the Government Code is amended*
36 *to read:*

37 3541.3. The board shall have all of the following powers and
38 duties:

39 (a) To determine in disputed cases, or otherwise approve,
40 appropriate units.

- 1 (b) To determine in disputed cases whether a particular item is
2 within or without the scope of representation.
- 3 (c) To arrange for and supervise representation elections ~~which~~
4 *that* shall be conducted by means of secret ballot elections, and
5 certify the results of the elections.
- 6 (d) To establish lists of persons broadly representative of the
7 public and qualified by experience to be available to serve as
8 mediators, arbitrators, or factfinders. In no case shall these lists
9 include persons who are on the staff of the board.
- 10 (e) To establish by regulation appropriate procedures for review
11 of proposals to change unit determinations.
- 12 (f) Within its discretion, to conduct studies relating to
13 employer-employee relations, including the collection, analysis,
14 and making available of data relating to wages, benefits, and
15 employment practices in public and private employment, and,
16 when it appears necessary in its judgment to the accomplishment
17 of the purposes of this chapter, recommend legislation. The board
18 shall report to the Legislature by October 15 of each year on its
19 activities during the immediately preceding fiscal year. The board
20 may enter into contracts to develop and maintain research and
21 training programs designed to assist public employers and
22 employee organizations in the discharge of their mutual
23 responsibilities under this chapter.
- 24 (g) To adopt, pursuant to Chapter 3.5 (commencing with Section
25 11340) of Part 1 of Division 3 of Title 2, rules and regulations to
26 carry out the provisions and effectuate the purposes and policies
27 of this chapter.
- 28 (h) To hold hearings, subpoena witnesses, administer oaths,
29 take the testimony or deposition of any person, and, in connection
30 therewith, to issue subpoenas duces tecum to require the production
31 and examination of any employer's or employee organization's
32 records, books, or papers relating to any matter within its
33 jurisdiction. Notwithstanding Section 11425.10, Chapter 4.5
34 (commencing with Section 11400) of Part 1 of Division 3 of Title
35 2 does not apply to a hearing by the board under this chapter,
36 except a hearing to determine an unfair practice charge.
- 37 (i) To investigate unfair practice charges or alleged violations
38 of this chapter, and take any action and make any determinations
39 in respect of these charges or alleged violations as the board deems
40 necessary to effectuate the policies of this chapter, *except that in*

1 *an action to recover damages due to an unlawful strike, the board*
2 *shall have no authority to award strike-preparation expenses as*
3 *damages, and shall have no authority to award damages for costs,*
4 *expenses, or revenue losses incurred during, or as a consequence*
5 *of, an unlawful strike.*

6 (j) To bring an action in a court of competent jurisdiction to
7 enforce any of its orders, decisions, or rulings, or to enforce the
8 refusal to obey a subpoena. Upon issuance of a complaint charging
9 that any person has engaged in or is engaging in an unfair practice,
10 the board may petition the court for appropriate temporary relief
11 or restraining order.

12 (k) To delegate its powers to any member of the board or to any
13 person appointed by the board for the performance of its functions,
14 except that no fewer than two board members may participate in
15 the determination of any ruling or decision on the merits of any
16 dispute coming before it, and except that a decision to refuse to
17 issue a complaint shall require the approval of two board members.

18 (l) To decide contested matters involving recognition,
19 certification, or decertification of employee organizations.

20 (m) To consider and decide issues relating to rights, privileges,
21 and duties of an employee organization in the event of a merger,
22 amalgamation, or transfer of jurisdiction between two or more
23 employee organizations.

24 (n) To take any other action as the board deems necessary to
25 discharge its powers and duties and otherwise to effectuate the
26 purposes of this chapter.

27 *SEC. 4. Section 3563.3 of the Government Code is amended*
28 *to read:*

29 3563.3. The board shall have the power to issue a decision and
30 order directing an offending party to cease and desist from the
31 unfair practice and to take such affirmative action, including, but
32 not limited to, the reinstatement of employees with or without back
33 pay, as will effectuate the policies of this chapter, *except that in*
34 *an action to recover damages due to an unlawful strike, the board*
35 *shall have no authority to award strike-preparation expenses as*
36 *damages, and shall have no authority to award damages for costs,*
37 *expenses, or revenue losses incurred during, or as a consequence*
38 *of, an unlawful strike.*

39 *SEC. 5. Section 71639.1 of the Government Code is amended*
40 *to read:*

1 71639.1. (a) As used in this article, “board” means the Public
2 Employment Relations Board established pursuant to Section 3541.

3 (b) The powers and duties of the board described in Section
4 3541.3 shall also apply, as appropriate, to this article and shall
5 include the authority as set forth in subdivisions (c) and (d).
6 Included among the appropriate powers of the board are the power
7 to order elections, to conduct any election the board orders, and
8 to adopt rules to apply in areas where a trial court has no rule.

9 (c) A complaint alleging any violation of this article or of any
10 rules and regulations adopted by a trial court pursuant to Section
11 71636 shall be processed as an unfair practice charge by the board.
12 The initial determination as to whether the charge of unfair practice
13 is justified and, if so, the appropriate remedy necessary to effectuate
14 the purposes of this article, shall be a matter within the exclusive
15 jurisdiction of the board, *except that in an action to recover*
16 *damages due to an unlawful strike, the board shall have no*
17 *authority to award strike-preparation expenses as damages, and*
18 *shall have no authority to award damages for costs, expenses, or*
19 *revenue losses incurred during, or as a consequence of, an*
20 *unlawful strike. The board shall apply and interpret unfair labor*
21 *practices consistent with existing judicial interpretations of this*
22 *article and Section 71639.3. The board shall not issue a complaint*
23 *in respect of any charge based upon an alleged unfair practice*
24 *occurring more than six months prior to the filing of the charge,*
25 *except that if the rules and regulations adopted by a trial court*
26 *require exhaustion of a remedy prior to filing an unfair practice*
27 *charge or the charging party chooses to exhaust a trial court’s*
28 *remedy prior to filing an unfair practice charge, the six-month*
29 *limitation set forth in this subsection shall be tolled during such*
30 *reasonable amount of time it takes the charging party to exhaust*
31 *the remedy, but nothing herein shall require a charging party to*
32 *exhaust a remedy when that remedy would be futile.*

33 (d) The board shall enforce and apply rules adopted by a trial
34 court concerning unit determinations, representation, recognition,
35 and elections.

36 (e) This section does not apply to employees designated as
37 management employees under Section 71637.1.

38 (f) The board shall not find it an unfair practice for an employee
39 organization to violate a rule or regulation adopted by a trial court
40 if that rule or regulation is itself in violation of this article.

1 *SEC. 6. Section 71825 of the Government Code is amended to*
2 *read:*

3 71825. (a) As used in this section, “board” means the Public
4 Employment Relations Board established pursuant to Section 3541.

5 (b) The powers and duties of the board described in Section
6 3541.3 shall also apply, as appropriate, to this chapter and shall
7 include the authority as set forth in subdivisions (c) and (d).
8 Included among the appropriate powers of the board are the power
9 to order elections, to conduct any election the board orders, and
10 to adopt rules to apply in areas where a regional court interpreter
11 employment relations committee has no rule.

12 (c) A complaint alleging any violation of this chapter or of any
13 rules and regulations adopted by a regional court interpreter
14 employment relations committee pursuant to Section 71823 shall
15 be processed as an unfair practice charge by the board. The initial
16 determination as to whether the charge of unfair practice is justified
17 and, if so, the appropriate remedy necessary to effectuate the
18 purposes of this chapter, shall be a matter within the exclusive
19 jurisdiction of the board, *except that in an action to recover*
20 *damages due to an unlawful strike, the board shall have no*
21 *authority to award strike-preparation expenses as damages, and*
22 *shall have no authority to award damages for costs, expenses, or*
23 *revenue losses incurred during, or as a consequence of, an*
24 *unlawful strike. The board shall apply and interpret unfair labor*
25 *practices consistent with existing judicial interpretations of this*
26 *chapter and subdivision (b) of Section ~~71826(b)~~ 71826. The board*
27 *shall not issue a complaint in respect of any charge based upon an*
28 *alleged unfair practice occurring more than six months prior to the*
29 *filing of the charge, except that if the rules and regulations adopted*
30 *by a regional court interpreter employment relations committee*
31 *require exhaustion of a remedy prior to filing an unfair practice*
32 *charge or the charging party chooses to exhaust a regional court*
33 *interpreter employment relations committee’s remedy prior to*
34 *filing an unfair practice charge, the six-month limitation set forth*
35 *in this subsection subdivision shall be tolled during such reasonable*
36 *amount of time it takes the charging party to exhaust the remedy,*
37 *but nothing herein shall require a charging party to exhaust a*
38 *remedy when that remedy would be futile.*

1 (d) The board shall enforce and apply rules adopted by a regional
2 court interpreter employment relations committee concerning unit
3 determinations, representation, recognition, and elections.

4 (e) This section does not apply to employees designated as
5 management employees.

6 (f) The board shall not find it an unfair practice for an employee
7 organization to violate a rule or regulation adopted by a regional
8 court interpreter employment relations committee if that rule or
9 regulation is itself in violation of this chapter.

10 *SEC. 7. The amendments made by this act do not constitute a*
11 *change in, but are declaratory of, existing law. These amendments*
12 *are not intended to modify existing law holding that a court of*
13 *competent jurisdiction may, upon a showing by clear and*
14 *convincing evidence, award costs, expenses, or lost revenue*
15 *resulting from independently unlawful, tortious activity, such as*
16 *vandalism, property damage, mass picketing, or the unlawful*
17 *blocking of ingress or egress from the struck facility.*

18 ~~SECTION 1. Section 3333.6 is added to the Civil Code, to~~
19 ~~read:~~

20 ~~3333.6. (a) In any action to recover damages due to an~~
21 ~~unlawful strike, a person shall not recover damages resulting from~~
22 ~~expenses incurred by the employer in anticipation of, or in~~
23 ~~preparation for, the strike.~~

24 ~~(b) For the purposes of this section, “unlawful strike” means~~
25 ~~any strike that has been determined unlawful by the Public~~
26 ~~Employment Relations Board.~~