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11 STATE OF CALIFORNIA

12 PUBLIC EMPLOYMENT RELATIONS BOARD

13 SAN DIEGO MUNICIPAL EMPLOYEES) Case No. LA-CE-746-M
14 ASSOCIATION,)
15 Charging Party,) CITY'S MOTION TO DISMISS OR FOR
16 v.) NON-SUIT
17 CITY OF SAN DIEGO,)
Respondent.)
18 DEPUTY CITY ATTORNEYS) Case No. LA-CE-752-M
19 ASSOCIATION,)
20 Charging Party,)
21 v.)
22 CITY OF SAN DIEGO,)
Respondent.)
23 AMERICAN FEDERATION OF STATE,) Case No. LA-CE-755-M
24 COUNTY AND MUNICIPAL)
EMPLOYEES, AFL-CIO, LOCAL 127,)
25 Charging Party,)
26 v.)
27 CITY OF SAN DIEGO,)
28 Respondent.)

1 SAN DIEGO CITY FIREFIGHTERS) Case No. LA-CE-758-M
 LOCAL 145,)
 2)
 Charging Party,)
 3)
 v.)
 4)
 CITY OF SAN DIEGO,)
 5)
 Respondent.)
 6)

7 **INTRODUCTION**

8 The crux of the unions’ Unfair Practice Charges (UPCs) is that the Comprehensive
 9 Pension Reform Initiative (CPR) was a “sham” initiative, despite qualifying for the ballot under
 10 California Elections Law with nearly 116,000 signatures, because the Mayor of San Diego
 11 “spearheaded” the entire CPR project, hired the lawyer who drafted it to his specifications, and
 12 got “surrogates” to sign a Notice of Intent to circulate petitions. Based on the facts elicited
 13 through testimony and documents at the PERB hearing, these allegations are demonstrably false.
 14 Thus, the unions have failed to carry their burden of proof, and the Administrative Law Judge
 15 should dismiss the Complaints or grant a non-suit.

16 **LEGAL ARGUMENT**

17 **I. Union Allegations in Their UPCs¹**

18 To determine the factual burden of proof which the unions must satisfy, it is necessary to
 19 look to the UPCs and other statements of their cases. The UPCs constitute Union promises that
 20 they will prove certain facts.

21 The MEA’s UPC alleges “... as the evidence shows, this so-called ‘citizens initiative’ is
 22 merely a sham device which the City’s ‘Strong Mayor’ has used for the express purpose of
 23 avoiding City’s MMBA obligation to meet and confer.” (MEA Ex, 1, 0003)

24
 25
 26 _____
 27 ¹ The allegations of the PERB Complaints are very general and violate PERB Regulation
 28 32640, which requires the Complaint to “state with particularity the conduct which is alleged to
 constitute an unfair practice.” Thus, one must resort to the UPCs to understand the true nature of
 their charges which the unions must prove by a preponderance of the evidence.

1 The Deputy City Attorneys Association (DCAA) UPC states: “*DCAA incorporates*
2 *MEA’s charge herein in its entirety along with all evidence submitted by MEA to PERB.*” [Italics
3 added] (DCAA Ex. 281, p. 1 of 6.d. Attachment, note I.)

4 The DCAA UPC further alleges that: “the Mayor used funds to hire attorneys to research
5 and write a initiative to meet his specifications and objectives in furtherance of the City’s
6 interests. The Mayor and City Councilmember Kevin Faulconer thereafter negotiated with City
7 Council Member Carl DeMaio with the assistance of *others who filed the Mayor’s Initiative for*
8 *him*”. [Italics added] (DCAA Ex. 281, 6.d. Attachment, p. 3.)

9 The San Diego City Firefighters Local 145 UPC alleged: “Local 145 believes there is
10 sufficient evidence to show that this indeed was an initiative crafted and promoted by Mayor
11 Sanders in his official role as Mayor of San Diego, ... *Local 145 asserts the same evidence in*
12 *this claim as that provided by [MEA] in UPC LA-CE-746 M,* with the exception of IA-IH
13 [which refers to MEA’s demands to meet and confer and the City’s Attorney’s responses to
14 them] [Italics added] (SDCFF Ex. 285, ULP Attachment.)

15 PERB, which supposedly thoroughly investigated the MEA UPC and filed an
16 administrative Complaint against the City on the basis of MEA’s allegations and PERB’s
17 investigation, alleged in its Superior Court Complaint for Injunctive Relief (partial copy attached
18 as Exhibit A): “PERB is informed and believed, however, that *Ms. Boling Mr. Zane and Mr.*
19 *Williams are agents of the City ...*” [Italics added]

20 MEA counsel Ann Smith in an article published on the MEA website on May 7, 2012
21 (Attached Exhibit B) summarizes MEA’s UPC this way:

22 “Based on Mayor Sanders’ entire course of conduct with regard [sic] Proposition B, the
23 thrust of MEA’s UPC is that it is the City’s initiative (not a bona fide “citizens’ initiative”).

24 “MEA’s UPC explains that the Mayor (with help from council members Faulconer and
25 DeMaio) *merely used the three citizen proponents (April Boling, T.J. Zane and Stephen*
26 *Williams) as surrogates to get Proposition B on the ballot* in order to avoid his obligation as the
27 City’s CEO and Chief Labor Negotiator to meet and confer with MEA.” [Italics added]

28 Thus, the crux of all the union UPCs is that the CPR is a “sham,” not a true citizens’

1 initiative, and that the three persons who presented to the City Clerk the Notice of Intent to
2 circulate the petition to qualify the CPR for the ballot (See Ex. 54, 0687-0690) were “surrogates”
3 of the Mayor.

4 **II. The Term “Sham Initiative” Has No Legal Significance**

5 No court decision has ever defined a “sham initiative.” No court has shorn the proponents
6 of an initiative, duly qualified for the ballot by nearly 116,000 signatures, of their constitutional
7 right to have it placed on the ballot without change, just because of the support of public
8 officials. To the contrary, the Court of Appeal in *League of Women Voters of California v.*
9 *Countywide Criminal Justice Coordination Committee* (1980) 203 Cal. App. 3d 529, recognized
10 the right of public officials to draft and propose a citizens’ initiative, and find private supporters,
11 and held that the use of public funds to do so did not violate any law:

12 “... if the interests a local governmental entity seeks to serve are
13 legitimate but the legislature has proven disinterested, there
14 appears to be no logical reason not to imply from the undisputable
15 power to draft proposed legislation the power to draft a proposed
16 initiative measure in the hope a sympathetic private supporter will
17 forward the cause and the public will prove more receptive.”

18 (*Id.* at 547)

19 Since the *League of Women Voters* decision approved the practice of public officials in
20 proposing and drafting a citizens’ initiative and finding private supporters to carry it forward, the
21 actions of the Mayor or any Councilman in this case cannot make the CPR initiative a “sham.”

22 Lacking any other law on “sham initiative,” the only recourse is to turn to the dictionary
23 definition of “sham.” As an adjective, Webster’s II New College Dictionary (2001) defines the
24 word as “not genuine.” Turning now to the evidence advanced at the PERB hearing, one can
25 only conclude that the CPR Initiative was no “sham.” It was a genuine citizens’ initiative.

26 **III. The Hearing Evidence Completely Refutes the Crux of the Union Charges**
27 **Against the City Because it Proves the CPR Was Genuine, and the Mayor Did Not**
28 **Use “Surrogates”**

29 The Union promises of proof were broken. The hearing evidence clearly shows that the
30 CPR was a genuine, bona fide citizens’ initiative. Nearly 116, 000 registered voters signed the
31 petitions to qualify the CPR for the ballot. (Ex. 81, 0861)

32 The evidence also shows that beginning in late 2010, powerful citizen groups – The

1 Lincoln Club of San Diego, San Diego County Taxpayers Association (SDCTA), and the
2 Chamber of Commerce – had embraced pension reform proposals of Councilmember Carl
3 DeMaio and were committed to move forward with an initiative. For example, on December 17,
4 2010, the board of Directors of the SDCTA voted to adopt a set of Pension Reform Principles
5 which included: “The creation of a 401(k) type plan for new hires complete with either Social
6 Security of an equivalent modest defined benefit plan.” (MEA Ex. 191, p. 2; see also City
7 Exhibit N)

8 The Mayor’s testimony, corroborated by his staff members Aimee Faucett and Julie
9 Dubick², clearly established that members of the Lincoln Club and SDCTA told the Mayor,
10 during his early discussions with them in late 2010, through his “negotiations” with these citizen
11 groups in late March 2011, that they would proceed with their own initiative ballot measure,
12 whether or not the Mayor joined them, would not support the Mayor’s proposals if he proceeded
13 with a separate initiative, and that they could raise the money to successfully get their initiative
14 on the ballot and approved by the voters.

15 The allegations that the Mayor was using Ms. Boling, Mr. Zane and Mr. Williams as
16 “surrogates,” or that they were “agents” of the City are completely false. The Mayor did not ask
17 these people to sign and bring forth the Notice of Intent to circulate the petition, or otherwise act
18 to induce them to do so. The unions did not present a scintilla of evidence to the contrary.

19 There are other false allegations in the MEA UPC, which the other unions incorporate,
20 which purportedly support “sham” initiative and “surrogate” claims. The evidence completely
21 refutes those false allegations, too. The following are examples:

22 (i) Allegation: “Mayor Sanders formed a fund raising committee ‘San Diegans for
23 Pension Reform.’ (ID 1334711). The contact person and treasurer for the Mayor’s committee is
24 CPR proponent Boling.” (MEA Ex. 1, 0007)

25 Evidence: The treasurer of “San Diegans for Pension,” which was not formed by
26

27 ² City appreciates that there is not yet an official record of the PERB proceeding but
28 trusts that the testimony is fresh enough in the Administrative Law Judge’s mind, assisted by
hearing notes, that he can confirm the substance of their cited testimonies.

1 the Mayor, but formed to support his concept for pension reform, was Nancy Haley.
2 (MEA Ex. 34) April Boling was treasurer of “Comprehensive Pension Reform for San
3 Diego (CPR for San Diego) sponsored by the Lincoln Club of San Diego County.” (MEA
4 Ex. 151) “San Diegans for Pension Reform” later transferred money and non-monetary
5 items to the CPR Committee, and the CPR Committee added its name as a sponsor.
6 (MEA Ex. 152) On September 30, 2011 “San Diegans for Pension Reform” terminated.
7 (City Ex. H)

8 (ii) Allegation: “San Diegans for Comprehensive Pension Reform” filed the Notice of
9 Intent to circulate the petitions. (MEA Ex. 1, 0005)

10 Evidence: The named committee did no such thing. April Boling, T.J. Zane, and
11 Stephen B Williams signed the Notice of Intent as individuals. (MEA Ex. 54, 0690)
12 They also signed a transmittal letter, but the letterhead is not “San Diegans for
13 Comprehensive Pension Reform” but “The Comprehensive Pension Reform (CPR)
14 Initiative for San Diego” (MEA Ex. 54, 0688), which is not even an official committee,
15 but sounds like the one for which April Boling was treasurer. (See MEA Ex. 151)

16 (iii) Allegation: “Mayor Sanders hired the attorneys who wrote the proposition
17 for pension reform to his specifications.” (MEA Ex. 1, 0008)

18 Evidence: The Mayor did not hire the attorneys who drafted the CPR initiative.
19 SDCTA hired the firm of Lounsbery Ferguson Altona & Peek to draft it. SDCTA paid the
20 Lounsbery firm, and the Mayor contributed nothing to their fees. The Mayor’s testimony,
21 corroborated by the testimony of Ken Lounsbery, established these unrebutted facts. (See
22 also MEA Exs. 125 and 126)

23 (iv) Allegation: “Although the CPR is being held out as a ‘Citizens’ initiative,’
24 the evidence is clear that the Mayor spearheaded the *entire* CPR project from its
25 inception.” [Italics added] (MEA Ex. 1, 0006)

26 Evidence: Abundant and unrebutted testimonial and documentary evidence of
27 the significant involvement and leadership by powerful citizen groups, which initially
28 embraced Councilman DeMaio’s pension reform proposals and took over the CPR

1 project in April, 2011, prove this allegation completely false. (See, e.g. MEA Ex. 199
2 [...the Chamber (of Commerce) endorsed and significantly invested to place CPR on the
3 ballot. In addition, many of our members helped with signature gathering, and many
4 individual chamber members contributed to the campaign.”] and City Exs. N and R
5 [“DeMaio . . . who is the initiative’s most ardent champion ...”])

6 **IV. The Involvement of Council Members Faulconer and DeMaio**
7 **is of No Legal Consequence**

8 The facts show that Councilmember Kevin Faulconer joined with the Mayor,
9 from the time when the Mayor first proposed his concept for pension reform in
10 November, 2010, through the announcement of the compromise between the Mayor and
11 the citizen groups who had been supporting the concepts of Councilmember Carl
12 DeMaio. Mr. DeMaio proposed a competing ballot measure, but did cooperate or even
13 communicate with the Mayor for at least six months, until late March, 2011.

14 The involvement of these Councilmembers has no legal consequence to the
15 MMBA issues in this case. First, the UPCs focus almost entirely on the Mayor. Second,
16 the unions describe the nexus between the Mayor and meet and confer process this way:
17 “... a proper legal analysis cannot begin and end with the fact that the *City Council* is not
18 proposing this ballot initiative. This fact has never been in dispute. But the City Council
19 is not empowered to act as the City’s chief labor negotiator under the Charter’s Strong
20 Mayor Form of Government – the Mayor is; the City Council does not employ outside
21 labor counsel to conduct the required meet and confer process in accordance with law –
22 the Mayor does. [Emphasis in original] (MEA Ex. 1, 0010)

23 Of course, everything the Mayor is, individual Council Members are not.
24 Everything the Mayor does, the Council Members do not do. The only way a
25 Councilmember can effect labor policy is form a majority of five Councilmembers to
26 approve or disapprove policy. Councilmembers are not actual or ostensible agents of the
27 City in formulating labor policy, nor would any of their actions trigger a meet and confer
28 obligation under the MMBA, and any argument to the contrary would be ludicrous.

1 Thus, the involvement of Councilmen Faulconer and DeMaio adds nothing of
2 legal consequence to the issues in this case, other than the fact that the CPR turned out to
3 have far more of Councilmember DeMaio's fingerprints on it than the Mayor's. Their
4 involvement does not at all detract from the fact that the CPR was a genuine citizens'
5 initiative.

6 **CONCLUSION**

7 The PERB hearing testimony and exhibits show that the unions have failed to
8 carry their burden of proof on the crux of their UPC charges to establish that the CPR
9 was a "sham" initiative or that the Mayor got "surrogates" to present the Notice of Intent
10 to circulate petitions and get signatures. With the support of powerful, well-heeded
11 citizen groups, the CPR gained signatures of nearly 116,000 registered voters, qualified
12 for the ballot, and won nearly 2/3 of voters. It was a genuine citizens' initiative, not a
13 City-sponsored initiative. City requests that the Administrative Law Judge so find and
14 dismiss the Complaint or grant a non-suit.

15 This would greatly expedite the PERB process and save taxpayers of the City and
16 the State the significant expenditures that a drawn-out process would entail.

17 Dated: July 30, 2012

JAN I. GOLDSMITH, City Attorney

18
19 By 

Donald R. Worley
Assistant City Attorney

20
21 Attorneys for Respondent
CITY OF SAN DIEGO

22 I, as agent and attorney for Respondent City of San Diego, declare under penalty of
23 perjury that this City's Motion to Dismiss or for Non-Suit is true and complete to the best of my
24 knowledge and belief, and this declaration was executed on July 30, 2012, at San
25 Diego, California.

26
27 By 

Donald R. Worley
Assistant City Attorney

EXHIBIT A

RECEIVED
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10 IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
11 COUNTY OF SAN DIEGO

12 PUBLIC EMPLOYMENT RELATIONS BOARD,
13 Plaintiff/Petitioner,
14 v.
15 CITY OF SAN DIEGO,
16 Defendant/Respondent.

18 SAN DIEGO MUNICIPAL EMPLOYEES
19 ASSOCIATION,
20 Real Party in Interest.

Case No. 37-2012-00092205-CU-MC-CTL

COMPLAINT FOR
INJUNCTIVE RELIEF;
VERIFIED PETITION FOR
WRIT OF MANDATE

(Gov. Code, §§ 3509, subds. (a),
(b) & 3541.3, subd. (j); Cal. Code
Regs., tit. 8, § 32450 et seq.; Code
Civ. Proc., §§ 526, 527 & 1085)

Ex Parte Hearing Date:
Date: February __, 2012
Time: __: __ a.m.
Dept.: _____

Exempt from Fees
(Gov. Code, § 6103)

Service on California Attorney
General Required (Cal. Rules of
Court, rule 8.29)

Complaint for Injunctive Relief;
Verified Petition for Writ of Mandate

1 MEA regarding the provisions of the Initiative before it was placed on the June 5, 2012 ballot.
2 Rather, the City asserts that it is a so-called "citizens' initiative" brought by three private citizens—
3 Catherine (April) Boling, T. J. Zane, and Stephen B. Williams—and that the City, therefore, had no
4 obligation to negotiate the provisions of the Initiative prior to placing the Initiative on the ballot for
5 the June 5, 2012 election. (Ross Decl., ¶ 2, Exh. A; ¶ 5, Exh. B; ¶ 14, Exh. K.) PERB is informed
6 and believes, however, that Ms. Boling, Mr. Zane, and Mr. Williams are agents of the City, or
7 persons acting in concert with agents of the City in the development, sponsorship, promotion,
8 funding, and implementation of the Initiative, and in its refusal to negotiate with the MEA about the
9 Initiative. (*Ibid.*)

10 Procedural Background

11 20. On or about January 31, 2012, the MEA filed an unfair practice charge (UPC), No.
12 LA-CE-746-M, and also requested that PERB petition the superior court for an injunction pursuant
13 to sections 3541.3, 3509, subdivision (a), and California Code of Regulations, title 8, section 32450
14 et seq., requiring the City to remove the Initiative from the ballot for the June 5, 2012 election.
15 (Ross Decl., ¶¶ 2-3, Exh. A; ¶ 5, Exh. B.)

16 21. On February 10, 2012, PERB's General Counsel issued a complaint against the City,
17 alleging that it violated Government Code section 3505 and 3509, subdivision (b), and California
18 Code of Regulations section 32603(c), based upon evidence that the City, acting through its agents and
19 representatives, refused to meet and confer in good faith with MEA regarding the provisions of the
20 Initiative that impact wages and retirement benefits for current and future bargaining unit members
21 before placing the Initiative on the ballot for the June 5, 2012 election. (Ross Decl., ¶ 4, Exh. 1 [the
22 Administrative Complaint].)

23 22. In support of its request for injunctive relief, the MEA provided PERB with the sworn
24 declaration of Michael Zucchet, General Manager of the MEA. Mr. Zucchet's declaration contains
25 numerous exhibits. (Ross Decl., ¶ 5, Exh. B.)

26 23. The MEA's request for injunctive relief was granted by the Board on February 10,
27 2012, and is filed herein by direction of the Board. (Ross Decl., ¶ 6, Exh. J.)

28 Venue and Jurisdiction

EXHIBIT B



San Diego Municipal Employees Association

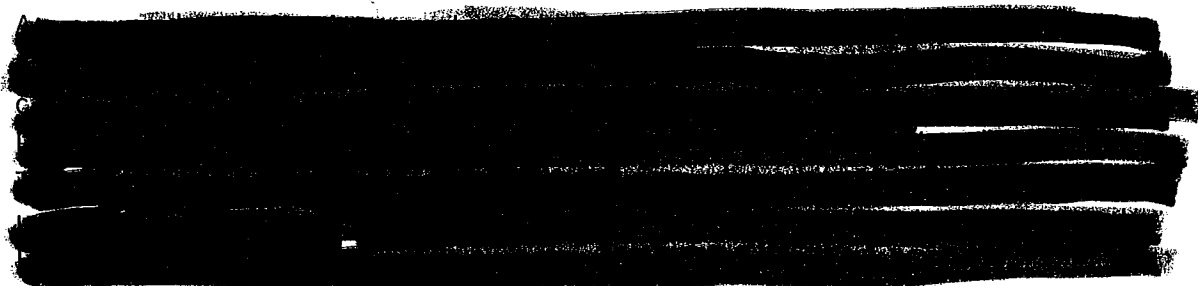
Breaking News from Ann Smith Regarding Pension Ballot Initiative -- Setback for City at Court of Appeal

Dear All:

As you know, in January, MEA filed an unfair practice charge (UPC) against the City with the Public Employment Relations Board (PERB) challenging the City's failure to meet and confer with MEA over the Comprehensive Pension Reform (CPR) ballot initiative (Proposition B). Based on Mayor Sanders' entire course of conduct with regard Proposition B, the thrust of MEA's UPC is that it is the City's initiative (not a *bona fide* "citizens' initiative").

MEA's UPC explains that the Mayor (with help from Councilmembers Faulconer and DeMaio) merely used the three citizen proponents (April Boling, T. J. Zane and Stephen Williams) as surrogates to get Proposition B on the ballot in order to avoid his obligation as the City's CEO and Chief Labor Negotiator to meet and confer with MEA. When MEA filed its UPC, MEA also requested that PERB seek injunctive relief on its behalf in an effort to keep Proposition B off the June ballot or any future ballot until and unless the City has fulfilled its duty under California's statewide bargaining law to meet and confer.

In response to MEA's UPC filing, PERB issued a Complaint, directed that a hearing on the UPC be expedited, and agreed that it was appropriate to seek injunctive relief in the San Diego County Superior Court.



On February 21, 2012, San Diego County Superior Court Judge William Dato denied PERB's request for a temporary restraining order but agreed that the issue of a preliminary injunction against implementation would be heard immediately after the

<p>Article Info</p> <p>Published in: E-News Date published: 5/7/2012</p> <p>Article Media</p> <p>MEA Petition for Writ City Informal Response to Writ MEA's Response to Boling et al Order re Writ Interested Party (Boling) Opposition Interested Party (Boling) Request to Join MEA Reply to City Ltr re Writ MEA v City - Sur-reply to MEA Reply PERB Informal Response to MEA Writ</p>
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PROOF OF SERVICE

San Diego Municipal Employees' Association v. COSD
(PERB Case No. LA-CE-746-M)
Deputy City Attorneys Association of San Diego v. COSD
(PERB Case No. LA-CE-752-M)
AFSCME, AFL-CIO Local 127 v. COSD
(PERB Case No. LA-CE-755-M)
San Diego City Firefighters Local 145 v. COSD
(PERB Case No. LA-CE-758-M)

I declare that I am a resident of or employed in the County of San Diego, State of California. I am over the age of eighteen years and not a party to the below-entitled action. The name and address of my residence or business is Office of the City Attorney, Civil Division, 1200 Third Avenue, Suite 1620, San Diego, CA 92101.

On **Monday, July 30, 2012**, I served the **CITY'S MOTION TO DISMISS OR FOR NON-SUIT** on the parties listed below:

- Placing a true copy of the above-named document in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid;
- Personal delivery;
- Facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).
- Electronic transmission in accordance with the requirements of PERB Regulation 32135.

Donn Ginoza
Administrative Law Judge
Public Employment Relations Board
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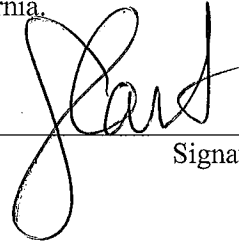
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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on **Monday, July 30, 2012**, at San Diego, California.



Print Name



Signature