IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CATHERINE A. BOLING; T.J. ZANE; AND STEPHEN B. WILLIAMS,

Petitioners,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,

Respondent,

and

CITY OF SAN DIEGO; SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION; DEPUTY CITY ATTORNEYS ASSOCIATION; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 127; AND SAN DIEGO CITY FIREFIGHTERS LOCAL 145

Real Parties in Interest.

Case No.: S242034

After a Decision by the Court of Appeal, Fourth Appellate District, Division One
Case Nos. D069626 and D069630; PERB Decision No. 2464-M
(PERB Case Nos. LA-CE-746-M, LA-CE-752-M, LA-CE-755-M, and LA-CE-758-M)

PUBLIC EMPLOYMENT RELATIONS BOARD'S OPENING BRIEF ON THE MERITS

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STATEMENT OF THE ISSUES

1. When a final decision of the Public Employment Relations Board (PERB or Board) is challenged in the Court of Appeal pursuant to section 3509.5, subdivision (b), of the Meyers-Milias-Brown Act (MMBA),[1] are the Board's interpretation of the statutes it administers and its findings of fact subject to de novo review?

2. Is a public agency's duty to "meet and confer" under section 3505 of the MMBA limited only to those situations when its governing body proposes to take formal action affecting wages, hours, or other terms and conditions of employment pursuant to section 3504.5?

INTRODUCTION

This case is of great importance, not only to the Board's mission of promoting harmonious labor relations in California's public sector, but also to the relationship between the Legislature, the courts and quasi-judicial agencies such as PERB. PERB is the expert statewide agency entrusted with exclusive initial jurisdiction over the MMBA and six other public sector labor relations statutes. (§ 3509.5, subd. (b); *Coachella Valley Mosquito and Vector Control Dist. v. Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1077 (*Coachella*).) Since 1968, the MMBA has required local public agencies to meet and confer in good faith with their

[1] The MMBA is codified at Government Code section 3500 et seq. All further statutory references are to the Government Code, unless otherwise noted.

employees' chosen representatives over wages, hours, and other terms and conditions of employment. This duty, imposed by section 3505, is the MMBA's "centerpiece." (*Voters for Responsible Retirement v. Bd. of Supervisors* (1994) 8 Cal.4th 765, 780.) The Court of Appeal's decision in *Boling v. Public Employment Relations Board* (April 11, 2017) 10 Cal.App.5th 853 (*Boling*), which annulled the Board's decision in *City of San Diego* (2015) PERB Decision No. 2464-M, dramatically undermined: (1) the level of deference the Board receives; and (2) the scope of section 3505's duty to bargain.

Until *Boling*, the standard of review of the Board's final decisions was well settled. California courts, led by this Court, have afforded the Board's final decisions deference for over 35 years. As this Court has repeatedly acknowledged, PERB's construction of a statute within its "legislatively designated field of expertise" will not only receive deference, but will be followed unless clearly erroneous. (*Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804 (*Banning*); *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 856 (*San Mateo*) [superseded by statute on other grounds as stated in *California School Employees Assn. v. Bonita United School Dist.* (2008) 163 Cal.App.4th 387, 401].) Importantly, PERB receives such deference even when interpreting its statutes in light of external law (i.e., legal principles outside of the Board's direct expertise). As to the Board's

factual determinations, section 3509.5, subdivision (b)—like similar provisions in the other statutes administered by PERB—expressly states that the Board's findings are *conclusive* if they are supported by substantial evidence in the record considered as a whole. The courts have consistently adhered to this statutory command when reviewing the Board's decisions.

But upon review of the final Board decision in this case, the Court of Appeal dispensed with these standards. The court gave no deference to the Board's interpretation of the MMBA, based on its reading of *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1 (*Yamaha*), and on the court's determination that this case "turned almost entirely upon" legal authority outside of the Board's expertise. However, *Yamaha* does not stand for the proposition that deference depends on whether the interpretation of the agency's statute is the sole or primary issue involved in a case. Moreover, this case turns on principles of statutory and common law agency, which are firmly within PERB's expertise. The court also declined to give any deference to the Board's factual findings, contrary to the express legislative mandate of section 3509.5. The court's erroneous views of the applicable standards of review must be corrected.

This Court must also correct the Court of Appeal's serious error in interpreting section 3505 of the MMBA. That section provides that "[t]he governing body of a public agency, or such boards, commissions,

administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with ... such recognized employee organizations...." (§ 3505). The Board interpreted section 3505 to mean that an "other representative" must meet and confer before deciding to change wages, hours, or other terms and conditions of employment. This interpretation comports with decades of cases finding that public employers, acting through representatives, managers, supervisors, or other agents, violated their duty to bargain, without any formal action by their respective governing bodies.

However, the Court of Appeal relied on section 3504.5—a statutory provision never raised by any of the parties—to conclude that the duty to bargain arises *only* when the agency's governing body proposes to act. The court then applied this novel interpretation of the MMBA to reject the Board's application of statutory and common law agency principles. This interpretation is contrary to existing case law, overlooks critical differences between sections 3504.5 and 3505, and undermines the MMBA's primary purposes.

Applying the proper standards of review and the correct interpretation of MMBA section 3505, the Court of Appeal's decision should be reversed, and the Board's decision should be affirmed. The

Board carefully considered the facts before it and concluded that under both statutory and common law agency principles, the City violated its duty to meet and confer in good faith through the actions of its Mayor, Jerry Sanders, and other City officials, who helped develop, draft and promote a citizens' initiative to change pension benefits for City employees. Under the City's "strong mayor" form of government, the Mayor is the City's chief executive and lead labor negotiator. Mayor Sanders admitted that he pursued his pension proposal through a citizens' initiative to avoid the City's obligations to bargain with its recognized employee organizations before proposing to amend the City Charter. He also admitted that he used his title and City resources to further his goals. The Board rejected this blatant attempt to evade the MMBA's requirements, concluding that because the Mayor was the City's agent for collective bargaining purposes, the City was required to meet and confer over the Mayor's proposal, or, at a minimum, an alternative ballot measure.

The Court of Appeal's decision upsets longstanding case law, serves to throw PERB's constituents in a state of uncertainty, and undermines harmonious labor relations in this state. It cannot stand. PERB respectfully requests that the Court of Appeal's decision be reversed and that the Board's decision be affirmed in full.

STATEMENT OF THE CASE

A. The Parties

The City is a "public agency" subject to the MMBA. (§ 3501, subd. (c).) (AR:III:842.)[2]

The San Diego Municipal Employees Association (SDMEA), 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) are each a "recognized employee organization" (§ 3501, subd. (b)), and an "exclusive representative" (Cal. Code Regs., tit. 8, § 32016, subd. (b)), representing an appropriate unit of City employees. (AR:III:842; V:1193; VII:1777, 1814.)

Catherine A. Boling (Boling), T.J. Zane (Zane), and Stephen B. Williams (Williams) (collectively, the Ballot Proponents) were the official proponents of an initiative to modify City employees' pension benefits, referred to as the Comprehensive Pension Reform Initiative (CPRI) or Proposition B. Although the Ballot Proponents were not parties in the PERB administrative proceedings, they petitioned for a writ of

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

extraordinary relief in the Court of Appeal, Case No. D069626, and were real parties in interest in the City's petition, Case No. D069630.[3]

B. Underlying Facts

1. Background

The City is a charter city governed by a nine-member City Council and a "Strong Mayor." (AR:XVII:4492-4497.) Under the City Charter, the Mayor is the chief executive officer, responsible for the City's day-to-day operations. (AR:XVII:4492-4493 [Charter, § 265]; XIII:3349.) The Mayor has no vote on the Council, but may recommend legislation and veto certain Council actions. (AR:XVII:4493, 4498-4501.)

The Mayor's responsibilities under the Strong Mayor system include serving as the City's lead negotiator in collective bargaining with the City's six recognized employee organizations. (AR:XIII:3349-3350.) In this role, the Mayor developed the City's negotiating strategy and initial bargaining proposals. (AR:XIII:3350-3351.) In practice, the Mayor briefed the City Council and obtained agreement on his proposals before presenting them to the Unions. (AR:XIII:3349-3352.) However, the City Council's only formal authority with respect to the meet-and-confer process was either to: (1) ratify a tentative agreement between the

[3] PERB moved to dismiss the Ballot Proponents as real parties in interest in Case No. D069630, and moved to dismiss the petition in Case No. D069626. The Court of Appeal denied the former motion and deemed the latter motion—as well as the issues raised by the Ballot Proponents' petition—moot. (*Boling, supra*, 10 Cal.App.5th 853, 867.)

Mayor and an employee organization; or (2) following a declaration of impasse in negotiations, impose the Mayor's last, best, and final offer. (AR:XVIII:4636-4637, 4714.)

Twice before this dispute arose, in 2006 and 2008, Mayor Sanders developed ballot measures affecting matters within the scope of representation; both times he negotiated with the Unions before attempting to place them on the ballot. (AR:XIII:3345; XII:3194-3197, XII:3206-3207, 3212-3213, 3217-3219.)

2. City Attorney Aguirre's 2008 Legal Opinion about "Pension Ballot Measure Questions"

During the 2008 ballot measure negotiations, then-City Attorney Michael Aguirre (Aguirre) issued a legal memorandum to the Mayor and City Council explaining the City's bargaining obligations with respect to pension-related ballot measures. (AR:XVIII:4708-4717.) In addition to the City's obligation to bargain over a measure proposed by the City Council, pursuant to *People ex rel. Seal Beach Police Officers Association v. City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*), Aguirre advised that if the Mayor proposed a citizens' initiative affecting negotiable matters, the City would be required to negotiate with its unions, because the Mayor would "legally be considered as acting with apparent governmental authority." (AR:XVIII:4710.)

City Chief Operating Officer Jay Goldstone (Goldstone), who reports directly to the Mayor, testified that during the 2008 negotiations, Aguirre's legal opinion prompted the Mayor to present his proposal to the City Council, rather than pursue a citizens' initiative. (AR:XIV:3627.)

3. City Attorney Goldsmith's 2009 Opinion about the City's Obligations under the MMBA

In January 2009, the City Attorney's Office under then-City Attorney Jan Goldsmith, issued a legal opinion regarding the City's impasse procedures. (AR:XVIII:4719-4720.) The 2009 opinion did not refute Aguirre's earlier legal advice, and acknowledged that "[i]n determining whether or not the City has committed an unfair labor practice in violation of the MMBA, PERB will consider the actions of *all officials and representatives* acting on behalf of the City." (AR:XVIII:4730; emphasis added.)

4. The Mayor's Pension Reform Proposal

In 2010, Mayor Sanders and his staff determined that a primary goal for the remainder of his term would be fixing what he perceived as the unsustainable cost of the City's defined benefit pension system. (AR:XIII:3390-3391; XIV:3532-3533.) To this end, the Mayor proposed placing all newly-hired employees, except for police and firefighters, in a 401(k)-style defined contribution plan. (AR:XIII:3308-3309.) He stated

this change was necessary to eliminate the City's $73 million structural deficit before he left office in 2012. (AR:XIII:3308.)

After discussions with his staff, including then-Chief of Staff Kris Michell (Michell), Deputy Chief of Staff Julie Dubick (Dubick), and Goldstone, the Mayor decided to pursue his pension reform proposal as a citizens' initiative, rather than submit it to the City Council. (AR:XIV:3653-3656.)[4] One of his reasons for doing so was to avoid negotiating with the Unions over the proposal, as required by *Seal Beach*, *supra*, 36 Cal.3d 591, 602. (AR:XIII:3344.)

On November 19, 2010, the Mayor unveiled his proposal to the public. The Mayor's Communications Director, Darren Pudgil (Pudgil), reviewed and approved an announcement, titled "Mayor Will Push Ballot Measure to Eliminate Traditional Pensions for New Hires at City," which appeared on the Mayor's section of the City's website and was released to the media in the form of a "Mayor Jerry Sanders Fact Sheet" bearing the City's seal. (AR:XV:3911-3912; XVIII:4742-4743; XVIII:4745-4747.) The Mayor's staff also announced the plan in an e-mail message to

[4] Dubick testified that she worked on the proposal in her "unofficial capacity as a private citizen," but admitted that she "may have done some work in the office in exploring the viability of it as it could benefit San Diego citizens and work with our budget," as well as researching which method to use to bring the proposal to voters. (AR:XIV:3653-3654.) Dubick also stated that supporting the initiative once it was formally filed was personal business, as distinguished from "looking at it, thinking about it, studying it, determining if it would fit with the budget," which was official business. (AR:XIV:3667-3668.)

thousands of community members from the Mayor's official City e-mail address, JerrySanders@sandiego.gov. (AR:XV:3910-3912; XXIII:5747-5749.) The same day, the Mayor, accompanied by Goldsmith, Councilmember Kevin Faulconer, and Goldstone, held a press conference in the Mayor's City Hall office to announce his proposal. (AR:XIII:3312-3313.) Pudgil prepared the Mayor's talking points. (AR:XV:3913-3914.)

Over the next two months, the Mayor and his staff continued to develop and publicize his pension reform proposal. (AR:XVIII:4772; XXIII:5923-5924, 5926; XV:3923-3925; XVIII:4788.) Mayor Sanders acknowledged that he never directed his staff not to engage in these promotional activities. (AR:XIII:3321-3322.)

In January 2011, the Mayor promoted his pension reform proposal during his annual "State of the City" address to the City Council. (AR:XVIII:4816.) The City Charter describes the address as a message from the Mayor to the City Council with "a statement of the conditions and affairs of the City" and "recommendations on such matters as [the Mayor] may deem expedient and proper." (AR:XVII:4494.) In his speech, the Mayor vowed to "complete our financial reforms and eliminate our structural budget deficit, proposing what he called 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." (*Ibid.*) Later in the speech, the Mayor explained that acting as "private

citizens," "Councilman Kevin Faulconer, the city attorney and I will soon bring to voters an initiative to enact a 401(k)-style plan." (AR:XIX:4836.) That same day, the Mayor's office issued a press release publicizing the Mayor's vow "to push forward his ballot initiative to replace pensions with a 401k-type plan for most new city hires." (AR:XVIII:4816.)

Following the speech, the Mayor continued his publicity efforts with appearances on local and national broadcast media. (AR:XV:3937, 3940-3942.) The Mayor's talking points for these appearances were all prepared by his City staff. (*Ibid.*)

Sometime in early 2011, Goldstone obtained financial analyses of the Mayor's proposal, which required arranging for a consultant to receive actuarial data from the City pension system's database. (AR:XIV:3545-3549.) Goldstone acknowledged that this information was not available to "someone off the street." (*Ibid.*)

Sanders testified that he perceived no conflict between his official duties as the City's Mayor and lead labor negotiator and his pursuit of pension reform as a private citizen. (AR:XIII:3361-3362.) Sanders conceded that when speaking about his proposal publicly, he was always identified as the Mayor. (AR:XIII:3363.)

Gerald Braun, the Mayor's City-paid speechwriter, testified that "everyone was aware that the Mayor was working on [pension reform]