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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

LEONARD ISENBERG, Plaintiff and Appellant, v. UNITED TEACHERS LOS ANGELES et al., Defendants and Respondents.	B259611 (Los Angeles County Super. Ct. No. BC486517)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura C. Ellison, Judge. Reversed and remanded.

Ronald C. Lapekas, for Plaintiff and Appellant.

Musick, Peeler & Garrett, Cheryl A. Orr for Defendants and Respondents United Teachers Los Angeles.

Kaufman Dolowich & Voluck, Elizabeth Williams, for Defendants and Respondents Trygstad, Schwab & Trygstad.

INTRODUCTION

Appellant Leonard Isenberg, a teacher and former member of the United Teachers Los Angeles labor union (UTLA or the union), sued the union and a law firm, Trygstad, Schwab & Trygstad (Trygstad), alleging that they violated the Cartwright Act (Bus. & Prof. Code, §16720, et seq.) and the Unfair Competition Law (*id*., § 17200, et seq.) (UCL). Isenberg alleged that an exclusive representation agreement between UTLA and Trygstad limited the legal representation available to union members because UTLA would pay Trygstad, but no other attorneys or firms, to represent UTLA members in teacher disciplinary and dismissal proceedings. Isenberg alleged that this agreement unlawfully restrained trade in the relevant legal market. On the day set for trial, Trygstad moved to dismiss the case, arguing that that the Public Employee Relations Board (PERB) had exclusive jurisdiction over Isenberg's claims. The trial court granted the motion, and Isenberg appealed.

We hold that the trial court erred in finding that PERB had exclusive jurisdiction over Isenberg's claims. PERB's jurisdiction extends only to issues that have a substantial impact on the relationship between union members and their employers; PERB does not exercise jurisdiction over matters involving the internal activities of a union. PERB has ruled that disagreements between a union and its members relating to outside legal representation are solely internal matters beyond the scope of PERB's jurisdiction. Moreover, PERB does not exercise discretion over issues governed by the Education Code rather than by the Educational Employment Relations Act (EERA). Dismissal proceedings involving certificated teachers—the proceedings at issue in Isenberg's allegations—are governed by the Education Code, not the EERA, and therefore are not within PERB jurisdiction.

Defendants request that we affirm the trial court's dismissal on the alternative basis that the Cartwright Act exempts labor unions from liability. In fact, the Cartwright Act exempts a labor union from liability only when the union does not act with the purpose of restraining trade. There is insufficient evidence in the record to determine

UTLA's purpose in employing only a single law firm. On this record, the labor exemption of the Cartwright Act therefore does not provide an alternative basis to affirm the dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

A. Isenberg's allegations

Isenberg was a teacher in the Los Angeles Unified School District (LAUSD) and is a former member of UTLA. The parties agree that UTLA is the exclusive bargaining agent for certificated LAUSD teachers. UTLA works with defendant Trygstad, which UTLA says "has a long-standing familiarity with the union and representation of teachers with respect to employment decisions." UTLA provides union members with legal representation by Trygstad as follows: "As a benefit of union membership, and at its discretion, UTLA affords its members reimbursement of $1,000 to $1,500 for legal fees for the services provided by Trygstad to the member. If, however, a union member wishes to retain legal counsel of his or her own choosing, the union member is free to do so."

Isenberg sued UTLA and Trygstad[1] in June 2012, alleging that together they conspired to monopolize the market for all UTLA members needing legal services. Isenberg alleged that UTLA and Trygstad entered into agreements "for the purpose of limiting access to legal services provided by any attorney except those employed by [Trygstad]. [¶] The purpose and goal of the conspiracy were [sic] to restrain and restrict the availability of legal services to UTLA members so that [Trygstad] could maintain a monopoly over such services in the relevant market."[2] The relevant market consisted of "more than 35,000 UTLA members." Isenberg alleged that union members who do not want to use Trygstad as their law firm must pay for their own legal representation.

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[1] Isenberg added the "Educators Liability Insurance Fund" as a Doe defendant, but the record gives no indication that this entity ever answered or participated in proceedings below. UTLA's trial brief suggested that there is no such entity.

[2] The allegations vary somewhat in the different versions of the complaint filed. We focus on only the third amended complaint, which was operative at the time of the dismissal.

According to the complaint, UTLA purported to keep a list of law firms "approved" by UTLA, but in fact there was no process by which any other law firm or attorney could gain UTLA approval. Isenberg alleged that Trygstad had held this monopoly for more than 30 years.

Isenberg alleged that he and other UTLA members were harmed by the exclusive relationship between UTLA and Trygstad. Isenberg alleged that when LAUSD initiated dismissal proceedings against him, he initially worked with Trygstad attorney Richard Schwab but later wanted different counsel. UTLA refused to pay any amount for a non-Trygstad attorney or law firm, even though UTLA had authorized a $15,000 fee for Trygstad to represent him. As a result, Isenberg alleged, he incurred fees and litigation expenses because he had to pay for his own attorney. In addition, Isenberg alleged that other UTLA members were damaged by the relationship between UTLA and Trygstad because Trygstad has "persuaded almost all of the teachers it has represented to accept a settlement agreement from LAUSD, including those who were factually and legally innocent of the charges." Isenberg also alleged that Trygstad routinely failed to assert critical affirmative defenses on behalf of teachers.

Isenberg asserted causes of action against UTLA and Trygstad for violations of the Cartwright Act (Bus. & Prof. Code, §16720, et seq.) and UCL (*id*., § 17200, et seq.). He alleged that the agreement between UTLA and Trygstad "restrains competition by refusing to authorize payment of legal fees and expenses [from UTLA] to any law firm except [Trygstad]." He also alleged that this conspiracy "interferes with the client's right to choose his or her own attorney." Affected parties were damaged because they had to pay attorney fees for other attorneys or accept substandard representation by Trygstad.

Isenberg asserted an additional cause of action against UTLA for fraudulent business practices, alleging that UTLA fraudulently represented to Isenberg and other members that it had a properly funded legal defense program in place. He alleged that UTLA concealed information from union members, including "the procedures to be followed to submit a claim, the standards for determining whether a claim will be paid, the name of the insurance company(ies) providing benefits, and procedures for appealing

UTLA's decision not to provide payment for attorney's fees." Isenberg also alleged that "UTLA, acting as a quasi-fiduciary, may not act arbitrarily or discriminate between or among claimants."[3]

In response to Isenberg's first and second amended complaints, UTLA and Trygstad demurred and moved for judgment on the pleadings on the basis that as a labor union, UTLA was exempt from the Cartwright Act. They cited Business and Professions Code section 16703 (section 16703), which states, "Within the meaning of this chapter, labor, whether skilled or unskilled, is not a commodity." The trial court rejected the defendants' arguments, holding that the face of the complaint did not indicate that UTLA was exempt from the Cartwright Act, and therefore Isenberg's complaint stated a valid cause of action.

B. Trygstad's motion to dismiss

The day trial was set to begin, Trygstad filed a document titled, "Motion to Dismiss for Lack of Subject Matter Jurisdiction." In it, Trygstad asserted for the first time that "the Public Employment Relations Board ('PERB') has exclusive and initial jurisdiction over matters involving the unfair practices claims relating to unions." Trygstad cited part of the EERA, Government Code section 3541.5, which states, "The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board."

In support of its argument, Trygstad said, "It cannot be disputed that Plaintiff's operative claims are for 'unfair practices' as contemplated under Section 3541.5." Trygstad pointed to a paragraph in Isenberg's complaint that quoted the language of the

[3] Isenberg also asserted a cause of action for professional negligence against Trygstad and partner Richard Schwab. Isenberg alleged that when he was involved in the disciplinary process with LAUSD, UTLA referred him to Trygstad, which did not adequately represent him. According to the complaint, Trygstad and Schwab did not disclose relevant conflicts of interest and failed to assert certain affirmative defenses. Isenberg dismissed this cause of action about three months before the parties were scheduled to go to trial.

UCL, alleging that the defendants' actions constituted an "unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) Trygstad also argued that because Isenberg alleged a conspiracy between the union and Trygstad, the cause of action should be interpreted as alleging an "attempt by a union to restrain members' rights as contemplated by Government Code section 3543 and 3543.6(b) – claims properly subject to PERB."[4]

Trygstad conceded that PERB does not exercise jurisdiction over exclusively internal union matters, but argued that PERB jurisdiction applies because this case involves issues between union members and employers: "Plaintiff's claims in this Action involve a union member's ability to obtain legal representation at dismissal proceedings which ultimately determine whether this employer-employee relationship will continue or terminate. It cannot be reasonably argued that this issue and alleged restraint on representation does [sic] not have a substantial impact on this relationship." Trygstad also repeated its earlier argument that labor union activity is exempt from the Cartwright Act. UTLA joined the motion.

The trial court allowed Isenberg to file an opposition the same day. Isenberg argued that the case was not within PERB's jurisdiction because his allegations did not involve any issue arising under a collective bargaining agreement or within the employer-employee relationship. Isenberg pointed out, "There are no facts nor is there an allegation that any act or omission involved plaintiff and his employer, LAUSD." Therefore, Isenberg argued, the issue is not unfair *labor* practices under the EERA, but rather unfair *business* practices under the UCL and antitrust under the Cartwright Act.

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[4] Government Code section 3543, subdivision (a) provides that public school employees may form and join unions, and that those unions may be exclusive representatives of the employees in employment relations with the employer. Subdivision (b) of section 3543 discusses grievance procedures. Government Code section 3543.6, subdivision (b) says it is unlawful for a union to "[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter."

Isenberg also opposed the renewed argument that the actions in this case fall under the labor exemption to the Cartwright Act.

The following day, the court granted Trygstad's motion. The court held, "The Public Employment Relations Board ('PERB'), has exclusive and initial jurisdiction over matters involving unfair practice claims relating to unions. [¶] Mr. Isenberg's Third Amended Complaint alleges causes of action for unfair practices by the United Teachers Los Angeles ('UTLA') and Trygstad, Schwab, & Trygstd [sic] ('TST') specifically that these organizations conspired to monopolize the market for legal services and restricting the availability of these services. The Educational Employment Relations Act ('EERA'), makes clear that the initial determination as to whether an unfair practice charge is justified SHALL not MAY be [sic] within the exclusive jurisdiction of the PERB. California Government Code Section 3541.5." The minute order further stated, "It is undisputed that the benefits at issue here, i.e., the provision by the UTLA of attorney benefits . . . directly impacts the ability of a union member such as Mr. Isenberg to defend himself in dismissal proceedings brought by his employer. This very clearly substantially affects the relationship between employer and employee. [¶] For these reasons I must dismiss this matter as being outside of this Court's jurisdiction." (Ellipsis in original.) The court stated that it was not deciding whether UTLA was immune from Cartwright Act liability under the labor exception in that statute. The court dismissed the case with prejudice.

The court entered a judgment and awarded costs to defendants. Isenberg timely appealed.

STANDARD OF REVIEW

"Subject matter jurisdiction . . . is the power of the court over a cause of action or to act in a particular way." (*Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1035.) Here, the court found that it did not have subject matter jurisdiction over this case. An appeal from a dismissal for lack of subject matter jurisdiction presents a question of law that this court reviews de novo. (*Robbins v. Foothill Nissan* (1994) 22 Cal.App.4th 1769, 1774; see also *Finnie v. Dist. No. 1 - Pacific Coast Dist. etc. Assn*.

(1992) 9 Cal.App.4th 1311, 1318 [a dismissal for lack of subject matter jurisdiction presents a question of law similar to a demurrer].)

DISCUSSION

A. PERB did not have initial exclusive jurisdiction over Isenberg's allegations.

1. *PERB jurisdiction extends to alleged violations of the EERA.*

"The Legislature created the Educational Employment Relations Board (EERB) in 1975 to administer the Educational Employment Relations Act (EERA). (*Coachella Valley [Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072], 1084-1085.) In 1977 the Legislature expanded the EERB's jurisdiction to encompass unfair practice charges under the former State Employer-Employee Relations Act (§ 3512 et seq. [now the Ralph C. Dills Act]) and renamed the entity 'Public Employment Relations Board.' (*Coachella Valley*, at p. 1085.)" (*County of Los Angeles v. Los Angeles County Employee Relations Com*. (2013) 56 Cal.4th 905, 916, fn.10.)

"The EERA governs employer-employee relations within public school systems. Government Code sections 3543.5 and 3543.6 set forth conduct deemed to constitute unfair employment practices by employers or employee organizations. Government Code section 3541.5 provides, '[t]he initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of [PERB].' PERB's exclusive jurisdiction extends to all alleged violations of the EERA, not just those which constitute unfair practices. [Citation.]" (*Personnel Com. v. Barstow Unified School Dist.* (1996) 43 Cal.App.4th 871, 885 (*Barstow Unified*).)

Barstow Unified characterized PERB's jurisdiction as "preempting" superior court jurisdiction. It noted, "The decisions considering PERB preemption of superior court jurisdiction can be divided into three categories. In the first category are cases in which the plaintiff alleges only a violation of the Education Code, and no arguable EERA violation is evident. In these cases, the courts find no preemption. [Citations.] [¶] In the

second category are cases in which the plaintiff alleges only conduct constituting an unfair practice or other violation of the EERA. In these cases, the courts find preemption. [Citations.] [¶] In the third category are cases in which the plaintiff alleges both a violation of the Education Code and an unfair practice or other violation of the EERA. In these cases, the courts again find preemption. [Citations.]" (*Barstow Unified, supra*, 43 Cal.App.4th at pp. 886-887.)

This case does not fit into any of the three categories because Isenberg has not alleged that UTLA violated either the EERA or the Education Code.[5] Rather, Isenberg has alleged that defendants violated the Cartwright Act and the UCL. The Cartwright Act is California's principal antitrust law, intended to "rein in the burgeoning power of monopolies and cartels" by preserving consumer welfare. (*In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 136.) "The act 'generally outlaws any combinations or agreements which restrain trade or competition or which fix or control prices' (Antitrust and Trade Reg. Law Section of the State Bar of Cal., Cal. Antitrust Law (1991) p. 4), and declares that, with certain exceptions, 'every trust is unlawful, against public policy and void' ([Bus. & Prof. Code,] § 16726)." (*Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1147.) Isenberg has alleged that the same actions constitute a violation of the UCL, which prohibits "any unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) "The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.) "By defining unfair competition to include any '*unlawful* . . . business act or practice' (§ 17200, italics added), the UCL permits violations of other laws to be treated as unfair competition that is independently actionable." (*Ibid*.)

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[5] Respondents make a passing argument that this case also involves the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.; the MMBA), specifically Government Code section 3502, which states that employees "shall have the right to represent themselves individually in their employment relations with the public agency." Isenberg's allegations do not touch on whether UTLA members have a right to represent themselves in employment relations, and therefore this statute is not relevant.

Trygstad and UTLA argue that despite Isenberg's characterization of his causes of action in the complaint, his claims nonetheless fall under the EERA. They argue that the actions underlying Isenberg's allegations are properly interpreted as implicating the "unfair labor practices" prohibited by the EERA, including a subset of unfair practices generally characterized as a "duty of fair representation." (See Gov. Code §§ 3544.9 [a union "shall fairly represent each and every employee in the appropriate unit"], 3543.6 [it is unlawful for a union to discriminate against employees "because of their exercise of rights guaranteed by this chapter"]; *Los Angeles Council of School Nurses v. Los Angeles Unified School Dist*. (1980) 113 Cal.App.3d 666, 672 [violation of the duty of fair representation constitutes an unfair practices claim].) Trygstad admits that "there is no definition of 'unfair practices' provided" in the relevant statutes, but Trygstad quotes a PERB decision for the proposition that "[i]t is possible that the range of actions which may be deemed as unfair practices may have been left to PERB's own determination." (Quoting *Mt. Diablo Unified School District (Quarrick)* (1978) PERB Dec. 68E at p. 12 [2 PERC ¶ 2174].)

Trygstad is correct that courts generally defer to PERB's interpretation of the EERA's scope. PERB has the power and duty "[t]o determine in disputed cases whether a particular item is within or without the scope of representation" under the EERA. (Gov. Code, § 3541.3, subd. (b).) "Under established principles PERB's construction is to be regarded with deference by a court performing the judicial function of statutory construction, and will generally be followed unless it is clearly erroneous." (*San Mateo City School Dist. v. Public Employment Relations Bd*. (1983) 33 Cal.3d 850, 856.)

2. *PERB does not exercise jurisdiction over purely internal union matters, including choice of counsel for union members.*

PERB has held that it "will not intervene in matters involving the solely internal activities or relationships of an employee organization which do not impact employer-employee relations." (*California State Employees Association (Hutchinson)* (1998) PERB Dec. No. 1304-S [1998 Cal. PERB Lexis 61 at p. *5].) In other words, "only those activities that have a substantial impact on the relationship of unit members to their

employer are subject to the duty of fair representation." (*El Centro Elementary Teachers Assoc. (Willis)* (1982) PERB Dec. No. 232 at p. 14 [6 PERC ¶ 13186].) The question, therefore, is whether a union's provision of legal representation for union members is a matter that impacts only the relationship between the employee and the union, or one that impacts the employer-employee relationship.

PERB's past decisions establish that a union's decision as to which attorney will represent a member, or whether a union will pay for an attorney to represent a member, is an internal issue that is beyond the scope of PERB's jurisdiction. In a similar case, *United Teachers Los Angeles (Bracey)* (1987) PERB Dec. No. 616 [1987 Cal. PERB Lexis 28], LAUSD placed a teacher and UTLA member on medical leave and began dismissal proceedings. UTLA put the teacher in contact with an attorney at Trygstad, Mr. Schwab (who also represented Isenberg in some of his proceedings involving LAUSD, but the teacher failed to return his calls and letters. The teacher later argued that she did not contact Mr. Schwab because she wanted to work directly with Mr. Trygstad instead, and she filed a complaint with PERB alleging that UTLA breached its duty of fair representation. PERB rejected the teacher's argument. After noting that PERB would not address "matters which do not involve the employer or which are strictly internal union matters" (*id*. at, p. *17), PERB stated, "Charging party [the teacher] is thus essentially alleging that UTLA violated its duty of fair representation toward her by failing to provide her with the attorney of her choice. However, this is an internal union matter." (*Id*. at p. *19.) The decision went on to say that "an employee organization's denial of a member's request for a particular attorney, without more, does not establish arbitrary, discriminatory, or bad faith conduct on the part of the employee organization." (*Ibid*.)

All parties cite *National Education Assoc.-Jurupa (Norman)* (2014) PERB Dec. No. 2371 [2014 Cal. PERB Lexis 11] in support of their respective positions. In *Norman*, a teacher who had been placed on leave and was facing dismissal proceedings alleged that his union (NEA-J) and the California Teachers Association (CTA) promised he would be provided an attorney throughout the leave and dismissal hearing process. (*Id*. at

p. *2.) He alleged that although the union provided an attorney for a portion of the proceedings, it did not appoint an attorney or pay for a private attorney for the remainder, including his dismissal proceeding. (*Id*. at p.*5.)

PERB rejected the teacher's claim. It noted, "PERB has long held that the duty of fair representation extends only to contractually [ ] based remedies under the exclusive control of the exclusive representative." (*Norman, supra*, at pp. *15-16.) Therefore, "[a]n exclusive representative owes no duty of fair representation to a unit member unless the exclusive representative possesses the exclusive means by which such member can vindicate an individual right, and the right in question derives from a collective bargaining agreement." (*Id*. at p. *16.) PERB went on to add, "Permanent teacher dismissal proceedings are governed exclusively by the Education Code, and are beyond the scope of negotiations under EERA. [Citations.] Therefore, it was legally impossible for permanent teacher dismissal proceedings to be a term and condition contained in a [collective bargaining agreement] between the District and NEA-J. NEA-J, the exclusive bargaining representative, owed no duty of fair representation for the statutory teacher dismissal procedure." (*Id*. at pp. *17-18.)

PERB also held that it had no jurisdiction over Norman's contract-based claim that CTA owed him representation. "Any alleged contract to provide legal services to members is not a part of a collective bargaining agreement negotiated between the [school district employer] and NEA-J, but instead an alleged promise made only to CTA members. PERB does not have jurisdiction to enforce such contracts. PERB's jurisdiction over employee organizations is confined to remedying alleged violations of EERA, including EERA sections 3543.6 and 3544.9. Nothing in EERA requires employee organizations to offer members economic benefits such as legal services, and nothing in EERA envisions PERB enforcing such alleged individual contracts between an employee organization and its members, especially where the employee organization is not the exclusive representative." (*Norman, supra*, at pp. *19-20.) Here, UTLA admits that its provision of legal representation to its members is "a benefit of union membership" that UTLA provides "at its discretion." UTLA's provision of legal

representation is therefore not a result of any collective bargaining agreement involving employer LAUSD.

UTLA argues, "The fact that the PERB reached the merits of the union members' arguments in *Norman* and *Bracey* confirms that the PERB exercised its jurisdiction over the claims and thus believed those disputes within the purview of the PERB." This argument is not persuasive. *Norman* cannot reasonably be read to mean that PERB had jurisdiction over Norman's claims to the extent they were outside of any collective bargaining agreement. After finding that Norman's claims did not fall within PERB's jurisdiction, PERB commented that Norman also failed to adequately allege facts that would constitute a prima facie case because he did not allege that his union—as opposed to other entities referenced in Norman's complaint—denied him fair representation. For example, PERB noted, "Norman alleges no facts that NEA-J, the only named respondent, denied representation to Norman at any stage of his dismissal-related procedure," and "Norman has not alleged that any of the above-referenced entities were alter egos or agents of each other." (*Norman*, *supra*, p. *21-22.) PERB's observation that Norman failed to allege facts sufficient to show that his exclusive representative breached the duty of fair representation is not a holding on the merits of Norman's non-EERA claims.

PERB looked more closely at the facts in *Bracey* because the teacher there alleged that UTLA violated the duty of fair representation under the EERA. (*Bracey*, *supra*, at p. *1.) This does not merit a conclusion that Isenberg's claims are within PERB's jurisdiction. To reach such a conclusion would require us to ignore *Bracey*'s holding that failing to provide a union member her attorney of choice is an internal union matter. Indeed, *Bracey* highlights that a union's choice to use a particular attorney—the issue alleged here—is distinct from whether the union breached the duty of fair representation in proceedings involving the employer. *Bracey* states that choice of a particular attorney is not within PERB's jurisdiction, but the duty of fair representation is. Here, Isenberg's allegations focus on the former, and PERB's examination of the latter in *Bracey* does not compel us to reach a different result.

Other PERB decisions reach similar conclusions. In *California State Employees Association (Fox)* (1995) PERB Dec. No. 1099-S [1995 Cal. PERB Lexis 24], for example, PERB denied a teacher's allegation that her union breached the duty of fair representation, stating, "Because CSEA is under no obligation to represent you before the State Personnel Board, a denial of financial assistance to hire private counsel would also be outside the duty of fair representation." (*Fox, supra*, at p. *10.) In *Valley of the Moon Teachers Association (McClure)* (1996) PERB Dec. No. 1165 [1996 Cal. PERB Lexis 40], a teacher alleged that the California Teacher's Association violated the duty of fair representation by requiring a union member to either choose an attorney "affiliated" with the teacher's association or waive the right to a union-provided attorney. PERB rejected the allegation, stating, "[A]n employee organization's denial of a member's request for a particular representative, without more, does not establish arbitrary, discriminatory or bad faith conduct on the organization's part. [Citation.] Similarly, where an employee chooses self representation or representation by an outside agent, the Association has no obligation to provide representation or assistance." (*Id*. at p. *20.) Another PERB decision, *Service Employees Int'l Union (Banks)* (2004) PERB Dec. No. 1636M [2004 Cal. PERB Lexis 257], noted that "a union is not obligated to assist an employee with . . . proceedings before a Commission on Professional Competence." (*Id*. at p. *5.) Here, Isenberg alleges that his damages arose because he needed to hire an attorney to represent him in a dismissal proceeding before the Commission on Professional Competence. Moreover, as noted in *Norman*, the dismissal procedure for permanent teachers such as Isenberg falls under the Education Code, not the EERA, and therefore is not within PERB's jurisdiction. (*Barstow Unified, supra,* 43 Cal.App.4th at pp. 886-887 [claims falling under the Education Code are not within PERB's jurisdiction].) Under the reasoning of these PERB decisions, UTLA did not have a duty to provide representation under the EERA under the circumstances alleged in Isenberg's complaint, and therefore PERB's jurisdiction does not extend to Isenberg's claims.

In its order granting Trygstad's motion to dismiss, the trial court held that UTLA's manner of providing attorneys to its members "very clearly substantially affects the

relationship between employer and employee." This conclusion contradicts PERB's rulings that a union's provision of legal services outside the parameters of a collective bargaining agreement is an internal union matter that does not affect the employer-employee relationship. "PERB decisions are entitled to deference and its interpretation of pertinent statutes will be followed unless clearly erroneous." (*Williams v. Public Employment Relations Bd*. (2012) 204 Cal.App.4th 1119, 1127.) We see no basis for finding *Bracey*, *Norman*, *Fox*, *McClure*, or *Banks* clearly erroneous.

3. *UTLA's voluntary provision of legal representation to members does not place this issue within PERB's jurisdiction.*

Trygstad argues that even if UTLA did not initially have a duty to represent Isenberg and therefore may not have been subject to the duty of fair representation, "the analysis rightfully changes, when, as here, the exclusive representative voluntarily assumes a duty to an individual member collateral to the collective bargaining agreement." Trygstad cites *Lane v. I.U.O.E. Stationary Engineers* (1989) 212 Cal.App.3d 164 (*Lane*) for the proposition that "if the union had no formal obligation to represent plaintiff but voluntarily undertook to do so it owed him the duty to act with the requisite degree of care." (212 Cal.App.3d at p. 171.) Trygstad argues that because "PERB has never definitively stated whether or not *Lane* creates an unfair practice right of action for voluntarily assumed obligations," it is fair to assume that PERB would accept a *Lane*-based theory of duty and breach.

Contrary to Trygstad's argument, however, PERB has rejected *Lane*'s reasoning as a basis for a claim under PERB jurisdiction. "PERB has never adopted the *Lane* theory as a basis for an unfair practice charge. PERB has viewed such a theory as implicating a cause of action in state court rather than a matter within its jurisdiction." (*Oakland Education Association (McKeel)* (2000) PERB Dec. No. 1383 [2000 Cal. PERB Lexis 17 at pp. *12-13]; see also *California State Employees Assoc. (Cohen)* (1993) PERB Dec. No. 980-S [1993 Cal. PERB Lexis 19]["Even assuming facts were alleged to demonstrate that the Association promised to undertake representation in these arenas, and then negligently forfeited Cohen's rights, such conduct would not be within

PERB's jurisdiction, but her recourse, if any, would be in the State courts."] (*Id* at pp. *19-*20.))

PERB's decisions therefore demonstrate that the manner by which a union chooses legal representatives for its members is not within the scope of PERB's jurisdiction under the EERA. Because UTLA was not obligated to provide Isenberg (or other UTLA members) legal representation under the EERA or any collective bargaining agreement, and PERB has rejected *Lane*'s theory of an assumed duty of representation as a basis for relief under PERB's jurisdiction, UTLA and Trygstad have failed to show that Isenberg was required to address his allegations with PERB before filing suit in superior court.

The trial court erred by finding that Isenberg's claims were subject to PERB's exclusive jurisdiction, and it erred by dismissing the case on that basis.

B. On this record, the labor exemption to the Cartwright Act does not apply.

Defendants ask that if we find that the trial court erred by dismissing the case on jurisdictional grounds, we should nonetheless affirm the judgment on the alternative basis that UTLA, as a labor union, is exempt from liability under the Cartwright Act. Although Trygstad asserted this argument in the motion to dismiss below, the trial court explicitly declined to decide the issue in ruling on the final motion to dismiss. Based on the record before us, this defense does not provide a basis to affirm the judgment.

UTLA articulates the argument as follows: "Trygstad [is] serving the union's interests in a matter relating to the members' interests in their continued employment and the continuation of their compensation. Therefore, the relationship between the UTLA and Trygstad is immunized under Business and Professions Code 16703 and a cause of action for violation of the Cartwright Act will not lie against UTLA or Trygstad." Trygstad argues that "the fact that UTLA is a labor union mandates a finding that UTLA is exempt from the Cartwright Act and therefore, it is legally impossible for [Trygstad] to 'conspire' with UTLA to violate the Act and the UCL."

Defendants base their argument on section 16703, which states, "Within the meaning of this chapter, labor, whether skilled or unskilled, is not a commodity." In some cases, a question of statutory immunity can be a pure question of law that may be addressed for the first time on appeal. (See, e.g., *Inland Empire Health Plan v. Superior Court* (2003) 108 Cal.App.4th 588, 592 ["governmental immunity from liability is a jurisdictional matter that can be raised for the first time on appellate review."].) But defendants cite no authority, and we have found none, indicating that section 16703 provides immunity to a labor union for alleged Cartwright Act violations as a matter of law.

The application of the labor exemption in section 16703 relies on findings of fact relating to the union's primary purpose in taking the allegedly improper actions: "[A] labor union, acting alone, violates the Cartwright Act . . . when its primary purpose is to accomplish a restraint of trade [citations], not when its purpose is to obtain a valid labor objective [citations]." (*Messner v. Journeymen Barbers, Hairdressers and Cosmetologists, Intern. Union of America, Local 256* (1960) 53 Cal.2d 873, 886.) This is because "section 16703 was intended to insulate from antitrust liability concerted activities by workers seeking to improve their working terms and conditions. . . . [T]he exemption broadly covers combinations, agreements, and concerted activities *for the purpose of negotiating or otherwise fixing workers' rates of wages or compensation*." (*California Dental Assn. v. California Dental Hygienists' Assn*. (1990) 222 Cal.App.3d 49, 63 (emphasis added).) Therefore, the purposes and effects of the allegedly improper actions must be considered: "The relevant question, in every case, is whether the practice in question is meant to further the interest of tradesmen as employees in a collective bargaining context, or whether it is designed to advance their interests as entrepreneurs." (*Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 927-928.)

UTLA argues that its "primary objective is a legitimate and valid labor objective; namely, securing affordable and experienced employment attorneys to represent its members' interests . . . not to restrain trade in the legal profession." Isenberg, however, has alleged that defendants' objectives were to "restrain and restrict the availability of

legal services to UTLA members so that [Trygstad] could maintain a monopoly over such services in the relevant market," and that this was "an unlawful conspiracy in restraint of trade."

Determining the purposes and effects of an exclusive dealing arrangement such as the one Isenberg has alleged is a fact-intensive endeavor. (See, e.g., *Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 335 ["[A] determination of illegality is tested under a rule of reason and 'requires knowledge and analysis of the line of commerce, the market area, and the affected share of the relevant market. . . . The resulting factual inquiry often makes summary judgment inappropriate."].) Here, the motion to dismiss was granted on jurisdictional grounds; the court did not admit or consider any evidence relating to the merits of Isenberg's Cartwright Act allegations. We will not address these disputed issues of fact for the first time on appeal.

In short, a labor union does not have statutory immunity from Cartwright Act violations as a matter of law, as Trygstad and UTLA argue. We therefore reject defendants' argument that section 16703 provides an alternative basis for affirming the judgment below.

DISPOSITION

The trial court erred by dismissing the case for lack of subject matter jurisdiction. The court's dismissal also cannot be affirmed on the alternative basis of the Cartwright Act labor exemption in section 16703. We therefore reverse and remand for further proceedings consistent with this opinion. Isenberg shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J. MANELLA, J.