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)

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PUBLIC EMPLOYMENT RELATIONS BOARD'S COMBINED REPLY BRIEF ON THE MERITS

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INTRODUCTION

Largely avoiding the points raised in the Public Employment Relations Board's (PERB or Board) Opening Brief, the Answer Briefs of the City of San Diego (City) and Catherine A. Boling, T.J. Zane, and Stephen B. Williams (Ballot Proponents) alternate between reiterating the Court of Appeal's erroneous conclusions and offering new and different grounds for overturning the Board's decision in *City of San Diego* (2015) PERB Decision No. 2464-M. Neither of the Answer Briefs demonstrate that the Court of Appeal applied the right standard of review, properly interpreted section 3505 of the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq. [MMBA]), or otherwise correctly rejected the Board's decision.[1]

Both the City and the Ballot Proponents support the Court of Appeal's application of a de novo standard of review. Citing *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1 (*Yamaha*), the court concluded that since the Board's decision rested on issues "outside" PERB's expertise, it could disregard *Banning Teachers Association v. Public Employment Relations Board* (1988) 44 Cal.3d 799, 804 (*Banning*) [the courts defer to PERB's interpretation unless "clearly erroneous"], *Inglewood Teachers Association v. Public Employment*

[1] All further statutory references are to the Government Code, unless otherwise noted.

Relations Board (1991) 227 Cal.App.3d 767, 776 (*Inglewood*) [agency principles are within the Board's expertise] and *Cumero v. Public Employment Relations Board* (1989) 49 Cal.3d 575, 583 (*Cumero*) [PERB may interpret its statutes in light of external law]. But *Yamaha* does not support the Court of Appeal's conclusion, and the City and the Ballot Proponents' efforts to distinguish *Banning*, *Inglewood,* and *Cumero* do not jusftify a different standard of review. Therefore, it is clear that the Court of Appeal erred in applying de novo review.

Tellingly, neither Answer Brief attempts to defend the Court of Appeal's reliance on section 3504.5 to limit the MMBA's duty to meet and confer to the employer's governing body. Although they argue that PERB erred in finding an agency relationship between the Mayor and the City, these arguments misconstrue the Board's decision, raise new issues not presented to the Court of Appeal, and ultimately fail on their merits.

The Answer Briefs also proclaim the importance of the citizen's initiative process and the constitutional rights of elected leaders. PERB has no dispute with either proposition, and in fact the Board's decision leaves *intact* the entirety of the ballot measure in this case referred to as Proposition B.

The Board's decision, concluding that the Mayor was the City's agent under both statutory and common law principles, was not clearly erroneous and was based on substantial evidence in the record as a whole.

The City and the Ballot Proponents do not refute that the City's "Strong" Mayor, Jerry Sanders: was the City's chief executive and lead labor negotiator pursuant to the City Charter; admitted he wanted to use the initiative process to avoid the City's obligations to bargain with the Unions[2] over employee pension benefits; used his City-paid staff to help draft and promote his proposal; used his City office, the City seal, his State of the City address, and City resources to support and campaign for his pension proposal; and signed the ballot statement supporting the initiative as "Mayor Jerry Sanders." Based on these facts and other facts in the record, the Board found an agency relationship between the City and the Mayor, and concluded the City was required to meet and confer with the Unions regarding the Mayor's pension proposal or an alternative proposal before placing the measure on the ballot. Because this conclusion is based on the correct interpretation of the MMBA and serves to effectuate the purposes of the statute, it should be affirmed.

[2] "Unions" refers to real parties in interest San Diego Municipal Employees Association (SDMEA), Deputy City Attorneys Association of San Diego, American Federation of State, County and Municipal Employees, AFL-CIO, Local 127, and San Diego City Firefighters, Local 145, IAFF, AFL-CIO (Firefighters).

ARGUMENT

I. THE LEGISLATURE AND COURTS LONG AGO DETERMINED THAT DEFERENCE IS OWED TO PERB'S LEGAL INTERPRETATIONS AND FACTUAL FINDINGS.

A. Both Answer Briefs ignore the weight of authority and the sound policy reasons for deferring to PERB's interpretation of the statutes it enforces even if a case presents other legal issues.

The City and the Ballot Proponents argue that the Court of Appeal correctly applied a de novo standard of review, because this case presents issues supposedly outside of PERB's expertise, and is not a typical unfair practice case. (City Ans., pp. 19-22; BP Ans., pp. 33-39.) But neither disputes that this Court has repeatedly affirmed, for over 35 years, that PERB's expertise warrants deference under the clearly erroneous standard of review. (*Banning*, *supra*, 44 Cal.3d 799, 804; *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].)

PERB acknowledges it is not entitled to deference when interpreting external laws, such as constitutional provisions. (*Cumero*, *supra*, 49 Cal.3d 575, 583.) Until the Court of Appeal below, however, the courts have never held that the presence of other legal issues reduces the deference owed to PERB's interpretation of its own statutes. Rather,

they have uniformly deferred to PERB's interpretation *even if* other issues were implicated. (*Id.* at pp. 586-587; *County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 922.) For instance, in *City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1287-1288, the court applied the "clearly erroneous" standard in a case that—like this one—included election law and constitutional issues, in addition to issues of MMBA interpretation.

The City would distinguish the cases applying the "clearly erroneous" standard of review, because this case involves a "confluence" or "convergence" of "numerous" issues outside PERB's expertise. (City Ans., pp. 19, 21.) But the City fails to explain why this should mean PERB's interpretation *of the MMBA* receives no deference.

The City and the Ballot Proponents also repeat the Court of Appeal's error in relying on *Yamaha*, *supra*, 19 Cal.4th 1. However, they do not cite anything in *Yamaha* or its progeny supporting the proposition that the standard of review of an agency's legal interpretation changes if a case also involves other legal issues.

Thus, the City and Ballot Proponents offer no basis for upholding the Court of Appeal's rejection of the "clearly erroneous" standard of review.

B. The substantial evidence standard of review must be legislatively changed; it cannot be selectively ignored or altered on a case-by-case basis.

The Answer Briefs claim that PERB's factual determinations are not entitled to deference under the substantial evidence standard of review if they are undisputed. (City Ans., p. 20; Ballot Proponents [BP] Ans., pp. 36, 40-41.) They are wrong.

By statute, PERB's factual determinations are conclusive if supported by substantial evidence. (§ 3509.5, subd. (b).) Under this standard, "[i]f there is a plausible basis for the Board's factual decisions, [the court is] not concerned that contrary findings may seem ... equally reasonable, or even more so.... [A] reviewing court may not substitute its judgment for that of the Board." (*Regents of the University of California v. Public Employment Relations Bd.* (1986) 41 Cal.3d 601, 617 (*Regents*); *Inglewood, supra*, 227 Cal.App.3d 767, 776-779, 781.) Notably, neither Answer brief contests PERB's argument that "the Legislature [is] free ... to specify... that certain administrative determinations need to be subjected only to substantial evidence review rather than independent judgment review." (PERB Opening Brief (OB), p. 43.)

Both Answer Briefs also fail to acknowledge that the substantial evidence standard applies when the facts are undisputed (*Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142

Cal.App.3d 191, 196),[3] and when conflicting inferences may be drawn from undisputed facts (*Lantz v. Workers' Compensation Appeals Bd.* (2014) 226 Cal.App.4th 298, 316-317). Notably, while the underlying facts of this case are not in dispute, both Answer Briefs raise new arguments about the inferences to be drawn from those facts. (See § II.C., *post.*)

Thus, given the express mandate of section 3509.5, the City and the Ballot Petitioners' arguments as to the standard of review of PERB's factual determinations are without merit.

C. *Inglewood* properly determined the standard of review of the Board's agency determinations.

The Answer Briefs argue that PERB's agency determinations are not entitled to deference. (City Ans., pp. 23-31; BP Ans., pp. 37-38.) These arguments, which attempt to distinguish this case from *Inglewood*, *supra*, 227 Cal.App.3d 767, are unavailing.

As explained in PERB's Opening Brief, *Inglewood*, *supra*, 227 Cal.App.3d 767, held that the Board's "interpretation of agency principles is subject to the clearly erroneous standard of review" (*id.* at p. 776),

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[3] Both the City and Ballot Proponents briefly refer to the Court of Appeal's reliance on *Los Angeles Unified School District v. Public Employment Relations Board* (1986) 191 Cal.App.3d 551. (City Ans., pp. 20-21, fn. 4; BP Ans., p. 35.) Neither Answer Brief disputes PERB's explanation why reliance on that case is misplaced. (See PERB OB, pp. 63-64.)

while its factual findings on agency—like all of the Board's findings of fact—are conclusive if supported by substantial evidence (*id.* at p. 781).

The Ballot Proponents claim this case is distinguishable from *Inglewood* because the purported agent in *Inglewood* was a school principal. (BP Ans., p. 38.) Missing from this argument is any reason *why* different standards of review should apply to PERB's agency determinations involving school principals, on the one hand, and city mayors, on the other.[4] Different standards of review for different statutes would be at odds with the Legislature's purpose in entrusting PERB with jurisdiction over the MMBA and seven other public sector labor relations statutes. (See *Coachella Valley Mosquito and Vector Control Dist. v. Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1090.)[5] Had the Legislature intended different standards of review for mayors and school principals, it could have simply declined to transfer exclusive initial jurisdiction over the MMBA to PERB in 2001. This would have allowed courts to continue to decide agency issues de novo.

[4] Circularly, the Ballot Proponents argue that PERB's lack of expertise in making agency determinations is "evidenced by the inaccuracy of [its] conclusions." (BP Ans., p. 37.)

[5] Since PERB's Opening Brief, the Legislature has passed and the Governor has signed Assembly Bill No. 83 (2017-2018 Reg. Sess.), creating a new statute under PERB's jurisdiction, the Judicial Council Employer-Employee Relations Act.

The City's attempt to distinguish this case from *Inglewood*, *supra*, 227 Cal.App.3d 767, claims that this matter involves undisputed material facts, unlike *Inglewood*. (City Ans., pp. 20-21, fn. 4.) Even if this were true, and agency becomes a pure question of law, the City ignores *Inglewood*'s holding regarding questions of law related to agency. As noted, those questions are *also* subject to deference—under the "clearly erroneous" standard of review. (*Inglewood*, *supra*, 227 Cal.App.3d 767, 776.)

As PERB argued in its Opening Brief, *Inglewood* was correct on this point because, on the issue of agency, California's public sector labor relations statutes are "open-ended [and] entwined with issues of fact, policy, and discretion." (*American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 461.) Neither Answer Brief responds to this argument.

Therefore, the Court of Appeal's conclusion that PERB's interpretation of agency principles is not subject to deference must be reversed.

D. The Court of Appeal's use of the word "erroneous" does not mean it applied the "clearly erroneous" standard of review

Despite defending the Court of Appeal's rejection of the "clearly erroneous" standard of review, both Answer Briefs also argue that the Court of Appeal in fact applied it. (City Ans., p. 22; BP Ans., p. 41.) The

basis for this argument is the categorical declaration that "erroneous" and "clearly erroneous" mean the same thing. (*Ibid.*)

Needless to say, neither Answer Brief cites any authority for such a proposition. This argument assumes that this Court has not meant what it said when it repeatedly affirmed the "clearly erroneous" standard—not just in the numerous cases involving PERB (PERB OB, pp. 37-38)—but also in cases involving other administrative agencies. (See, e.g., *Larkin v. Workers' Compensation Appeals Bd.* (2015) 62 Cal.4th 152, 158; *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 988.)[6] Consequently, the claim that the Court of Appeal applied the "clearly erroneous" standard of review is without merit.

E. The Board did not invite de novo review.

The City claims that the Board "invited" de novo review when, in the course of its decision, it determined that certain issues were beyond its own jurisdiction but ultimately not implicated by the facts of the case. (City Ans., p. 22.) In the cited part of the Board's decision, the Board acknowledged that its own authority is limited to interpreting and enforcing the MMBA. (AR:XI:3006.) Such an acknowledgment in no way suggested that the Board believed its interpretation *of the MMBA*

[6] This Court has used the specific phrase "clearly erroneous" in various contexts virtually since its inception (see, e.g., *McFarland v. Pico* (1857) 8 Cal. 626, 631), and introduced it to the administrative law context in *Bodinson Manufacturing Co. v. California Employment Commission* (1941) 17 Cal.2d 321, 325.

should be subject to de novo review. The City's claim to the contrary is meritless.

II. BECAUSE THE DUTY TO MEET AND CONFER IS NOT LIMITED TO THE EMPLOYER'S GOVERNING BODY, THE BOARD PROPERLY RELIED ON STATUTORY AND COMMON LAW AGENCY PRINCIPLES TO FIND THAT THE CITY HAD A DUTY TO BARGAIN.

A. The Answer Briefs do not respond to PERB's arguments regarding section 3504.5 or the Board's application of agency principles.

As PERB argued in its Opening Brief, the Court of Appeal erred by relying on section 3504.5 to conclude that only a public agency's governing body must meet and confer under section 3505. (PERB OB, pp. 45-58.) Neither Answer Brief makes any attempt to defend the Court of Appeal's reliance on section 3504.5.

PERB also argued that the Court of Appeal erred by rejecting the Board's reliance on statutory and common law agency principles. (PERB OB, pp. 64-73.) In response to these arguments, the City largely—and erroneously—relies on the non-delegation doctrine. (See § II.B, *post.*) Neither Answer Brief, however, responds directly to PERB's arguments that: (1) the Mayor was a statutory agent of the City because of his unique power over the negotiations process (PERB OB, pp. 64-66); (2) with respect to actual authority, the relevant inquiry was whether the Mayor "'was acting within the scope of his authority, including the degree of discretion conferred on the Mayor by the City Charter to further the City's

interests'" (PERB OB, pp. 67-68, quoting AR:XI:2991); (3) the Board could find the City liable on grounds of apparent authority without express manifestations that the City Council authorized the Mayor's conduct (*id.* at pp. 69-71); and (4) the City Council ratified the Mayor's actions because it had discretion to do something other than place the CPRI on the ballot without negotiating—specifically, negotiate over an alternative ballot measure (*id.* at pp. 72-73).[7]

In a footnote, the City latches onto two points the Court of Appeal made regarding the Board's apparent authority finding: (1) that the Board did not find that the Unions relied to their detriment on their belief in the Mayor's apparent authority; and (2) that apparent authority cannot be applied against the government if doing so would undermine important public policies. (City Ans., pp. 29-30, fn. 7; see *Boling v. Public Employment Relations Board* (April 11, 2017) 10 Cal.App.5th 853, 888, fns. 44 & 45.) Neither of these arguments can properly serve as grounds for overturning the Board's decision, because they were raised sua sponte by the Court of Appeal. The City never made them to the Board. (See *Carian v. Agricultural Labor Relations Bd.* (1984) 36 Cal.3d 654, 668, fn. 6 (*Carian*).)

[7] The argument that the Unions did not request to meet and confer over a competing initiative is addressed in section II.C, *post*.

Moreover, both arguments are meritless. The Unions relied on the Mayor's apparent authority as the City's chief negotiator, by simultaneously negotiating with the Mayor and agreeing to significant concessions on retiree health benefits (AR:XII:3223-3224; XIX:5074-5079), while expecting the opportunity to negotiate over his pension reform proposal (AR:XIX:5109-5110). In addition, applying the principles of apparent authority promotes the important public policies underlying the MMBA, by preventing the City from benefiting from the Mayor's failure to negotiate with the Unions.

B. Because the Board did not find that the Mayor engaged in a legislative act, the City's reliance on the non-delegation doctrine is misplaced.

In response to PERB's arguments based on statutory and common law agency principles, the City relies on the City Charter's reservation of legislative authority to the City Council, and argues that it would violate the non-delegation doctrine to hold the City accountable for the Mayor's actions in violation of section 3505. (City Ans., pp. 23-25.) This argument misconstrues the nature of the Mayor's actions and misapplies the non-delegation doctrine.

The Board did not find the Mayor to have engaged in legislative actions. There is no dispute that the City Council may place its own proposed charter amendment on the ballot by majority vote. Here, however, the Board did not find that the Mayor was responsible for

actually placing the CPRI on the ballot. In the proposed decision, which was adopted by the Board, the administrative law judge (ALJ) explained, "The policy decision relevant to the MMBA is one to change negotiable subjects, not whether to seek placement of a policy to that effect on the ballot." (AR:XI:3079.) The ALJ also observed that when a city council places a charter amendment on the ballot (and is obligated to bargain according to *People ex rel. Seal Beach Police Officers Association v. City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*)), "the city council is not legislating per se, but offering a proposal to be adopted by legislative action on the part of the electorate." (*Ibid.*) Thus, the Mayor's policy decision to propose pension reform was not a legislative act. The non-delegation doctrine does not apply.

Section 3505 did, however, apply to the Mayor's actions. The City suggests that it only applies to legislative actions. (City Ans., p. 25.) But had this been the Legislature's intent, it would have provided that the duty to bargain arises under the same circumstances as the duty to "meet" under section 3504.5: "any ordinance, rule, resolution, or regulation proposed to be adopted by the governing body"—legislative actions. Instead, the Legislature used more expansive language in section 3505: "prior to arriving at a determination of policy or course of action." This difference demonstrates that section 3505 is not confined to legislative

acts. (See *Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 343.)

The Board's application of the duty to bargain to the Mayor's non-legislative action in this case is consistent with longstanding PERB precedent. In *San Diego Unified School District* (1980) PERB Decision No. 137, the Board considered whether the employer violated its duty to bargain when two of the five members of its governing board took action that contravened established policy, without negotiating with the union. While PERB recognized that the governing board could take official action only by majority vote, it nevertheless held that the issue was whether the actions of the two members "may be viewed ... as acts of the employer in the eyes of the employees." (*Id.* at p. 10.) Finding that standard met, the Board concluded that the employer committed an unfair practice by failing to bargain over the change in policy. (*Id.* at p. 19.)

In any event, even if the non-delegation doctrine applied, the City cannot use it to defeat the mandates of section 3505. As the City notes, the doctrine bars a local legislative body from delegating its authority without providing sufficient guiding standards. (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 375.) The doctrine's purpose is to ensure "that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to

assure the proper implementation of its policy decisions." (*Id.* at pp. 376-377.)

Here, however, the City is using the non-delegation doctrine not to ensure that the City Council resolves "truly fundamental issues," but to frustrate the purposes of the MMBA. Application of the non-delegation doctrine to immunize the City contravenes the clear policy embodied in section 3505, which requires a public agency's governing body *and* its "other representatives" to meet and confer "prior to arriving at a determination of policy or course of action." The Courts have consistently recognized that the MMBA regulates a matter of statewide concern and supersedes contrary provisions of a local charter. (*State Bldg. & Cons. Trades Council of Cal., AFL–CIO v. City of Vista* (2012) 54 Cal.4th 547, 564, citing *City of Seal Beach, supra*, 36 Cal.3d 591.) As a result, the City cannot evade liability for the Mayor's actions by relying on a conflict with Charter provisions concerning the delegation of legislative authority.

C. The Answer Briefs' factual disputes regarding the possibility of bargaining over an alternative ballot measure are improper.

In its Opening Brief, PERB pointed out the Board's factual finding that the Unions' demands to bargain contemplated bargaining over an alternative or competing ballot measure (PERB OB, pp. 33, 74-75), as well as the Court of Appeal's acknowledgment that the City had

flexibility under the Elections Code regarding the timing of the election at which the CPRI would be presented to voters (*id.* at p. 75, fn. 18, citing *Boling, supra*, 10 Cal.App.5th 853, 873, fn. 25). The City and the Ballot Proponents dispute these points for the first time in this Court. (City Ans., pp. 31, 33; BP Ans., pp. 14, 24-25.) Both disputes are untimely and ultimately meritless.

Regarding the Unions' several demands to bargain, the Board expressly found that they "also contemplated the possibility of bargaining over an alternative or competing measure on the subject." (AR:XI:3035.) The City acknowledged this finding in the Court of Appeal, but did not challenge it. (City's Opening Br., Case No. D069630, p. 67.) The Ballot Proponents did not address it at all. Thus, the Court should decline to consider this untimely challenge to the Board's factual finding. (Cal. Rules of Ct., rule 8.500(c)(1).)

Even if the Court were to consider this challenge, it fails on the merits. The substantial evidence standard of review means there must be a "plausible basis," for the Board's finding; this Court does not reweigh the evidence. (*Regents, supra*, 41 Cal.3d 601, 617.) There is a plausible basis for the Board's finding here, because the City and the Ballot Proponents have cited nothing in the Unions' demands to bargain in which suggested that the City could alter the CPRI or decline to place it on the ballot. For instance, the Firefighters' demand to bargain stated: