S242034

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED
OCT 11 2017
Jorge Navarrete Clerk
Deputy

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

Petitioners,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,

Respondent,

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

After a Decision of the Court of Appeal, Fourth Appellate District, Division One, Consolidated Case Nos. D069629 and D069630

CITY OF SAN DIEGO'S COMBINED ANSWER BRIEF ON THE MERITS TO THE OPENING BRIEFS OF RESPONDENT PUBLIC EMPLOYMENT RELATIONS BOARD AND THE REAL PARTIES IN INTEREST UNIONS

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CITY OF SAN DIEGO

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Petitioner and Real Party in Interest City of San Diego (City) submits this Combined Answer Brief on the Merits in response to the Opening Brief filed by California Public Employment Relations Board (PERB) and the Opening Brief filed by 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 (hereinafter referred to collectively as "Unions") which seek to reverse the Decision of the Court of Appeal, Fourth Appellate District, Division One, published in Case No. D069626 (consolidated with Case No. D069630), *Boling v. Public Employment Relations Board*, 10 Cal. App. 5th 853 (2017) (hereinafter referred to as "Opinion" or "Opn.").

I. INTRODUCTION

PERB's Decision, that a duly certified citizens' initiative could be deemed "impure" because of a public official's support was unprecedented. Never before had a State agency determined it had the power to rule on the validity of a citizens' initiative. In making its "purity" determination, PERB was presented with unique questions of law in numerous areas outside of its expertise. Accordingly, in reviewing PERB's Decision the Court of Appeal properly applied this Court's holding in *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1 (1998), that the deference given to an administrative agency's statutory interpretation is fundamentally situational, and because the issues to be decided were purely legal based on undisputed material facts, the appropriate standard of review was de novo as opposed to clearly erroneous. ***The Opinion correctly recognized that it is the judiciary – not PERB – that ultimately must decide the "purity" of a duly certified citizens' initiative.***

The Opinion also properly interpreted Government Code sections 3504.5 and 3505 in relation to the undisputed facts of the case. The Court of Appeal correctly determined PERB's attempts to nullify the Citizens' Pension Reform Initiative (CPRI) by finding Mayor Jerry Sanders ("Mayor" or "Sanders") was acting as an agent of the City when supporting a citizens' initiative was misguided and ignored fundamental principles governing the Charter amendment process and limitations set forth expressly in the City's Charter.

California's Constitution provides *only* two ways to propose amendments to the City's Charter. Either a proposal made through the citizens' initiative process, or a proposal by vote of the City's "governing body" – the City Council. There is no other method. It is undisputed that the Citizen Proponents[1] were not agents of Sanders or the City Council. It was further undisputed that the City Council did not propose the CPRI, and the City's Mayor does not have the power to unilaterally propose or decide to submit an initiative on behalf of the City, that authority rests solely with the City Council and is nondelegable. Furthermore, in the most public of settings, Sanders continuously stated he was acting as a private citizen.

PERB, in its appellate briefing, even admitted that Sanders had constitutional and statutory rights as a private citizen to take positions on matters of City employee compensation, including the CPRI. Yet, PERB and the Unions contend such rights were somehow lost due to alleged improper use of emails and public resources. However, no authority exists for nullifying Sanders' constitutional rights, an election, and denying the Citizen Proponents and the hundreds of thousands of petition signers and

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[1] "Citizen Proponents" refers to Petitioners and Real Parties in Interest, Catherine A. Boling, T.J. Zane, and Stephen B. Williams.

voters their reserved constitutional right to initiative due to any alleged violation.

A long line of cases clearly hold that citizens' initiatives are not subject to procedural requirements that might otherwise be imposed on government body action, like the meet-and-confer process of the Meyer-Milias-Brown Act (MMBA), regardless of the substantive law that might be involved. To hold otherwise would unconstitutionally limit the people's reserved initiative power and disenfranchise the very people who have the greatest stake in the City's fiscal responsibility. PERB and the Unions' attempt to expand the MMBA's meet-and-confer obligations to citizens' initiatives would unconstitutionally infringe upon First Amendment and statutory rights and would limit the people's reserved initiative power.

Accordingly, the City respectfully requests that this Court affirm the Court of Appeal's Opinion which correctly annulled PERB's Administrative Decision.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. Competing Pension Reform Concepts

In early November 2010, Councilmember DeMaio released his "Roadmap to Recovery," which included a proposal to replace defined benefit pensions with a 401(k) style plan for all new hires and a freeze on pensionable pay for five years. (XVI AR 193:004103-94.)[2]

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[2] Citations to the Administrative Record (AR) include volume number, tab number, and page number. For example, XVI AR 193:004103-94, refers to Volume XVI, Tab 193, pages 4103 through 4194.

On November 19, 2010, Sanders announced he would seek to place an initiative on the ballot to eliminate defined benefit pensions for all but safety (police, fire and lifeguard) new hires and offer a 401(k) style plan. (XVIII AR 195:004745-49.) Sanders and Councilmember Faulconer met with business leaders of the Lincoln Club, San Diego County Taxpayers Association (SDCTA) and Chamber of Commerce to describe their pension reform concept. However, they were "lukewarm" to the Sanders' concept and preferred DeMaio's plan. (XV AR 192:003801:25-3802:2.) They told Sanders his concept was not "tough enough" and did not save enough money, and they only wanted one initiative to go forward. (XIII AR 190:003481:2-22; XIV AR 191:003575:2-9.) On December 17, 2010, the SDCTA voted to adopt pension reform principles including a 401(k) plan for new hires. (XXIII AR 200:005769.)

On January 12, 2011, Sanders announced in his State of the City address that "acting as a private citizen" he would "soon bring to the voters an initiative to enact a 401(k) style plan that is similar to the private sector's and reflects the reality of our times." (XVIII AR 195:004823.) In early March 2011, the SDCTA and Lincoln Club determined that DeMaio's plan was more in line with their pension reform principles and they informed Sanders that they were going to move forward with or without his input or support. (XVI AR 191:003575:2-9.) A series of meetings ultimately took place between supporters of the competing proposals.

B. The Citizen Proponents Initiative – the CPRI

The CPRI was drafted not by attorneys paid for by the City, Sanders, or the campaign committee formed to support the Sanders' pension reform concept, but by a private law firm – Lounsbery Ferguson Altona & Peak – which was hired by the SDCTA. (XIII AR 190:003482:13-19; XV AR

192:003994:13-3995:11.) The CPRI (XIX AR 196:005013-21) differed in many key respects from Sanders' concept and contained many components Sanders expressly opposed. (XIII AR 190:003482:22-24.)

On April 4, 2011, the Citizen Proponents, the official proponents of the CPRI, whom PERB found were not agents of the City or Sanders (XI AR 186:003088-89), presented their notice of intention to circulate petitions to place the CPRI on the ballot. (XIX AR 196:005009, 5012.) Sanders did not run the campaign for the CPRI, it was run by the head of the Lincoln Club, Citizen Proponent T.J. Zane. (XIII AR 190:003491:21-3492:10; XI AR 186:003089.) Sanders did not attend any strategy sessions. (XIII AR 190:003491:26.) While he did enthusiastically support the CPRI and mentioned it in some speeches, no evidence showed he had any control over signature gathering or its ultimate passage.

On September 30, 2011, Citizen Proponent Zane delivered the petition sections and signatures to the City Clerk and attested they contained at least 94,346 valid signatures. (XVI AR 193:004065.) They were forwarded to the San Diego County Registrar of Voters (SDROV) to officially verify the signatures, and on November 8, 2011, the SDROV certified the CPRI petition had received a "SUFFICIENT" number of valid signatures requiring it to be presented to the voters as a citizens' initiative. (XX AR 197:005164.)

On December 5, 2011, the City Council passed a resolution of intention (R-307155) to place the CPRI on the June 5, 2012 Presidential primary election ballot, as required by law. (XVI AR 193:004067-69.) And on January 30, 2012, fulfilling its ministerial duty under then Election Code section 9255(b)(2), the City Council enacted Ordinance O-20127 which placed the CPRI on the June 5, 2012 Presidential primary election ballot as

Proposition B. (XVI AR 193:004071-89.) The CPRI called for certain aspects of the proposed amendment to take effect beginning July 1, 2012. (XIX AR 196:005015 (proposed Charter section 70.2).) The CPRI was ultimately approved by 65.81% of the City's voters. (XVI AR 193:004094-96.)

C. The Unions Demand to the City to Meet-and-Confer *Over the CPRI*

On July 15, 2011, the San Diego Municipal Employees Association (SDMEA) wrote to Sanders demanding that the City had an obligation under the MMBA to meet-and-confer over the CPRI. (XIX AR 196:005109.) SDMEA's letter informed Sanders that they would treat the CPRI as his "opening proposal." (*Id.*) The City Attorney's Office responded that the City had no meet-and-confer obligations because there was no legal basis upon which the City Council could modify the CPRI if it qualified for the ballot, rather, the Council needed to comply with the Elections Code and place the CPRI on the ballot if it met the signature and procedural requirements set forth therein. However, the City did assure the Unions that if the CPRI did qualify for the ballot and was approved by the voters, the City would engage in the meet-and-confer process over any impacts identified by the Unions. (XX AR 197:005155.) Accordingly, the City declined the Unions' multiple requests to meet-and-confer over the CPRI. (*See* XX AR 197:005115-17, 5151-5155.)

The Unions never requested that the City meet-and-confer over a competing ballot measure. Rather, the Unions' multiple demands claimed the City was obligated to meet-and-confer over the CPRI because they alleged "the notion that [the CPRI] is a citizens' initiative is pure fiction," and insisted the CPRI was the "City's initiative." (XX AR 197:005143.)

D. Unfair Labor Practice Charges and Initiation of PERB Action

On January 19, 2012, SDMEA filed an Unfair Practice Charge (UPC) with PERB over the City's refusal to bargain over the CPRI because the City claimed it was a "citizens' initiative" and not the "City's initiative." SDMEA's UPC stated the City rejected "each of MEA's several demands for meet and confer over the CPR Ballot Initiative, . . ." (I AR 1:000011.) It made no allegation that the City refused any request to meet-and-confer over a potential competing ballot measure. Three other City employee unions, the DCAA, Firefighters Local 145, and AFSCME Local 127, also filed UPCs with PERB, and embraced the allegations of the SDMEA UPC. Shortly after the UPCs were filed, PERB filed administrative complaints contending the City's alleged MMBA violation was its denial of the Unions' requests to meet-and-confer over the CPRI before placing it on the ballot. (III AR 13:000572-3; III AR 27:000836; V AR 48:001181; and V AR 62:001408.)

On January 31, 2012, SDMEA filed a request for injunctive relief with PERB, which PERB granted. (II AR 4:000246-249.) PERB then filed a superior court action seeking to enjoin the City from placing the CPRI on the ballot, but was rejected. *San Diego Municipal Employees Ass'n. v. Superior Court*, 206 Cal. App. 4th 1447, 1452-53 (2012). After PERB administrative hearings were scheduled, the City sought a stay in superior court. After the trial court granted the City's stay, SDMEA pursued writ relief. *Id.* at 1454-55. The Court of Appeal concluded the stay was improper and it was vacated. The Court of Appeal returned the case to PERB jurisdiction solely on the basis of SDMEA UPC's claim that the CPRI was not a true citizen-sponsored initiative but was instead a "sham"

device employed by the City using "strawmen" to circumvent the MMBA. *Id.* at 1460, 1463; *see also* Opn. at p. 42, n. 33.

E. PERB's Decision

A PERB Administrative Law Judge (ALJ) conducted four days of administrative hearings in July 2012. (VIII AR 147:002303-13; IX AR 148:002315-423; 150:002428-74.) On February 11, 2013, the ALJ issued his Proposed Decision finding the City violated the MMBA by failing to meet-and-confer with the Unions over the CPRI. (X AR 157:002613-75.)

On December 29, 2015, PERB issued its Decision affirming and adopting the ALJ's Proposed Decision with minor modifications. (XI AR 186:002979-3103.) It abandoned the "sham"/"strawman" theory, finding the Citizen Proponents were not agents of Sanders or the City as the Unions alleged. Instead, it concluded the City violated the MMBA when it refused to meet-and-confer over the CPRI, based on theories of statutory agency and common law agency principles. (XI AR 186:003005.)

Specifically, PERB found that: (1) under the City's Strong Mayor form of governance and common law principles of agency, Mayor Sanders was a statutory agent of the City with actual authority to speak for and bind the City with respect to initial proposals in collective bargaining with the unions; (2) under common law principles of agency, the Mayor acted with actual and apparent authority when publicly announcing and supporting Proposition B; and (3) the City Council had knowledge of the Mayor's conduct, by its action and inaction, and, by accepting the benefits of Proposition B, thereby ratified his conduct. (XI AR 186:003005.)

PERB Ordered the City to cease and desist from: (1) Refusing to meet and confer with the Unions before adopting ballot measures affecting

employee pension benefits and other negotiable subjects; (2) Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing; and (3) Denying the Unions their right to represent employees in their employment relations with the City. (XI AR 188:003122.)

PERB also ordered the City to take the following, among other, affirmative actions: (1) Upon request, meet-and-confer with the Unions before adopting ballot measures affecting employee pension benefits and/or other negotiable subjects; (2) Upon request by the Unions, join in and/or reimburse the Unions' reasonable attorneys' fees and costs for litigation undertaken to rescind the provisions of Proposition B adopted by the City, and to restore the prior status quo as it existed before the adoption of Proposition B; and (3) Make current and former bargaining-unit employees whole for the value of any and all lost compensation, including but not limited to pension benefits, offset by the value of new benefits required from the City under Proposition B, plus interest at the rate of seven (7) percent per annum until Proposition B is no longer in effect or until the City and Unions agree otherwise. (XI AR 188:003122-23.)

The PERB Decision admitted it did not purport to resolve the constitutional issues raised by the City, and acknowledged "the City raises some significant and difficult questions about the applicability of the MMBA's meet-and-confer requirement to a pure citizens' initiative." However, it concluded "those issues are not implicated by the facts of this case," and therefore, chose not to address them." (XI AR 186:003006.)

F. Writ for Extraordinary Relief and the Court of Appeal Opinion

On January 26, 2016, the City filed a timely Petition for Writ of Extraordinary Relief seeking to annul PERB's Decision. The Citizen Proponents also filed their own Petition. The Court of Appeal issued the writ of review on August 17, 2016, and oral argument took place on March 17, 2017.

The City's and Citizen Proponents' Petitions were consolidated for purposes of opinion and on April 11, 2017, the Court of Appeal's Opinion was issued. The Opinion granted the writ petitions and annulled PERB's decision.

The Opinion held that the meet-and-confer obligations under the MMBA apply only to a proposed charter amendment placed on the ballot by the governing body of a charter city, but has no application when such proposed charter amendment is placed on the ballot by citizen proponents through the initiative process. (Opn. at p. 6.) Despite several people occupying elected and non-elected positions in City government providing support for the CPRI, the Court of Appeal concluded PERB erred when it applied agency principles to transform the CPRI into a governing-body-sponsored ballot proposal. Notwithstanding the support given to the CPRI by Sanders and others, there was no evidence the CPRI was ever approved by the City Council (the City's governing body), and, therefore, the Opinion held PERB erred when it concluded the City was required to satisfy the concomitant "meet-and-confer" obligations imposed upon governing-body-sponsored charter amendment ballot proposals. *Id.*

Both PERB and the Unions filed rehearing petitions which were denied.

G. Petitions for Review

PERB and the Unions each filed Petitions for Review, which were granted on July 26, 2017. The Court identified two main issues: (1) When a final decision of the Public Employment Relations Board under the Meyers-Milias-Brown Act (Gov't Code §§ 3500 et seq.) is challenged in the Court of Appeal, what standard of review applies to the Board's interpretation of the applicable statutes and its findings of fact?; and (2) Is a public agency's duty to "meet and confer" under the Act limited to situations in which the agency's governing body proposes to take formal action affecting employee wages, hours, or other terms and conditions of employment?

III. LEGAL ARGUMENT

A. The Court of Appeal Correctly Applied a *De Novo* Standard of Review Pursuant to *Yamaha* as the Material Facts Were Undisputed and PERB's Determination the CPRI Was Not a "Pure" Citizens' Initiative Turned Nearly Entirely on Application of Legal Principles Outside of PERB's Expertise

PERB and the Unions contend the Court of Appeal's Opinion created a conflict regarding the proper standard of review that should be applied when an appellate court considers PERB's interpretation of statutes within its jurisdiction. They contend the "clearly erroneous" standard of *Banning Teachers Ass'n v. PERB (Banning)*, 44 Cal. 3d 799 (1988) should have been applied, as opposed to the "de novo" standard of review the

Court of Appeal found was applicable pursuant to *Yamaha Corp. of America v. State Bd. of Equalization (Yamaha)*, 19 Cal. 4th 1 (1998). They argue the Opinion "overextends" *Yamaha*.

Their argument for application of the clearly erroneous standard of review is overly simplistic and ignores the glaring differences between *Banning* and the case at issue. The *Banning* Court was only addressing a pure labor relations issue that clearly fell within the Education Employment Relations Act (EERA), an area unquestionably within PERB's expertise. *Banning*, 44 Cal. 3d at 804-05. *Banning* determined the Court of Appeal's application of a per se rule that parity agreements were illegal, in part to spare the reviewing court the task of having to examine claims on a case-by-case basis, deprived PERB "of its statutory function to investigate, determine, and take action on unfair practice charges to effectuate the policy of the EERA" and therefore failed to provide PERB's interpretation the deference to which it was entitled. *Id.* at 805.

The situation confronted by PERB in this case was nothing like the situation in *Banning*. It was undeniably unique, and presented a confluence of numerous areas of law outside of PERB's expertise. (Opn. at pp. 43-44.) Accordingly, the Court of Appeal looked to *Yamaha* for guidance as to the appropriate standard of review to apply to an administrative agency's statutory interpretation. The Opinion correctly construed *Yamaha* as recognizing that in our tripartite system of government, "it is the judiciary – not the legislative or executive branches – that is charged with the final responsibility to determine questions of law" and the weight to be accorded to an administrative agency's interpretation is "fundamentally situational." (Opn. at p. 26.) "The standard for judicial review of agency interpretation of law is the *independent judgment* of the court, giving *deference* to the

determination of the agency *appropriate* to the circumstances of the agency action." (Opn. at p. 24 (quoting *Yamaha*, 19 Cal. 4th at 8 (italics in original)).) An agency's expertise or comparative interpretative advantage over the reviewing court is a major factor to what level of deference and agency's interpretation should be provided. In a situation such as *Banning*, a pure labor relations issue within PERB's expertise, a deferential standard of review is appropriate.

Here, however, PERB's Decision nullified the effects of the CPRI[3] based on its erroneous conclusion that the CPRI was not a citizen sponsored initiative, but rather a governing body sponsored initiative subject to the MMBA. As the Court of Appeal Opinion noted, such a determination rested nearly entirely on PERB's application of the interplay among the City's charter (and Sanders' powers and responsibilities thereunder), common law agency principles, and California's constitutional and statutory provisions governing charter amendments. (Opn. at p. 43.) PERB's Decision "did not turn upon the resolution of material facts (to which the deferential 'substantial evidence' standard would apply) or upon PERB's application of legal principles of which PERB's special expertise with the legal and regulatory milieu surrounding the disputed legal principles would warrant deference."[4] *Id.* at 43-44. PERB's and the

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[3] The Opinion recognized that PERB ordered, among other remedies, "that the City in effect refuse to comply with the CPRI." (Opn. at p. 5.)

[4] The Opinion correctly concluded that when the material facts are undisputed, as they were in the present case, the question of the existence of a principal agent relationship is a matter of law to be decided by the courts. (Opn. at p. 44 n.34 (citing *Kaplan v. Caldwell Banker Residential Affiliates, Inc.*, 59 Cal. App. 4th 741, 745 (1997); *see also Troost v. Estate of DeBoer*, 155 Cal. App. 3d 289, 299 (1984) (noting that if the essential facts are not in conflict the question of the existence of an agency