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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INTRODUCTION

The Public Employment Relations Board (PERB or Board) hereby submits this combined answer to the three amicus briefs filed on behalf of the City of San Diego (City) and/or Catherine A. Boling, T.J. Zane, and Stephen B. Williams (collectively, the Ballot Proponents) by: (1) Pacific Legal Foundation, Howard Jarvis Taxpayers Association and National Tax Limitation Committee (collectively, PLF); (2) San Diego Taxpayers Educational Foundation (SDTEF); and (3) League of California Cities, California State Association of Counties and International Municipal Lawyers Association (collectively, LCC). As explained below, the arguments in those briefs offer no basis for affirming the Court of Appeal's erroneous decision in *Boling v. Public Employment Relations Board* (2017) 10 Cal.App.5th 853 (*Boling*).

Most of the arguments raised by PLF and LCC have previously been made. For instance, LCC follows the City and the Ballot Proponents by arguing that the court below was correct when it held, sua sponte, that *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1 (*Yamaha*) required de novo review of the Board's interpretation of the Meyers-Milias-Brown Act (MMBA).[1] Like the City and the Ballot Proponents, LCC claims that given the presence of "other" legal issues,

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

the expert Board's interpretation of the MMBA is not entitled to any deference whatsoever. But, as PERB has explained previously, and briefly reiterates below, *Yamaha* has never been applied—by this or any other court—to the legal interpretations of expert labor boards such as PERB. Rather, courts have uniformly applied the "clearly erroneous" standard of review to PERB's final decisions. Further, *Yamaha* certainly does not support the proposition that PERB's legal interpretations are not entitled to deference merely because a case involves other issues.

LCC and PLF also echo the City and the Ballot Proponents by stressing the sanctity of the citizen's initiative process—a proposition with which PERB has no dispute. Contrary to PLF's and LCC's arguments, the Board's decision did not hold that the MMBA applies to all citizens' initiatives affecting terms and conditions of employment. Rather, based on the unique facts on this case, the Board held that the City violated its duty to meet and confer in good faith under MMBA section 3505. This determination was based on the actions of the City's "Strong" Mayor and chief labor negotiator, Jerry Sanders, who helped develop, draft and promote a citizens' initiative—drastically changing City employees' pension benefits—as a mechanism to evade the City's obligation under the MMBA to bargain in good faith. Nor did the Board's decision impact

the citizens' initiative referred to as Proposition B. The decision leaves the initiative intact in its entirety.

Unlike LCC and PLF, SDTEF covers new ground, but in the process of doing so, it seeks to considerably expand the issues presented to this Court. So far in this litigation, the City has argued that the Board's decision interfered with the Mayor's First Amendment rights to speak as a private citizen, and PERB has explained that those rights do not extend to the Mayor's speech in his official capacity, whether executing his duties as the City's chief executive officer, acting as lead labor negotiator, or using the resources of his City office. Now, however, SDTEF argues that the Mayor in fact enjoys a virtually unfettered First Amendment right whether speaking as a private citizen or as Mayor. Needless to say, this Court need not decide this issue, raised only by an amicus. Even if it does, however, SDTEF's argument does not withstand scrutiny. It chiefly relies on cases involving legislators, not executive officials such as the Mayor, who cannot be excused from performing their legally mandated duties on the basis of their First Amendment rights.

In short, the arguments of PLF, LCC, and SDTEF offer no basis for affirming the Court of Appeal's erroneous decision below. For the reasons discussed below as well as in PERB's Opening Brief (OB) and Reply Brief (RB), PERB urges this Court to overturn the Court of

Appeal's decision and affirm the Board's decision in *City of San Diego* (2015) PERB Decision No. 2464-M.

ARGUMENT

I. Amici's arguments regarding the applicable standard of review of PERB's final decision add no value or insight into this case and can be disregarded.

A. *Yamaha* does not supply the standard of review for the legal interpretations of expert labor boards such as PERB.

LCC argues that this case presents the ideal "vehicle" for this Court to "re-confirm" a de novo standard of review based on *Yamaha*, *supra*, 19 Cal.4th 1. (LCC Br., p. 15.) *Yamaha*, however, has never previously been applied to an expert labor relations board such as PERB. Instead, this Court has determined that the "clearly erroneous" standard applies to PERB's decisions, just as it does to those of the Agricultural Labor Relations Board (ALRB). (See, e.g., *Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799, 804 (*Banning*), citing *J.R. Norton Co. v. Agricultural Labor Relations Bd.* (1979) 26 Cal.3d 1, 29 (*J.R. Norton*); *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 856, citing *Highland Ranch v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 848, 859 and *J.R. Norton*, *supra*.)

Recently, this Court emphatically reaffirmed the deference it gives the ALRB. "[T]he Board, as the agency charged with the ALRA's

administration, 'is entitled to deference when interpreting policy in its field of expertise.'" (*Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1155, quoting *J.R. Norton, supra.* 26 Cal.3d 1, 29.) "The Legislature 'intended that the ALRB serve as "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect."' (*Tri-Fanucchi Farms v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1161, 1168, quoting *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd.* (1979) 24 Cal.3d 335, 346.) "Where the Board relies on its 'specialized knowledge' and 'expertise,' its decision 'is vested with a presumption of validity.'" (*Ibid.*, quoting *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.* (1989) 49 Cal.3d 1279, 1292.) As a result, to now affirm the Court of Appeal's reliance on *Yamaha* in this case would be an abrupt and unwarranted departure from settled law.

LCC argues that resort to *Yamaha* is appropriate because the Board's decision was a "foray into municipal, Constitutional and election laws, as well as common law [agency] principles," ostensibly outside of PERB's expertise. (LCC Br., p. 15.) While PERB acknowledges, as it has throughout this case, that it is not entitled to deference when

interpreting external laws, such as constitutional provisions (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 583), the Legislature entrusted interpretation of the MMBA to the Board's expertise. Thus, the presence of other legal issues in a case does not allow a court to simply disregard the expert Board's interpretation of the MMBA. In PERB's more than 40-year history, the courts have consistently deferred to the Board's interpretation *even if* other extraneous 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; *City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1287-1288 (*Palo Alto*) [applying the "clearly erroneous" standard in a case that dealt with election law and constitutional issues, in addition to issues of MMBA interpretation].)

LCC also attempts to defend the Court of Appeal's reliance on *Yamaha* by referring to Professor Asimow's article, *The Scope of Judicial Review of Decisions of California Administrative Agencies* (1995) 42 UCLA L.Rev. 1157. (LCC Br., pp. 14-15.) However, nothing in that article even remotely suggests that a reviewing court may ignore an agency's interpretation of its own statute when a case presents other legal issues. In fact, the article confirms that while California courts are not required to accept an agency's reasonable interpretation of an ambiguous

statute, there are circumstances in which "courts are required to accord deference or 'great weight' to an agency's interpretation." (*Id.* at p. 1194.) Among these circumstances are when the "interpretation [is] contained in a written opinion rendered in the course of formal agency adjudication" (*id.* at p. 1196), and when "the legal text to be interpreted is technical, obscure, complex, or open ended, or ... entwined with issues of fact, policy and discretion" (*id.* at p. 1195). Notably, as the Board previously argued, both of these circumstances are present in this case, and the Board's decision is therefore entitled to greater deference. (PERB OB, pp. 41, 61.)

LCC also cites a portion of Asimow's article in which he recounts confusion among Washington state judges about the differences between a "clearly erroneous" and a "substantial evidence" standard of review. (LCC Br., p. 15.) This part of the article, however, concerns judicial review of an agency's *factual findings*, not its legal interpretations. (See Asimow, *supra*, 42 UCLA L.Rev. 1157, 1191-1192.)[2] It is therefore

[2] None of the amici dispute that 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 Univ. of Cal. v. Public Employment Relations Bd.* (1986) 41 Cal.3d 601, 617; *Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 776-779, 781.)

irrelevant to whether the Board's legal interpretations are subject to review under the clearly erroneous standard.

In short, nothing in Asimow's article supports LCC's view that an agency's interpretation of its own statute should receive no deference when a case involves other legal issues.

Thus, LCC's arguments do not establish that the Court of Appeal applied the correct standard of review in this case. This Court has repeatedly affirmed that deference must be afforded the Board's final decisions under the clearly erroneous standard, and it should do so again here.

B. The Board's past decisions addressing local ballot measures are irrelevant to whether its interpretation of the MMBA in this case is entitled to deference.

Citing four Board decisions concerning local ballot measures—and three non-precedential decisions by PERB administrative law judges—LCC claims that the Board "has been consistently hostile to local ballot measures," has "posted legal interpretations in areas outside its specialized sphere of expertise, and has argued that these interpretations are subject to deference under the "clearly erroneous" standard of review. (LCC Br, p. 9.) LCC is, however, misrepresenting the Board's arguments and the cited Board decisions.

Most importantly, it is not true that the Board has argued that it is entitled to deference in its treatment of "external" legal issues, such as election law and constitutional law. The Board has repeatedly acknowledged that it is not. (See § I.A., ante.)[3] As a result, whether such issues are tangentially involved in the Board decisions LCC cites, and whether the Board offered an interpretation of those legal issues in those decisions, are irrelevant to the question before this Court: whether the Board's interpretation of the MMBA is subject to de novo or "clearly erroneous" review.

Nevertheless, LCC's argument is an unfounded attack on the Board's neutrality and expertise. Each of the four cited decisions show the Board primarily deciding legal issues of pure MMBA interpretation, not issues outside its expertise. (*City & County of San Francisco* (2017) PERB Decision No. 2540-M [whether binding interest arbitration process was a "reasonable" dispute resolution process within the meaning of section 3507]; *City of Palo Alto* (2014) PERB Decision No. 2388-M [whether section 3507 required a city council to consult in good faith with an employee organization before approving a ballot measure terminating

[3] As argued in its Opening Brief, PERB maintains that common law agency principles are so intrinsically entwined with questions of MMBA interpretation and policy that the Board must receive deference on those issues as well. (See PERB OB, pp. 61-62.)

the city's interest arbitration process]; *County of Santa Clara* (2010) PERB Decision No. 2114-M (*Santa Clara I*) [whether section 3505 required a county to meet and confer with an employee organization before approving ballot measures concerning interest arbitration and prevailing wages]; *County of Santa Clara* (2010) PERB Decision No. 2120-M (*Santa Clara II*) [same].)[4]

Moreover, the Board's determinations in these cases followed existing judicial precedent, which the MMBA expressly dictates. (§ 3509, subd. (b) [the Board must "apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter"].) For instance, the Board's conclusion in *Santa Clara I* and *Santa Clara II* was a direct and straightforward application of *People ex rel. Seal Beach Police Officers Association v. City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*), in which this Court held that MMBA section 3505 requires local agencies to bargain in good faith with the employees' exclusive representatives, before proposing to the electorate a charter amendment that

[4] As noted, LCC cites three decisions by administrative law judges. These are not decisions of the Board and are not precedential unless adopted by the Board. (Cal. Code Regs., tit. 8, § 32215.) Only one of the cited decisions was adopted by the Board, in *City & County of San Francisco*, *supra*, PERB Decision No. 2540-M. The other two have been appealed to the Board but are in abeyance at the request of the parties. These cases therefore do not support LCC's claim regarding the Board's treatment of local ballot measures.

would impact the employees' terms and conditions of employment. (*Santa Clara I*, *supra*, at p. 9.) Likewise, the Board's conclusion in *City of Palo Alto*, *supra*, PERB Decision No. 2388-M, represented nothing more than an extension of *Seal Beach*'s rationale to section 3507's requirement that public agencies must consult in good faith before modifying their procedures for the resolution of bargaining disputes.[5] Significantly, the Courts of Appeal affirmed the Board's decision in three of these cases,[6]

[5] On review, the Court of Appeal embraced this conclusion: "*Seal Beach* dealt with the duty to meet and confer imposed by section 3505, not the duty to consult in good faith imposed by section 3507. Nonetheless, we see no reason why its reasoning should not apply here." (*Palo Alto*, *supra*, 5 Cal.App.5th 1271, 1298.)

[6] After full briefing, the Sixth Appellate District summarily denied petitions challenging *Santa Clara I* and *Santa Clara II* filed by both the employer and the employee organizations. (*County of Santa Clara v. Public Employment Relations Bd.* (December 29, 2011, H035791); *County of Santa Clara v. Public Employment Relations Bd.* (December 29, 2011, H035846); *Santa Clara County Correctional Peace Officers' Assn. v. Public Employment Relations Bd.* (Dec. 29, 2011 (H035786); *Registered Nurses Professional Assn. v. Public Employment Relations Bd.* (Dec. 29, 2011 (H035804).)

On review of *City of Palo Alto*, *supra*, PERB Decision No. 2388-M, the Court of Appeal recognized that PERB's construction of the MMBA "fall[s] squarely within its expertise" (*Palo Alto*, *supra*, 5 Cal.App.5th 1271, 1288); that the Board's interpretation was not "clearly erroneous" (*id.* at p. 1292); and that there was no conflict between the Board's interpretation of section 3507 and the employer's constitutional "power to propose charter amendments" (*id.* at p. 1298). Despite approving the Board's finding that the employer violated the MMBA, the Court of Appeal determined that part of the Board's remedial order was invalid. Specifically, the court concluded that the Board could not order the employer to rescind a resolution passed by its governing body,