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IN THE
SUPREME COURT OF CALIFORNIA

Case No.: S242034

Deputy

Court of Appeal Consolidated Case No.: D069626

CATHERINE A. BOLING, ET AL. and CITY OF SAN DIEGO,
Petitioners,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent,

**SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION,
DEPUTY CITY ATTORNEYS ASSOCIATION, AMERICAN
FEDERATION OF STATE, COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO, LOCAL 127, SAN DIEGO CITY
FIREFIGHTERS, LOCAL 145, IAFF, AFL-CIO**
Real Parties in Interest.

AFTER A DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION ONE
Consolidated Case Nos. D069626 and D069630

**OPENING BRIEF ON THE MERITS
BY ALL UNION REAL PARTIES IN INTEREST**

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ISSUES PRESENTED ¹

(1) When a final decision of the Public Employment Relations Board (PERB) is challenged in the Court of Appeal pursuant to section 3509.5, subdivision (b), of the Meyers-Milias-Brown Act (MMBA), are PERB's interpretations of the statutes it administers and its findings of fact subject to deference under the "clearly erroneous" standard or are they subject to *de novo* review?

(2) Do the MMBA's good faith meet-and-confer obligations apply to public agencies under section 3505 or do these obligations apply only to the public agencies' governing bodies when they propose to take formal action affecting employee wages, hours, or other terms and conditions of employment under section 3504.5?

FACTUAL AND PROCEDURAL SUMMARY

I. The Parties

PERB was established by the Legislature in 1976 as the state's expert administrative agency to administer collective bargaining for covered governmental employees. Since 2001, PERB has been vested with exclusive initial jurisdiction to interpret and enforce the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq., which applies to cities,

¹ This Court's Order states that the petitions for review are granted and that briefing on the issues raised in the petition for review filed by petitioners Catherine Boling, T. J. Zane and Stephen Williams is deferred pending further order of this court. (Cal. Rules Ct., rule 8.520(b)(2).)

counties and special districts. PERB determines whether charges of unfair practices are justified and, if so, what remedy is necessary to effectuate the purposes of the Act. (§3509, subd. (b); *Coachella Valley Mosquito and Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072, 1077 [*Coachella*].)

The City of San Diego (City) is a charter city and a “public agency” subject to the MMBA. (§ 3501, subd. (c); AR:III:842.)²

The San Diego Municipal Employees Association (MEA), the Deputy City Attorneys Association of San Diego (DCAA), the American Federation of State, County and Municipal Employees, AFL-CIO, Local 127 (AFSCME), and the San Diego City Firefighters, Local 145, IAFF, AFL-CIO (Firefighters)(collectively, Unions) is each a “recognized employee organization” (§ 3501, subdivision (b)) and an “exclusive representative” (PERB Regulation, CCR, tit. 8, §32016, subd. (B)), for an appropriate unit of City employees. Unions were the charging parties in the consolidated proceedings before PERB and real parties in interest in the Court of Appeal.

Catherine A. Boling, T. J. Zane, and Stephen B. Williams (collectively, Ballot Proponents) were the official proponents of a local initiative, referred to as the Comprehensive Pension Reform Initiative (CPRI) or Proposition B, which amended the City Charter to change certain terms and conditions of employment, including the elimination of defined benefit pensions for all new

² Citations to the 24-volume Administrative Record are abbreviated as “[volume number]:[page number].”

hires except sworn police officers. Although Ballot Proponents did not participate as parties in PERB's administrative proceedings, they filed a petition for writ of extraordinary relief (D069626), and were also named as real parties in interest in the City's petition (D069630).

II. The Underlying Facts³

A. By Charter Mandate, the City of San Diego's "Strong Mayor" Serves As City's Chief Executive Officer and Chief Labor Negotiator

City Charter article XV establishes a "Strong Mayor Form of Government," defining roles and veto power for a "Strong Mayor" elected on a City-wide basis and a 9-member City Council elected by Districts. (XIII:3337-3338; XIV:3512; XVII:4492-4502; XVIII:4707-40; XXI:5532-47.)

When sworn into office, the City's Mayor agrees to serve as the City's Chief Executive Officer, responsible for the day-to-day operations of the City functioning as a business, government, and employer. (XIII:3348-3349; City Charter § 265.) The Mayor is an elected official serving in a City-paid position as City's CEO. The City Attorney's Office (under Jan Goldsmith) published a Memorandum of Law (MOL) in January 2009 (XVIII:4719-4739)⁴

³ All citations are either to the Administrative Record or, where applicable, the opinion in *Boling v. Public Employment Relations Bd.* (2017) 10 Cal.App.5th 853 [*Boling*], on which review was granted.

⁴ This MOL was published to clarify the duties of Mayor and City Council in response to PERB's determination in a prior case (Case No. LA-CE-352-M) that City had violated the MMBA. (*Id.* 4719-4720.)

entitled “Impasse Procedures Under Strong Mayor Trial Form of Governance,” which addresses the respective roles of the Mayor and City Council on behalf of the City as a “municipal corporation” and “single employer” under the MMBA. (XII:3191-3193; XVIII:4626-38, 4727-8.) As the City’s elected chief executive officer, the Mayor gives controlling direction to the administrative service; recommends to the Council such measures and ordinances the Mayor deems necessary or expedient for the City and its residents; makes other recommendations to the Council concerning the affairs of the City as the Mayor finds desirable; has inherent authority and responsibility for labor negotiations because it is an administrative function of local government; and retains veto power over certain Council legislative actions. It is the Mayor who must “ensure that the City’s responsibilities under section 3500, subdivision (a) of the MMBA as they relate to communication with employees are met.” (XVII:4493; XVIII:4721, 4727-4728.)

The Mayor also serves as City’s Chief Labor Negotiator in collective bargaining with City’s recognized employee organizations, including Unions. It is the Mayor’s duty (1) to conduct a good faith meet and confer process under the MMBA “whenever, under the law, the obligation to meet and confer is triggered” (XIII:3349); (2) to communicate with City’s employees and their Unions in a manner consistent with the MMBA; and (3) to give direction to City’s Negotiating Team and determine City’s bargaining objectives – what

concessions, reforms, changes in terms and conditions of employment are important to achieve. (XIII:3349-3352; XII-3191-3193; XIV:3705; XVIII:4721, 4727-4728.) The Mayor's role is not an advisory function but rather "it is the Mayor who must ensure that City's responsibilities under section 3500, subdivision (a) of the MMBA [...] are met," (XVIII:4721, 4727-4728), and it is the Mayor's "duty to negotiate with Unions in an attempt to reach agreement for the Council's consideration and possible adoption." (XVIII:4728)

B. The Mayor's "Tentative Agreements" With Recognized Employee Organizations Are Submitted to the City Council

Subject to the terms of the City Charter and the State's Constitution, all legislative powers of the City are vested in the City Council, except those legislative powers reserved to the people by the Charter and the State Constitution. The Council adopts an annual salary ordinance establishing salaries for all City employees, subject to the Mayor's veto power. (XVII:4493 [Charter § 265], 4498-4501 [Charter §§ 280, 290]; XVIII:4636-4637, 4714.) Any tentative agreement the Mayor reaches with a recognized employee organization is submitted to the Council for determination under MMBA, Government Code section 3505.1. Because the Council has "ultimate authority to set salaries and to approve Memoranda of Understanding," (XVIII:4738-4739), the City Attorney recommends, and the Mayor follows, a bargaining protocol to foster "the core principle of the decisional law related to the

MMBA (which) is the duty to bargain in good faith.” (XIII:3349-3352; XVIII:4726-4730, 4733, 4736-9.) Though not required by the Charter, the Mayor obtains Council’s pre-approval for any proposed increase in wages or benefits before offered to Unions. This practice avoids an end-of-bargaining disconnect between any tentative agreement the Mayor brokers and what the Council is willing to approve. The Council is empowered to reject the Mayor’s “last, best and final” offer during any impasse proceeding but the Mayor remains in control of the bargaining process. (XVII:4493 [Charter §265], 4498-4501 [§§280, 290]; XVIII:4636-4637, 4714.)

C. City’s Course of Meet-and-Confer Confirms the Mayor’s and City Council’s Respective Roles Under the MMBA

1. Charter Amendments For the November 2006 Ballot

In 2006, Mayor Sanders met and conferred with Unions regarding two ballot proposals designed to amend the City’s Charter on negotiable subjects: (1) requiring a vote of the electorate to approve future increases in pension benefits; and (2) authorizing bargaining unit work to be contracted out under a managed competition system. Meet-and-confer concluded by the deadline for the Council to put these two measures on the ballot. (XIII:3345.)

2. A New Defined Benefit Pension Plan For New Hires

In 2008, Mayor Sanders led negotiations with Unions for a new “hybrid” defined benefit/defined contribution pension plan to de-incentivize early retirements and reduce the City’s pension costs. (XIV:3628-3630;

XX:5354-56.) The Mayor opened a press conference outside City Hall to announce his tentative agreement:

We are all assembled here today to announce **that the unions and I as the City's lead negotiator have arrived at a tentative agreement regarding pension reform.** [...] I think it's in the best interest of all parties that we arrived at this arrangement and **would urge the City Council to pass it unanimously once it's before them.** (XXI:5519 [video clip].)

The Council approved the new plan which became a term of a Council-approved Memorandum of Understanding (MOU) effective July 1, 2009, through June 30, 2011 – an MOU which also included negotiated compensation reductions, and City's agreement to meet and confer if City proposed to introduce ballot measures related to wages, hours, working conditions or employee-employer relations.” (XII:3183-3185; XIV:3518-3519; XIX:4917.)

3. “Tentative Agreements” on Compensation Reductions, Firefighters’ Pension Formula, and Retiree Health Benefits

In spring 2011, Council approved the Mayor's tentative agreement with MEA to extend its existing MOU through June 30, 2012, while continuing in effect the six percent (6%) compensation reduction begun on July 1, 2009, as well as other economic concessions. (XII:3185-3188; XIX:5023-26, 5045-46.) The Mayor also reached a tentative agreement with Firefighters for a one-year extension of its MOU through June 30, 2012, which included the concession the Mayor sought to reduce the pension formula applicable to future

firefighters from the existing “3%-at-age-50” to a less favorable “3%-at-age-55.” (XIII:3473; XXI:5525-30.)

In May, the Mayor led a press conference to announce that an “historic” tentative agreement with Unions on retiree healthcare benefits would be submitted to the Council for action. (XIII:3425-3426; XIV:3522-3523; XIX:5049-52, 5054-55.) This agreement, which Council approved, achieved “record savings” – \$714 million over 25 years [revised upward to a savings of \$802.2 million, (XX:5275-76)], accompanied by a reduction in City’s unfunded liability from \$1.1 billion to \$568 million. (XIX:5049-5052; 5054-55, 5063-64, 5066-5072, 5074-5104; XIV:3523.)

D. Meanwhile, the Mayor Unilaterally Made and Implemented A Policy Decision to Seek 401(k) Pension Reform By Use of A Citizens’ Initiative To Avoid Bargaining

1. Joined By City’s Chief Operating Officer and the City Attorney During A City Hall Press Conference, The Mayor Announced His Decision

With a new pension plan having been negotiated and adopted for those hired after July 1, 2009 – and with further concession bargaining in progress on compensation and retiree health benefits – the Mayor decided, after discussions with his staff, that he “would promote and pursue a 401(k)-style pension concept as his focus during his last two years in office,” and use a citizens’ initiative rather than a Council-sponsored ballot proposal.⁵ (*Boling* at

⁵ There was *no* citizens’ initiative pending or circulating.

858-859; XIII:3306-3307; XIV:3527, 3531-3532; XV:3835-3836.) The Mayor did not believe the Council would put his 401(k) proposal on the ballot, and, in any event, going to the Council to achieve this “reform” would require negotiating with Unions and perhaps “unacceptable compromises.”⁶ (*Ibid.*)

In a tape-recorded interview, the Mayor explained his rationale:

“[W]hen you go out and signature gather and it costs a tremendous amount of money, it takes a tremendous amount of time and effort But you do that so that you get the ballot initiative on that you actually want. [A]nd that’s what we did. Otherwise, we’d have gone through the meet and confer and you don’t know what’s going to go on at that point”
(10 Cal.App.5th at 859, fn. 2.)

In furtherance of his decision, the Mayor’s Office issued a press release in early November 2010 declaring the Mayor’s intent to “place an initiative on the ballot” to implement a “radical idea” of eliminating traditional pensions for new hires at the City “as part of his aggressive agenda [...] for eliminating the city’s \$73 million structural deficit by the time he leaves office in 2012.” (XVIII:4742-4743.)⁷ This “Mayor Jerry Sanders Fact Sheet” bore City’s seal;

⁶ The Mayor never asked the Council to consider the subject matter covered by his initiative. (XIII:3465-3466.) “Having decided that the citizens’ initiative was the right way to go” to achieve 401(k)-style pension reform,” he also never directed his Negotiating Team to present his proposal to Unions for bargaining. (XIII:3354, 3465; XV:3853-3854.)

⁷ By February 2012 (months before Prop B was on the ballot) this \$73 million structural deficit had been eliminated (in part due to concession bargaining), and, by April 2012 (before Prop B went to the voters), City projected a balanced budget for the following fiscal year, and a budget surplus for the successive five years. (XIV:3524-3525; XX:5269-5270, 5272-5273, 5278-79.)

explained that the Mayor’s “administration was re-think(ing) how City provides services to the public;” and confirmed that “items requiring meet-and-confer, such as reducing the city’s retiree health care liability (were) in negotiations and on track to have a deal by April.” (*Ibid.*) However, the “headline” was the Mayor’s plan to “push a ballot measure to eliminate traditional pensions for new hires ” and to do so in furtherance of *City’s* interests.⁸ (XVIII:4742.)

The Mayor’s staff posted this “Mayor Jerry Sanders Fact Sheet” on City’s website. Standing before the City seal on the 11th floor of City Hall – joined by City’s Chief Operating Officer, Councilmember Kevin Faulconer and the City Attorney – the Mayor held a “kick-off” press conference to announce his initiative. (*Boling* at 859 and fn. 3 & 4; XVIII:4742-43, 4747; XIII:3307-3309, 3312-3313, 3319-3320; XV:3914-3915, 3917; XIV:3533-3534.) Media coverage informed the public that “San Diego voters will soon be seeing signature-gatherers for a ballot measure that would end guaranteed pensions for new [C]ity employees.” (*Boling* at 859.)

The Mayor’s Office also issued a news release to announce the Mayor’s decision. Councilmember Faulconer disseminated this news release by e-mail

⁸ It is undisputed that Mayor Sanders was acting for the *City’s* benefit after deciding that 401(k)-style pension reform was a “necessary and expedient” measure to eliminate City’s structural budget deficit and “permanently fix” City’s financial situation. (XIII:3312-3313; XV:3918-3923; XXIII:5764, 5766.)

stating that the Mayor and he “would craft a groundbreaking [pension] reform ballot measure and lead the signature-gathering effort to place the measure before voters.” (*Ibid.*) Using JerrySanders@san-diego.gov, the Mayor’s Office sent a mass e-mail to several thousand community leaders and others with the Mayor’s message that he would “craft language and gather signatures for a ballot initiative to eliminate public pensions as we know them.” (*Ibid.*; XXIII:5747-49; XV:3907-3908, 3910-3911, 3912-3913.)

In early December 2010, Mayor Sanders’ City-paid staff began promoting his pension reform initiative to the media and others. (XIII:3320-3322; XV:3922-3925, 3989-3990; XVIII:4772; XXIII:5810-12, 5923-24, 5926.) The Mayor built support with key business groups and individuals, including Ballot Proponents who became the initiative’s “official proponents.” (XV:3918-3921; XXIII:5806-08.) The Mayor personally promoted his pension reform initiative plan before the Chamber of Commerce’s public policy committee and its full Board of Directors. (XV:3797-3800, 3925-3927; XVIII:4474, 4786; XXIII:5764, 5766.) He formed a campaign committee “San Diegans for Pension Reform” (SDPR) under FPPC rules, to “push forward with financing and fund-raising.” (XIII:3378-3379, 3409-3411, 3432-3435, 3437-3440; XVIII:4782-84; XIX:4980-81, 4990-5002.) The committee’s treasurer gave updates to the Mayor’s Deputy Chief of Staff who kept “tabs” on the committee’s activities. (XV:3816-3817.)

On January 7, 2011, the Mayor's Director of Communications sent an e-mail to Fox News: "We're eliminating employee pensions as we know them and putting in place a 401(k) plan like the private sector. My boss, San Diego Mayor Jerry Sanders, is available any time to come on The Factor to talk about what he's doing here in San Diego and the greater national problem." (XIII:3329-3331; XVIII:4788.)

2. The Mayor Announced His Policy Decision Directly to the City Council When Delivering His Charter-Mandated "State of the City" Address

In January 2011, the Mayor delivered his annual, Charter-mandated "State of the City" Address *directly to the City Council* to report on "the conditions and affairs of City" and to make "recommendations on such matters as he or she may deem expedient and proper." (*Boling* at 859; City Charter, Art. XV § 265(c); XVII:4494.) Vowing to "complete our financial reforms and eliminate our structural budget deficit," the Mayor described the "bold step" of creating a 401(k)-style plan for future employees to "contain pension costs and restore sanity to a situation confronting every big city:"

"Councilman Kevin Faulconer, the city attorney and I will soon bring to voters an initiative to enact a 401(k)-style plan [...]. We are acting in the public interest, but as private citizens." (*Boling* at 859; XIX:4832, 4836.)

Another press release confirmed the Mayor's promise that "the ballot initiative next year will build on [his] earlier pension reforms which are projected to save \$400 million over the next 30 years." (*Boling* at 859; XVIII:4816.)

In the months following his “State of the City” Address – with *no* citizens’ initiative filed or pending – the Mayor, aided by his staff, continued to develop, evaluate, promote and publicize his pension reform initiative while fine-tuning its terms based on the legal and financial analyses he commissioned. (*Boling* at 859-860 and fn. 6; XIII:3380-3385; XIV:3545-3549; XV:3809-3811, 3827-3828, 3937-3942, 3948-3951, 3990-3991; XIX:4983-84, 4986-88; XXIII:5782-83, 5814-30, 5928-30.)

There was an expectation that the Mayor’s staff would regard his pension reform initiative as City business and within the scope of their official duties. (XIII:3321, 3330-32; XV:3807, 3957.) The Mayor’s Chief of Staff viewed all the initiative-related work she and other City-paid Mayoral staff members did *before* April 2011 as “official City business.” (XIII:3401-02, 3480-81; XIV:3570-76; 3653-54; 3667-68; 3676-79; XV:3812-14.)

Between January 1st and March 31st 2011, the Mayor and his key policy staff, including City’s Chief Operating Officer, explored the fiscal viability of the Mayor’s pension reform proposal;⁹ while the Mayor’s SDPR committee paid a law firm to provide legal research and advice related to it. (*Boling* at 860, fn. 7; XIII:3378-3381, 3439-3441; XIX:4980-81, 4990-5002.)

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⁹ City’s COO testified that his fiscal analysis on the Mayor’s pension reform initiative was facilitated because of his access to actuarial data from the City’s defined benefit plan which was not available to “someone off the street.” (XIV:3509, 3547-3554, 3565-3566.)