STATE OF CALIFORNIA
EDMUND G. BROWN JR., Governor
PUBLIC EMPLOYMENT RELATIONS BOARD
Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: 916-324-0143
Fax: (916) 327-6377

February 11, 2013

Re: *San Diego Municipal Employees Association; 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 v. City of San Diego*
Case Nos. LA-CE-746-M, LA-CE-752-M, LA-CE-755-M, LA-CE-758-M

Dear Parties:

Attached is the Public Employment Relations Board (PERB or Board) agent's Proposed Decision in the above-entitled matter.

Any party to the proceeding may file with the Board itself a statement of exceptions to the Proposed Decision. The statement of exceptions shall be filed with the Board itself at the following address:

PUBLIC EMPLOYMENT RELATIONS BOARD
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

Pursuant to California Code of Regulations, title 8, section 32300, an original and five copies of the statement of exceptions must be filed with the Board itself within 20 days of service of this decision. A document is considered "**filed**" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, § 32135, subd. (a); see also, Cal. Code Regs., tit. 8, § 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet that meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, §§ 32135, subds. (b), (c) and (d); see also, Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The statement of exceptions shall be in writing, signed by the party or its agent and shall: (1) state the specific issues of procedure, fact, law or rationale to which each exception is taken; (2) identify the page or part of the decision to which each exception is taken; (3) designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception; and (4) state the grounds for each exception. Reference shall be made in

the statement of exceptions only to matters contained in the record of the case. An exception not specifically urged shall be waived. A supporting brief may be filed with the statement of exceptions. (Cal. Code Regs., tit. 8, § 32300.)

Within 20 days following the date of service of a statement of exceptions, any party may file with the Board itself an original and five copies of a response to the statement of exceptions and a supporting brief. The response shall be filed with the Board itself at the address noted above. The response may contain a statement of any exceptions the responding party wishes to take to the proposed decision. Any such statement of exceptions shall comply in form with the requirements of California Code of Regulations, title 8, section 32300. A response to such exceptions may be filed within 20 days. Such response shall comply in form with the provisions of this section.

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Any party desiring to argue orally before the Board itself regarding the exceptions to the proposed decision shall file with the statement of exceptions or the response thereto a written request stating the reasons for the request. Upon such request or its own motion the Board itself may direct oral argument. (Cal. Code Regs., tit. 8, § 32315.) All requests for oral argument shall be filed as a separate document.

A request for an extension of time within which to file any document with the Board itself shall be in writing and shall be filed at the headquarters office at least three days before the expiration of the time required for filing. The request shall state the reason for the request and, if known, the position of each other party regarding the extension. Service and proof of service pursuant to California Code of Regulations, title 8, section 32140 are required. Extensions of time may be granted by the Board itself or an agent designated by the Board itself for good cause only. (Cal. Code Regs., tit. 8, § 32132, subd. (a).)

Unless a party files a timely statement of exceptions to the proposed decision, the decision shall become final. (Cal. Code Regs., tit. 8, § 32305.)

Very truly yours,

Shawn Cloughesy
Chief Administrative Law Judge

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, 1031 18th Street, Sacramento, CA 95811-4124.

On February 11, 2013, I served the Letter with Proposed Decision in *San Diego Municipal Employees Association; 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 v. City of San Diego*, Case Nos. LA-CE-746-M, LA-CE-752-M, LA-CE-755-M and LA-CE-758-M, on the parties listed below by

_X_ placing a true copy thereof enclosed 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).

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on February 11, 2013, at Sacramento, California.

Regina Keith
(Type or print name)

Regina Keith
(Signature)

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION, Charging Party, v. CITY OF SAN DIEGO, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-746-M PROPOSED DECISION (February 11, 2013)
DEPUTY CITY ATTORNEYS ASSOCIATION OF SAN DIEGO, Charging Party, v. CITY OF SAN DIEGO, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-752-M
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 127, Charging Party, v. CITY OF SAN DIEGO, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-755-M
SAN DIEGO CITY FIREFIGHTERS LOCAL 145, Charging Party, v. CITY OF SAN DIEGO, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-758-M

Appearances: Smith, Steiner, Vanderpool & Wax by Ann M. Smith, Attorney, for San Diego Municipal Employees Association; Olins, Riviere, Coates & Bagula by Adam Chaikin, Attorney, for Deputy City Attorneys Association of San Diego; Rothner, Segall & Greenstone by Constance Hsiao, Attorney, for American Federation of State, County and Municipal Employees, AFL-CIO, Local 127; Smith, Steiner, Vanderpool & Wax by Fern M. Steiner, Attorney, for San Diego City Firefighters Local 145; Donald R. Worley, Assistant City Attorney, and Renne, Sloan, Holtzman & Sakai by Timothy G. Yeung, Attorney, for City of San Diego.

Before Donn Ginoza, Administrative Law Judge.

The Mayor of the City of San Diego announced in November 2010 that he would pursue an amendment to the City Charter to reduce pension benefits for City employees. Elimination of the defined benefit plan for new hires and its replacement with a defined contribution plan was the key feature of his proposal. Previously in his role as the City's chief negotiator, the Mayor had negotiated to achieve pension reforms with the City's unions, some in connection with proposed ballot initiatives he had developed. On this occasion the Mayor chose to pursue a citizens' initiative measure rather than invoke the City Council's authority to place his plan on the ballot because he doubted the Council's willingness to agree with him and because he sought to avoid concessions to the unions. After achieving a compromise between the language of his proposed ballot measure and that of a City Councilmember's competing reform plan, the Mayor announced to the public that the proposal would be carried forward as a citizens' initiative. The measure prevailed at the June 2012 election. The question presented here is whether the City violated its statutory obligations by failing to meet and confer with its unions over this proposal for pension reform.

PROCEDURAL HISTORY

Four unfair practice charges containing similar allegations were filed by the unions against the City of San Diego (City) under the Meyers-Milias-Brown Act (MMBA or Act).[1]

[1] The MMBA is codified at Government Code section 3500 et seq. Hereafter all statutory references are to the Government Code unless otherwise indicated.

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 (Firefighters) filed their unfair practice charges on February 1, February 15, February 24, and March 5, 2012, respectively.[2]

The Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint in each of the four cases on February 10, March 2, March 16, and March 28, 2012, respectively. The complaints allege that the City's Mayor co-authored, developed, sponsored, promoted, funded, and implemented a pension reform initiative, while refusing to meet and confer with the unions regarding the initiative's provisions.[3] This conduct is alleged to violate sections 3503, 3505, and 3506 of the Act and PERB Regulation 32603(a), (b), and (c).[4]

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[2] SDMEA requested that PERB seek injunctive relief to prevent the measure from being placed on the ballot. On February 14, 2012, PERB filed a complaint seeking injunctive relief in superior court. The superior court denied the request. On February 21, 2012, after PERB had scheduled a formal hearing as to SDMEA's complaint, the City filed a cross-complaint to PERB's superior court action, seeking orders staying the administrative hearing and quashing subpoenas that had issued. The superior court granted the stay, rejecting PERB's claim of initial jurisdiction over unfair practices. PERB's hearing dates for the SDMEA case were vacated. On April 11, 2012, SDMEA filed a petition for writ of mandate in the Court of Appeal challenging the stay (Case No. D061724). On June 19, 2012, the Court of Appeal granted the writ. (*San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.4th 1447.) The City filed subsequent writ and review petitions seeking to overturn the Court of Appeal order and to stay the PERB proceedings. These petitions were denied.

[3] The complaint in AFSCME's case contained the additional allegation that the City unilaterally repudiated a provision of the parties' negotiated agreement that the City would not pursue a charter amendment concerning retirement benefits. On July 31, 2012, AFSCME withdrew this allegation with prejudice.

[4] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

On March 2, March 22, April 4, and April 18, 2012, as to the four cases respectively, the City filed answers to the complaints, denying the material allegations and raising affirmative defenses.

On March 2, 2012, the City filed a motion to disqualify PERB from adjudicating SDMEA's unfair practice complaint based on bias. On March 22, 2012, the motion was denied.

On March 6, March 13, and June 21, respectively, DCAA, AFSCME and the Firefighters filed motions to consolidate their cases with the SDMEA case. On June 29, 2012, the motions were granted.

On March 22, March 13, and March 28, 2012, respectively, the City filed motions to disqualify PERB from adjudicating the DCAA, AFSCME and Firefighters complaints based on bias. On May 17, 2012, these motions were denied.

On March 23, 2012, the City filed a motion to dismiss the SMDEA complaint. On July 5, 2012, the motion was denied.

On July 6, 2012, the City filed a consolidated motion to dismiss the complaints. On July 12, 2012, the motion was denied.

On July 17, 18, 20, and 23, 2012, a formal hearing was conducted in Glendale.

On October 19, 2012, the matter was submitted for decision after the filing of post-hearing briefs.

FINDINGS OF FACT

The City is a charter city with a population of 1.3 million, the ninth largest city in the nation. The City Council consists of nine members elected by district. At all times relevant to this matter, Jerry Sanders was the Mayor of the City.

In 2006, shortly after Mayor Sanders took office, the City adopted a "strong mayor" form of governance on a trial basis. The Mayor acquired the executive authority previously held by the City Manager but lost his vote on the City Council. The City Charter states that the Mayor is the chief executive officer of the City; that he has the power to recommend measures and ordinances to the City Council as he finds necessary and expedient and make other recommendations he finds desirable. The Mayor has a veto power with respect to delineated matters, though it is subject to override by the City Council. In 2010, the voters adopted the strong mayor provisions on a permanent basis.

The City has nine represented bargaining units comprising approximately 10,000 employees, or 97 percent of the workforce. SDMEA represents four of these units (professionals, supervisors, technical employees, and administrative support and field service employees). The other charging parties represent one unit each. The remaining two units, represented by the International Association of Teamsters and the San Diego Police Officers Association, are not involved in this case.

Mayor Sanders discharges the responsibility for collective bargaining with represented employee organizations on behalf the City. He also develops the City's initial bargaining proposals and maps out a strategy for the negotiations. Under the City's current practice, the Mayor briefs the City Council on the proposals and strategy and obtains its agreement to proceed. To perform the actual negotiations, the Mayor retains outside counsel to be the chief negotiator at the bargaining table. The Mayor returns to the City Council with the results of his negotiations for its approval and adoption.

City Human Resources Department Director Scott Chadwick is responsible for the ongoing relationships with the unions. He provides advice to the Mayor on labor relations

matters and serves on the bargaining team. The Mayor directs him as to matters of policy and strategy on bargaining matters.

Jay Goldstone is the City's chief operating officer. His role includes the functions of the chief financial officer, a position the City once staffed. Goldstone serves as a conduit of information between the Mayor and Chadwick on labor relations matters and is consulted by the Mayor on top level labor-management issues. He is sometimes directly involved with the chief negotiator in contract negotiations.

Jan Goldsmith is the City Attorney. The City Attorney's office provides legal advice to City departments, including the human resources department, the Mayor, and City Council.

The Origins of Pension Reform in San Diego

During the late 20th Century, private sector defined benefit plans, especially those for industrial workers, suffered greatly due to a host of economic factors, including increased global competition. Public sector pensions by comparison were a model of stability during that period. Recently public employee pension funds have been challenged as a result of weak performance in the equities markets and decisions to enhance benefits for future retirees not accompanied by adequate increases in funding. Retiree health benefit programs also offered to public sector employees have suffered due to escalating premium costs. Added to these challenges, the recent economic recession and resulting decline in municipal tax bases presented a veritable perfect storm for public employers in terms of meeting their future financial obligations. Consistently throughout the state, public entities, including the City, are reducing the level of their services in order to maintain budgetary balance. At the hearing, the Mayor stated that the City was committing 20 percent of its annual budget to its retirement obligations. Pension reform for public employees has become headline news nationwide,

including accounts of municipalities threatened with bankruptcy resulting in part from the weight of legally vested obligations to current and future retirees.

The City has a well-documented history of problems in regard to its pension fund, the San Diego City Employees' Retirement System (SCDERS). In addition to the pressures suffered by funds in general, the City amended its plan to increase benefits to future retirees without adequate measures to fund those benefits. (See *City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M (*City of San Diego*).)[5] The City became referred to as "Enron by the Sea." The ballot initiative at the center of this case claimed the unfunded liability of the City for future pension obligations to be approximately $2 billion.

The stability of defined benefit plan funds is a goal by design: they are intended to be self-funded and self-sustaining over time. The ability for payouts to remain within the capacity of the plan's funds depends on the accuracy and stability of actuarial data, the achievement of predicted returns on invested funds, the adequacy of contributions to the fund's corpus on a year-to-year basis, and constancy of the level of promised benefits. In contrast, defined contribution plans define no payout to retirees and only require a present contribution to employees for their future savings, thereby avoiding the need for active fiduciary control. Here the Mayor would champion a proposal to impose defined contribution plans on a majority of the City's new employees. In speeches to the public he described defined benefit plans as "outdated" for public employees, whom he believed were no longer entitled to better retirement benefits than private citizens.

[5] In the cited case, the City Attorney was found to have engaged in unlawful bypassing by urging employees to rescind enhanced retirement benefits that he believed the City had unlawfully adopted.

The Mayor's Prior Pension Reforms

Arising out of the City's ongoing struggle to control its pension obligations, Mayor Sanders has accumulated a record of reform. In February 2006, the Mayor developed two ballot measures for the November 2006 election. Proposition B proposed to require voter approval for any increases in pension benefits for City employees. Proposition C proposed to permit the contracting out of work through a "managed competition process." The Mayor directed Chadwick to meet and confer with the unions on an expedited basis.[6] The parties negotiated over the language of the ballot measures for approximately six weeks before coming to impasse. Under the City's local rules, the City Council held a hearing on the impasse and provided its input to the Mayor with regard to the ballot initiatives.[7] Both propositions went to the ballot and prevailed at the election.

In the spring of 2008, SDMEA, DCAA, and AFSCME engaged in negotiations for successor agreements to be effective July 1, 2008. Retiree benefits were a subject of the negotiations. After the parties reached impasse, the City Council rejected the Mayor's request to implement his last, best and final offer. Council President Scott Peters urged the Mayor to return to the bargaining table with the unions, but the Mayor rejected that guidance. In a May 16 letter on behalf the Mayor, Chadwick informed the unions that the Mayor would not improve his last offer. The impasse was not broken, and the City refrained from any unilateral

[6] The SDMEA contract has included language that obligates the union to meet and confer with the City over a ballot initiative proposed by the City that involves negotiable subjects.

[7] A PERB administrative law judge found that the City violated its impasse procedures in relation to negotiations with AFSCME and SDMEA over the two measures. (Case No. LA-CE-352-M.) The issue there involved negotiations over proposed implementing ordinances following the passage of the 2006 ballot propositions.

implementation, electing to maintain the status quo of the expiring memoranda of understanding (MOU).

In response to the impasse, the Mayor developed another ballot measure to achieve his objectives for pension reform. The measure would have appeared on the November 2008 ballot. This proposal, directed at non-safety employees hired after July 1, 2009, would have lowered the multipliers for calculation of the pension payout,[8] required averaging of the highest compensation over three-to-five years rather than one year, required equal sharing of contributions between the City and employees, and created a supplemental defined contribution plan.

By letter dated May 28, Chadwick wrote to SDMEA, DCAA and AFSCME demanding to meet and confer over the Mayor's November 2008 ballot proposal. On the same day, Council President Scott Peters issued a press release indicating his support of the Mayor's "reform agenda" and promised to give serious consideration to the proposed measure. The City Council announced a deadline of July 28 for giving final approval to the Mayor's proposal. The unions did not initially accept the invitation to bargain.

City policy requires that if the Mayor proposes an initiative measure he must obtain the Council's approval. On June 25, 2008, the Mayor presented his ballot measure to the City Council's Rules Committee to fulfill the first step in the process. Goldstone testified: "[T]he Mayor didn't feel that [the] Council was going to . . . impose on labor, and so the Mayor did then propose taking the unsuccessful negotiations to the voters, . . ." At the Rules Committee hearing, the Mayor stated that pension reform was the most important of all the issues on his agenda. In the meantime, Council President Peters had developed his own pension reform

[8] The multiplier refers to a percentage of salary, which, when multiplied with the years of service, results in the total percentage of highest salary paid in the form of the pension.

proposal. The Mayor quickly announced that he and Council President Peters had reached a compromise proposal for pension reform that would advance to the City Council.

By letter dated June 25, 2008, Chadwick renewed the demand for bargaining with the unions over the compromise proposal. Ultimately the unions ratified provisions which achieved significant savings for the City in terms of the costs of funding the defined benefit plan for new hires. Multipliers were reduced and highest salary averaging was adopted consistent with the Mayor's proposal.[9] The compromise also adopted a cap on pension payouts at 80 percent of the highest average salary, a 401(k) component of the retirement plan, and a retiree health trust fund to replace vested benefits for new hires.

The agreement with the unions was announced and explained by the Mayor at a July 22, 2008 press conference. The Mayor stated that he, as the City's "lead negotiator," and the unions had agreed to reforms that would allow him to recommend that the City Council not go forward with the November ballot initiative. Projected savings of $23 million annually were estimated when the measure was fully implemented. The Mayor credited the parties with avoiding potentially costly litigation and the costs associated with the election. The Mayor withdrew his request for City Council approval of his proposed November 2008 initiative measure.

City Attorney Opinions

In the midst of the 2008 negotiations impasse, then-City Attorney, Michael Aguirre issued a legal memorandum regarding the possible ballot measure on pension reform, which included opinions that became central to this case. In his opinion dated June 19, 2008, Aguirre stated the Mayor generally speaking is the "spokesperson for the City in labor relations with the labor unions and has authority to set the City's bargaining position so long as he acts

[9] The changes lowered the multiplier rate to 1.0 percent at 55 rather than 2.5 percent, and 2.6 percent at 65, down from 2.8 percent.

reasonably and in the bests [sic] interest of the City." In advising on the first of four scenarios, Aguirre explained that the City Council has a constitutional right to present a ballot initiative, constrained however by the holding in *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*), which requires presentation of the proposed ballot measure to the unions for negotiations. In discharging the *Seal Beach* meet-and-confer obligation on behalf of the City, the City Council would request that the Mayor present its proposal to the unions and return with a report. If no agreement was reached the City would declare its final ballot proposal language, and after a hearing on the matter determine whether to place it on the ballot. In this process, the City Council would "control the decisions related to the substance and language of its proposal, and not the Mayor," "apart from any proposal the Mayor may wish to present to the Council for its consideration." Aguirre distinguished ballot proposal negotiations from normal negotiations, where the Mayor has control during the negotiations and the Council has no authority to add new provisions to the Mayor's proposals.

Recapitulating the practice at the time, Aguirre explained as to a second scenario that the Mayor "is empowered to propose, on behalf of the City, a ballot measure to amend the Charter provisions related to retirement pensions." Again, "[t]he Mayor is obligated to meet-and-confer with the labor organizations prior to bringing a final ballot proposal to the City Council."

A third scenario is directly applicable to this case—whether the Mayor can "initiate or sponsor a voter petition drive to place a ballot measure to amend the City Charter provisions related to retirement pensions." Aguirre opined that the Mayor

> has the same rights as a citizen with respect to elections and propositions. The Mayor does not give up his constitutional rights upon becoming elected. He has the right to initiate or sponsor a voter petition drive. However, such sponsorship would legally be considered as acting with apparent governmental authority because of his position as Mayor, and his right and

> responsibility under the Strong Mayor Charter provisions to represent the City regarding labor issues and negotiations, including employee pensions. As the Mayor is acting with apparent authority with regard to his sponsorship of a voter petition, the City would have the same meet and confer obligations with its unions as [where the Mayor proposed a ballot measure to the unions directly on behalf of the City].

Noting Propositions B and C in 2006, Aguirre explained: "Since the Strong Mayor Amendment was added, the City Council has repeatedly acknowledged the Mayor's authority as the City's spokesperson on labor negotiations . . . to negotiate on behalf of the City over his ballot proposals to amend the charter." The Mayor's authority as the City's spokesperson in labor negotiations is found in Council Policy 300-06 (the City's local labor relations policy) which defines the labor relations authority of the "City" as including "the City Council and *any duly authorized city representative*" (italics added) (i.e., the Mayor).

Addressing a fourth scenario, Aguirre wrote that a charter amendment could be proposed by citizens using the initiative process pursuant to article XI, section 3 of the California Constitution. The City could not alter the proposed measure and no meet-and-confer obligation would attach because neither the public agency nor a union was involved. Consistent with the practice in 2006 as to the Mayor's previous initiative measures, meeting and conferring would be required with the unions prior to enacting "implementing legislation."[10]

The Mayor denied any recollection of the Aguirre opinion's discussion of the third scenario as it related to his actions in June 2008. However, Goldstone conceded that the Aguirre memorandum prompted the Mayor to present his ballot proposal to the City Council rather than pursue a citizens' initiative because he knew it would violate his meet-and-confer

[10] The Mayor alluded to this step in the process in his testimony, though it was never fully explained.

duties as set forth in the Aguirre memorandum. The Mayor denied reading the Aguirre memorandum, as it was not his custom to read City Attorney opinions. But the Mayor did not deny knowledge of the memorandum altogether, admitting he was dismissive of its conclusions.

In January 26, 2009, City Attorney Goldsmith, who succeeded Aguirre, issued an opinion regarding the City's obligation in the wake of the PERB administrative law judge decision in case number LA-CE-352-M. The precise question relates to the City's obligations in regard to its own impasse procedures, after the decision found that the City had violated those procedures in regard to implementation of the provisions of Propositions B and C. The opinion analyzes the City's MMBA obligations in relation to the City Charter's strong-mayor provisions and Council Policy 300-06. Nothing in the memorandum specifically addresses City-sponsored charter initiatives.

When Chadwick was initially questioned whether it was his understanding, based on his reading of the 2009 opinion, that in preparing with the Mayor's Office to engage in bargaining it is the Mayor who "ultimately makes the determination of policy with regard to a meet and confer position that the City is going to bring forward to the unions," he answered yes. He later qualified that statement in regard to the 2009 opinion, stating: "That's where the practice changed. Where previously the Mayor was the lead negotiator and the Mayor had the authority to make the proposals and the end-game or the end result would be Council accepting or rejecting the Mayor's proposal, but with the new opinion that laid out the positions, the City does not have the ability to offer a proposal, absent Council's confirmation."

The Goldsmith opinion does not explicitly frame that question. But the opinion does state that the Mayor's responsibility for representing the City in labor negotiations is a "shared duty with the City Council;" that the Mayor's duty under the MMBA is to "ensure that the

City's responsibilities under the MMBA as they relate to communication with employees are met;" that under a California Attorney General's opinion, the public agency's bargaining representatives perform "an administrative function" and are not "an advisory body" to the legislative body; that the MMBA defines a "central role" for the City Council in directing the meet and confer process; and that the legislative power of the City Council, while subject to the Mayor's veto power, may not be delegated.

The Mayor agreed that if he deemed it important for the City to achieve concessions or reforms in terms of pensions, he had the authority to determine the City's objectives and present proposals to the unions with the City Council's approval of those objectives.

Mayor Sanders' Next Wave of Pension Reform

In the November 2010 election, Proposition D, a proposed sales tax to generate additional revenue for the City, was defeated by the voters. Proposition D had been proposed by the City Council. In response to the defeat, the Mayor met with his staff and discussed plans for the remaining two years of his term in office. The Mayor established as one of his primary objectives to "permanently fix" the problem of the "unsustainable" cost of the City's defined benefit plan. The Mayor's idea for his "next wave of pension reform" was to replace the defined benefit plan with a defined contribution plan (i.e., "401(k)-style plan") for all new employees with the exception of police and firefighters. City Council President Pro Tem Kevin Faulconer was the co-sponsor of the plan. The Mayor believed pension reform was needed to eliminate the City's $73 million structural deficit before he left office. He intended to propose and promote a campaign to gather voter signatures for an initiative measure that would accomplish his goal.

At the hearing, the Mayor offered several reasons for his strategy. He believed the reforms were necessary for the financial health of the City. He did not believe the City

Council would use its authority to put the measure on the ballot. And he wanted the public to "know that that was the route that we were going." He stated that it was his obligation to tell the public what he believed "were the answers and the solutions to some of these issues." Though acknowledging his negotiations over other pension proposals, the Mayor admitted that a related purpose was to avoid submitting the proposal to the collective bargaining process prior to a vote of the electorate. He stated: "Because on a citizens' signature initiative, you don't meet and confer prior to putting that onto the ballot. You meet and confer after the electorate makes a decision on the impasse." The Mayor added that the proposal "was important enough to take directly to the voters and allow the voters to voice their opinion by signing petitions to put that on the ballot." Mayor Sanders' political judgment told him that the City Council would not put his proposal on the ballot "under any circumstances." The Mayor observed that his earlier reform proposals had been "watered down" by the City Council. So the Mayor decided to pursue his latest proposal as a private citizen.

The Mayor had recently promoted Julie Dubick from policy director and deputy chief of staff to chief of staff in the Mayor's office. The Mayor acknowledged Dubick's role in his earlier pension reform efforts and announced she would be helping him implement his new phase of pension reform. At the hearing, Dubick confirmed the Mayor's view that his proposal would not be supported by the City Council. She agreed with the wisdom of the Mayor advancing his initiative as a private citizen, understanding that it would avoid both the prospect of compromise that might result from a City Council initiative and the obligation to meet and confer with the unions. She believed the 2008 negotiated solution was "better than nothing" but "not sufficient."

Goldstone testified that the question whether this plan would conflict with the Mayor's obligations as the City's chief labor negotiator never came up. Goldstone had read the Aguirre

opinion, but it was of no concern to him once the Mayor announced his plan. Goldstone believed the question of the Mayor presenting the proposal at the bargaining table was a closed case, that the Mayor could proceed with his plan as a private citizen, and in doing so avoid meeting and conferring on the subject. Goldstone recalled no discussion or review of the legality of the Mayor's approach, asserting that the Mayor was only obligated for compliance with the MMBA when he was acting as the City's chief negotiator.

On November 19, 2010, the Mayor's communication staff issued a "Fact Sheet" in advance of the Mayor's scheduled press conference that day (as was its custom for such events), alerting the public to the Mayor's plan and identifying Councilmember Faulconer's role in helping craft the language of the Mayor's proposed reform initiative. The media advisory noted that Faulconer, City Attorney Goldsmith, Goldstone, and Chief Financial Officer Mary Lewis would be present at the press conference. The Fact Sheet stated: "Items that require meet-and-confer, such as reducing the city's retiree health care liability, are currently in negotiations and on track to have a deal by April, in time to implement changes in the next budget." It also noted that Councilmember Richard DeMaio had criticized the proposal as not going far enough. The announcement was posted on the City's website devoted to news from the Mayor's office.

The Mayor's November 19 press conference was held at the Mayor's Conference Room on the 11th floor of City Hall. It was reported on the website of NBC News San Diego, with a picture of the Mayor standing in front of the City seal and a quote of the Mayor promising signature gatherers for the ballot measure in the near future. Councilmember Faulconer, City Attorney Goldsmith, and Goldstone were present. The Mayor invited Goldsmith because the City Attorney's legal advice was important to the initiative.

City Director of Communications Darren Pudgil, a direct report to Dubick, is responsible for publicizing the Mayor's policy goals. In the afternoon following the press conference, the Mayor's staff sent out a mass e-mail to a list of 3,000 to 5,000 community leaders and others, which Pudgil described as an announcement of the Mayor's plan "to address the City's budget issues" and "carry out the initiatives" he supported. The title of the announcement is "Rethinking City Government." The messages indicated they were sent from "JerrySanders@sandiego.gov."

At the same time, Councilmember Faulconer issued a similar announcement from his City e-mail address; stating he was "pleased to partner with the Mayor to put this together and take it to [the] voters." Faulconer noted plans to seek out the support of "several business groups." After referring to the failed Proposition D, he concluded: "I realize decisions like these won't always be easy pills for some to swallow, but I was elected to make these types of decisions, to look out for taxpayers, to ensure we're doing all we can with tax dollars they send to City Hall." He pledged his support to the signature-gathering effort.

Records indicate that Pudgil prepared the Mayor for a December 3 meeting of one to two hours with approximately 20 civic leaders at a law firm in downtown San Diego to discuss the strategy for moving forward with the measure. Lani Lutar, president of the San Diego Taxpayers Association, and Tom Sudberry, a one-time board chair of the Lincoln Club, were scheduled to be present. Their two organizations emerged as leading advocates of pension reform leading to the ballot campaign. San Diego Taxpayers Association Vice-Chair George Hawkins notified the Mayor that his organization had voted to adopt a set of pension reform principles that included creation of a 401(k)-style plan for new hires and urged his support for their adoption. Hawkins supported the adoption of these principles "through the legally required negotiating process or a vote of the people." Also in December 2010, Councilmember

Faulconer and the Mayor engaged leaders of the business community. The Chamber of Commerce was included in a discussion of the pension proposal. Faulconer was the organizer of the meetings.

During December and early January, Pudgil further publicized the Mayor's initiative. In the first week of December, Pudgil, from his City e-mail address, e-mailed media representatives on a pre-assembled list an article published that day in *Bloomberg Today*. The article touted the Mayor's leadership on pension reform. Pudgil prepared the Mayor for a December 6, 2010, appearance on the local television station KUSI's "Morning Show." Rachel Laing, the Mayor's deputy press secretary, sent out two e-mails to members of the Mayor's staff alerting them to news articles describing the Mayor's leadership on pension reform. In the e-mail attaching the *Bloomberg* article, Laing asked the staff to share it "with your contacts as appropriate." In a January 7, 2011, e-mail to a media contact, Pudgil offered to make the Mayor available for a show called "The Factor" to describe what his "boss" was doing to solve the problem of "bloated pensions." He attached an article from the *Bond Buyer*, again touting the Mayor's record on pension reform. The Mayor acknowledged this type of publicity was within the scope of Pudgil's duties.

Beginning in January 2011, Mayor Sanders enlisted the assistance of his friend and political consultant/strategist Tom Shepard. With Shepard leading, Mayor Sanders and Councilmember Faulconer, established a committee called San Diegans for Pension Reform to raise money for the proposed initiative.

On January 11, 2011, the Mayor gave his State of the City speech. The City Charter calls for the speech, describing it as a message to the City Council communicating "a statement of the conditions and affairs of the City" together with "recommendations on such matters as he or she may deem expedient and proper." A draft of the speech, prepared by the Mayor's

speech writer, was circulated for comment among the Mayor's senior staff, including his chief of staff, policy director, and director of communications.

In the speech, the Mayor stated: ". . . I will give you everything I have to see our plans through." He laid out two areas of "sustained focus": building an inclusive state of prosperity and completing his administration's financial reforms. In regard to the latter objective, the Mayor identified the creation of a "401(k) style plan for future employees." He returned to the subject in greater detail, beginning with the statement that for the past five years he had "channeled [his] disgust at [his] predecessors' recklessness into positive reforms that protect taxpayers to the greatest extent the law allows." After acknowledging the success in cutting retiree costs and stating his intention to negotiate further reductions, he stated that he was "rethinking pensions even further." The Mayor then announced that as "private citizens" acting in the "public interest" he would bring forward a ballot initiative, along with Councilmember Faulconer and City Attorney Goldsmith, that would permanently eliminate defined benefit pensions for new employees. As a point of emphasis, the Mayor asserted that "no pension reform—not mine or anyone else's—can generate savings fast enough to close our looming budget deficits."

The following day, Pudgil issued a press release restating the Mayor's themes of the "next wave of pension reform" and laying out a "vigorous agenda." A member of the Mayor's staff prepared talking points for a January 14, MSNBC interview, as well as a January 19, 2011 radio show. An e-mail blast was sent providing the internet link to the MSNBC video.

The Mayor testified that he perceived no conflict between his official role as the Mayor, including that of chief negotiator, and his capacity to act as a private citizen in pursuing his pension reform initiative. The Mayor never directed his negotiators to present his ideas for the mandatory 401(k) plan to the unions. Mayor Sanders believes the occupant of his office by

necessity must be able to simultaneously engage in private political campaigning while also serving as an officer of city government. The Mayor testified: "[W]hen you run for office and you run for a second term, you're doing both. You're not allowed to campaign on City time, but elected officials also don't have private time per se. We don't get vacation time. We don't get sick time. We don't get any of those. You move back and forth in the electoral process all the time." The Mayor believed he made it clear to the public that he was pursuing the initiative campaign as a private citizen, as reflected in his State of the City speech. He also testified that he informed the editorial board of the San Diego Union Tribune, news writers, and television interviewers that he was advancing his initiative in a private capacity. Pudgil conceded that the Mayor never directed him in his outreach activities to stress that he was carrying the initiative as a private citizen. Although Pudgil appears not to have made the point in his communications, there is evidence that the press was aware of the Mayor's contention that he could promote the initiative as a private citizen. The Mayor admitted never clarifying for his staff that his activities were undertaken solely as a private citizen.

The Mayor's top level staff was aware of the pension reform proposal and supported the launch of the initiative. Dubick, Pudgil, Goldstone, Aime Faucett, a former aide to Councilmember Faulconer who assumed Dubick's vacated position, and others played supporting roles. Goldstone and Dubick testified that the decision to pursue an initiative was discussed by the staff. Faucett, who attended December 2010 strategy meetings at Shepard's office, suggested that there was an expectation that the Mayor's staff would support his effort. No one was told explicitly of the option not to participate, and no one actually declined to participate. The Mayor denied directing Pudgil to engage in the public relations effort, but never told Pudgil to cease his work once it was undertaken. He acknowledged that Pudgil may have assumed it was within his scope of duties.

The DeMaio Plan

In early November 2010, and also in response to the defeat of the sales tax measure, Councilmember DeMaio announced a five-year financial recovery plan in a publication called the "Roadmap to Recovery." DeMaio's plan also included the substitution of a defined contribution plan for new employees, but with no exception for safety employees. The DeMaio plan would have imposed a "hard cap" on pensionable pay by limiting the pay rates upon which the years-of-service multiplier is applied.

In contrast to the DeMaio plan, the Mayor's plan included a freeze on the City's total payroll. The total payroll cap provided the flexibility to ameliorate the early losses associated with the transition to the new plan by reallocating other savings in employee compensation. The Mayor believed the pensionable pay freeze was legally vulnerable in contrast to his plan.

DeMaio issued a press release in January 2011 claiming City Attorney Goldsmith had issued an opinion that his plan was legal. DeMaio called on the Mayor and the City Council to act on his proposed measures. In another press release, DeMaio urged the unions "to accept an offer made with the unanimous support of the Mayor, City Council, and City Attorney to negotiate a final and complete resolution to the city's pension woes"; and that if the unions did not accept a compromise, his proposal would be taken "directly to a vote of the people."

The Lincoln Club and San Diego Taxpayers Association were early supporters of the DeMaio plan. The Lincoln Club's leaders included T. J. Zane, Steven Williams, Bill Lynch, and Sudberry. Other business interests included the San Diego Chamber of Commerce, San Diego Lodging Industry Association, and Building Industry Association of San Diego County.

The Compromise Version of the Initiative

News reports from the San Diego Union Tribune posted on the internet described the competing proposals and quoted the Mayor as claiming his plan was "more legally defensible" than the DeMaio plan. In March 2011, the Mayor's group commissioned a legal opinion that the freeze on pensionable pay could not be implemented unilaterally because the City has a continuing obligation to negotiate wages. Dubick was in contact with the law firm retained by Shepard's committee for that purpose.

With a view to supporting the Mayor's proposal, Goldstone asked the chief executive officer of SDCERS to have the fund's actuary conduct a financial analysis of the Mayor's proposal. The City indirectly pays for the actuary's services. On behalf of the Mayor and his pension reform committee, Goldstone retained an outside consulting firm to conduct a financial analysis of the Mayor's plan. Through Goldstone's connections, the firm obtained access to SDCERS's retirement program database. The purpose of the analysis was to support the Mayor's view that his proposal would allow the plan to avoid deficits in the initial years in contrast to the DeMaio plan.

At a meeting in approximately March, representatives of the Lincoln Club and San Diego Taxpayers Association informed Mayor Sanders that only one proposal should be on the ballot, that the business community and its citizen allies only wanted to fund one initiative, and that the groups involved had the finances to put their measure on the ballot regardless of the Mayor's plans. At the time, the Mayor's committee had raised approximately $100,000 of its own funds. Negotiations between the Mayor and those supporting the DeMaio plan took place over a three-to-four week period at meetings attended by the Mayor, Councilmember Faulconer, Goldstone, Dubick, and Faucett. Private citizens attending included Zane, Lynch, Williams, Paul Robinson, and April Boling. Boling had been active in

politics and was the treasurer of San Diegans for Pension Reform. She would become one of the official sponsors of the ballot proposition, along with Zane and Williams.

Pudgil prepared talking points for the Mayor's March 17, 2011, appearance on a KUSI San Diego People Program. Included was the Mayor's intention along with Councilmember Faulconer to reveal their "full package" in the "next couple of weeks." During March the press reported that the Mayor and Councilmember Faulconer were planning to present their initiative ahead of DeMaio's proposal. The Mayor's meeting agendas assigned responsibility to Pudgil, Faucett and another policy staff member for a press conference on March 24, 2011. At the news conference, the Mayor announced his intention to move forward with Councilmember Faulconer. The Mayor objected to one of these news articles describing his proposal as contributing to his "legacy" as the Mayor, because he never used that term or considered the proposal in that way.

Through their negotiations, the Mayor and DeMaio camps ultimately agreed on a single proposal. The compromise proposal allowed police to continue in the existing plan, but excluded firefighters. The Mayor's total cap on payroll was rejected. The Mayor testified that the negotiations had been "difficult," and while not liking every part of the proposal he agreed that the parties had come up with a proposal he thought was "important to the City in the long run."

The San Diego Taxpayers Association hired the law firm of Lounsberry and Low to draft the language of the compromise proposal. Lounsberry attorneys were present during the meetings to negotiate the compromise. On lobbying disclosure forms, the firm indicated it received $18,000 to lobby the Mayor, Councilmember Faulconer, City Attorney Goldsmith, Goldstone, and Dubick regarding pension reform. Lounsberry testified, denying that he lobbied the Mayor and asserting that the forms were prepared simply out of an abundance of

caution. The San Diego Taxpayers Association provided Goldstone and Dubick drafts of the initiative prepared by the Lounsberry firm, and they provided comments back through Lutar. Goldsmith was quoted in a news report asserting the initiative "does provide pension relief within legal parameters." During this period, Goldstone was also asked to comment on the financial consulting firm's analysis of the Mayor's proposal.

On April 4, 2011, Boling, Zane and Williams submitted to the City Clerk a notice of intent to circulate their petition amending the City Charter, entitled the Comprehensive Pension Reform Initiative for San Diego (CRPI). The petition was sponsored by San Diegans for Comprehensive Pension Reform (CPR Committee), which described itself as supported by a coalition of signature gatherers. The CPR Committee was in turn officially sponsored by the Lincoln Club. Zane, the Lincoln Club's executive director, became the chair of the committee. Williams was a past board chair of the Lincoln Club. The provisions of the measure included, inter alia: (1) phase-out of the defined benefit plan for all current members and replacement with a defined contribution plan for new employees; (2) a cap on the defined benefit equivalent to 80 percent at age 55 of the member's highest three years of base compensation for newly hired police officers, with a disincentive for early retirement; (3) an equal division of annual contributions between employees and the City for members of the defined benefit plan; (4) disqualification for defined benefit pensions for employees convicted of a felony related to their employment; (5) elimination of the requirements for a vote by retirement system members on an amendment to the system and for a vote by retirees on any amendment affecting the vested benefits of retirees; and (6) establishment of the City's initial bargaining position regarding base compensation for the calculation of pension benefits set no higher than the levels in the 2001 salary ordinance for a period of five years. The Mayor acknowledged that City Attorney Goldsmith had reviewed the language of the measure. Lynch asked the

Mayor if he approved of Zane running the campaign from the Lincoln Club. Though preferring Shepard, the Mayor agreed.

On April 5, a normal work day, the Mayor led a press conference on the concourse area outside City Hall to acknowledge the successful filing of the petition. The Mayor's staff prepared his statement and briefed him on the contents of the petition. KUSI, airing at 10:00 p.m., reported that the Mayor and Councilmember DeMaio had reached a compromise. The Lincoln Club and San Diego Taxpayers Association were mentioned as having brought the two officials together. Gathered behind the Mayor, among others, were Councilmembers Faulconer and DeMaio, City Attorney Goldsmith, Boling, Zane, and Lutar. DeMaio spoke and credited the Mayor for brokering the compromise. The KUSI report conveys the idea that the Mayor and Councilmember DeMaio were responsible for developing the joint proposal. The Mayor touted his record of achieving the goals he had set as mayor for taxpayers and employees in terms of pension reforms. The Mayor again believed both he and City Attorney Goldsmith were present in their capacities as private citizens. There is no evidence the Mayor stated he was acting as a private citizen on this occasion.

During the summer and fall of 2011, the Mayor's staff, most notably Pudgil, continued the public relations effort on behalf of the initiative by conducting outreach to both the print and broadcast media, providing quotes, and arranging for appearances. Talking points for various speaking appearances were prepared that describe the pension initiative. Mayor Sanders supported efforts to solicit the signatures needed to qualify Proposition B. Someone on the Mayor's staff prepared a solicitation letter from the Mayor to members of the San Diego

Chamber of Commerce, directing supporters to a website and their petition signatures to a listed e-mail address.[11]

Dubick believed that until the initiative was actually filed, her activities related to assessing the viability of the plan constituted official business. Goldstone shared a similar view believing that consideration of the initiative and the work of launching it was legitimate City business, while the private-citizen activity only commenced when the signature gathering began. Once the initiative was filed, Dubick reminded the staff that their work in support of the Mayor's initiative was not official City business and that they needed to submit leave slips for the time they spent on the initiative in order to comply with the City's conflict of interest code. Only Faucett and Pudgil submitted leave slips for small increments of time indicative of pension work (a total of six between the two of them) that occurred prior to the April 2011 news conference. Pudgil presented only four leave slips for the period after the April 2011 news conference. As a possible explanation for the paucity of leave slips, Dubick assumed that all staffers knew that activities in support of the Mayor's "private" initiative were to be done on non-work time and that they had flexibility to conduct these activities during the work week because they were salaried employees.

According to campaign disclosure statements for the period of January 1, through June 30, 2011, San Diegans for Pension Reform contributed approximately $89,000 to the

[11] During this period of time, a news report cited the Mayor as previously declaring his support for the initiative as a "private citizen" and suggests that for him to declare his support "as Mayor of San Diego" would "legally require" him to negotiate with the unions. The reporter expresses skepticism regarding the Mayor's representation of acting in an unofficial capacity, noting that the Chamber of Commerce solicitation letter "certainly makes it appear that he's not averse to playing the 'Mayor Card' on the QT." Another article reported the Mayor's explanation of the dual roles he plays as elected official and private citizen, after a reporter questioned whether the Mayor could bring the initiative forward as a private citizen in order to avoid negotiating with the unions.

CPR Committee. The Lincoln Club donated $56,000. DeMaio's committee donated $15,000. Total receipts for the period amounted to $235,000.

Following the submission of 116,000 petition signatures, the City Clerk certified the measure for the ballot in November 2011.

2011 Contract Negotiations

Between January and May 2011, all six of the City's unions were engaged in negotiations for successor MOUs. Separately but concurrently, all of the unions negotiated over a City proposal to reduce expenditures for retiree health benefits through a long-term agreement. The Mayor led both sets of negotiations. As to retiree health benefits, the parties agreed to significant changes aimed at containing the City's costs, including the freezing of City contribution levels and delaying vesting for employees hired before July 1, 2005. In May 2011, the City Council approved the resolution implementing the changes. The Mayor's Fact Sheet at the time claimed the achievement of $714 million in savings for the City over 25 years (an amount later revised to $802.2 million) and a reduction of the City's unfunded liability from $1.1 billion to $568 million. The Mayor described the "historic" agreement as providing "record savings" for the City. In addition, the City and SDMEA agreed to a one-year extension of their contract through 2012, as did the Firefighters. The agreements included changes negotiated with respect to pension benefits.

The City's Refusals to Meet and Confer

By letter dated July 15, 2011, Ann Smith, attorney for SDMEA, issued a demand to the Mayor to meet and confer over his "much publicized 'Pension Reform' Ballot Initiative." The letter objected to the Mayor's failure to offer negotiations of the matters contained in the proposed measure, and stated that if the Mayor did not present his own proposal, the unions would presume his opening proposal would be the contents of the CPRI. Smith objected to the

Mayor "bargaining" with entities, not the unions, "inside and outside the City." Mayor Sanders referred the letter to the City Attorney for a response. A second letter from Smith dated August 10, 2011, repeated the demand.

By letter dated August 16, 2011, City Attorney Goldsmith responded, answering that he "assumes that [the demand] is referring to a citizen initiative . . . entitled [the CPRI]" that had been filed by Boling, Zane and Williams. Goldsmith stated that the City did not believe that the filing of the CPRI triggered a duty to meet and confer because the City Council had a legal duty to place the measure on the ballot and "no authority within the meaning of the MMBA, specifically . . . section 3505, to make 'a determination of policy or course of action,' when presented with a Charter amendment proposed by citizen initiative." The City's position relied on the principle whereby state law on the charter amendment process pre-empts "any attempted municipal regulation in the same field" and mandates that the City place a qualified measure on the ballot. If the initiative received the necessary signatures, "there will be no determination of policy or course of action by the City Council, within the meaning of the MMBA, triggering a duty to meet and confer in the act of placing the citizen initiative on the ballot." Goldsmith directed copies of his letter to the Mayor and members of the City Council.

By letter dated September 9, 2011, Smith responded, claiming that SDMEA's demand was directed to the Mayor, not City Council; that the Mayor had made a "determination of policy *for this City* related to mandatory subjects of bargaining" and sponsored "this 'pension reform' initiative in furtherance of the *City's* interest as he defines them." (Original emphasis.) Two additional letters were exchanged without any change in the City's position. Copies of Smith's September 9 letter were sent to each City Councilmember. In her letter, Smith urged the City Council to obtain independent legal advice regarding the City's obligations under the

MMBA. The Mayor never directed Chadwick to open negotiations with the unions regarding his pension proposal.

DCAA President George Schaefer spoke with Chadwick on September 15, 2011. Schaefer joined in Smith's view that the City was under a duty to meet and confer over the Mayor's pension reform initiative. Citing *Seal Beach, supra,* 36 Cal.3d 591, Schaefer asserted that the duty to bargain attached in this case because the initiative would change matters within the scope of representation.

The City also rejected written meet-and-confer demands of the Firefighters and AFSCME, asserting that it played no role in the submission Proposition B.

The Passage of Proposition B

At a February 23, 2012 press conference, the City announced its structural deficit, which had been estimated to be $73 million in 2010, had been eliminated. By April 2012, the City was anticipating a balanced budget for the fiscal year beginning on July 1, 2012, with a projected budget surplus of $119 million for the next five years.

At the June 2012 election, the City's voters approved Proposition B with approximately 67 percent of the count. Mayor Sanders was the keynote speaker at the post-election celebration held at the Lincoln Club. After a brief introduction by Zane, the Mayor spoke, thanking Zane, Lutar, Lynch and the Lincoln Club for supporting Proposition B. He declared Proposition B as the latest in a list of fiscal reform measures including the pension reform negotiated in 2008.

ISSUE

Did the City violate its duty to meet and confer as a result of the Mayor's development, sponsorship and promotion of his pension reform proposal coupled with the City's refusal to negotiate with unions over the matter?

CONCLUSIONS OF LAW

The complaints in these cases allege that beginning in April 2011, the City, through its agents, including Mayor Sanders, "co-authored, developed, sponsored, promoted, funded and implemented a pension reform initiative," while refusing the unions' demands to bargain over the matter.

The unions contend that Mayor Sanders, with the support of key City staff and the citizen allies, initiated, crafted and promoted a campaign for drastic pension reform that was designed to avoid the City's obligation to meet and confer over the proposed changes. The City violated its meet-and-confer obligation as a result of the Mayor making a "policy decision" to pursue further pension reform through an initiative measure, his choice not to request the City Council's adoption of his proposal, and the City's acquiescence in the Mayor's actions, resulting in the City obtaining the benefits of Proposition B without bargaining when the measure was approved by the voters. The unions further claim that the City cannot avoid its duty to meet and confer on the grounds that the Mayor is acting as a private citizen, because the City is liable for the acts of the Mayor under the principles of agency.

The City counters by arguing that any public official, including the mayor of a city, acting as a private citizen, is lawfully entitled to draft an initiative measure and seek private citizens to carry it forward, as Mayor Sanders did in this case. Since a charter amendment to change the City's retirement system can only be prompted by the City Council or the citizens, the Mayor is lawfully entitled to pursue the citizens' initiative strategy, when, as here, the Mayor considers the City Council disinterested in such a charter amendment. *Seal Beach, supra*, 36 Cal.3d 591, held that a city council has an obligation to meet and confer over its own proposed initiative, but the court expressly declined to decide that such an obligation applies to a citizens' initiative. Thus, only the "public agency" (i.e., the City and not the electorate) is

obligated by the MMBA to meet and confer over an initiative measure (i.e., its own), and therefore the citizens may bypass the City Council and legislate directly as they did here.

The Mayor's Policy Decision

Consistent with the complaints, the unions argue that the Mayor made a policy decision to proceed with pension reform, and, as a result of the City Council's inaction, the City achieved a unilateral change in terms and conditions of employment. The unions in essence argue a unilateral change theory. (See *Moreno Valley Unified School District* (1982) PERB Decision No. 206, p. 4, affd. in part & revd. in part (1983) 142 Cal.App.3d 191 [establishment of any term or condition of employment prior to completion of bargaining].)[12]

The elements of a unilateral change violation are: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the employee organization notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*West Side Healthcare District* (2010) PERB Decision No. 2144-M.)

Seal Beach, supra, 36 Cal.3d 591, describes a unilateral change. Analysis of the elements of the unilateral change test was unnecessary because the only contested issue was whether the city was required to provide the union with an opportunity to meet and confer prior to taking action. The city implemented new terms and condition of employment for its employees, after its city council proposed them as charter amendments pursuant to its

[12] The Mayor's rejection of the unions' demands to meet and confer can also be treated as a flat refusal to bargain. (*Sierra Joint Community College District* (1981) PERB Decision No. 179.) The flat refusal theory applies in any unilateral change case where a bargaining demand is also rejected.

constitutional power (Cal. Const., art. XI, § 3, subd. (b)) and the voters approved the amendments at the election. The city was charged with lack of compliance with the MMBA's meet-and-confer requirement. The city argued that it had "absolute, unabridged constitutional authority to propose charter amendments to its electorate, which authority could not be impaired or limited by the requirements of the MMBA." (*Seal Beach, supra*, 36 Cal.3d at p. 596.) Emphasizing that the statute intended to establish a "procedure for resolving disputes" regarding terms and conditions of employment, rather than prescribe "standards" for such (*id.* at p. 597), *Seal Beach* construed section 3505[13] to require harmonization with the city council's constitutional right to propose initiative legislation. (*Id.* at pp. 598-601.) Harmonizing the two, the court held that the meet-and-confer process is to take place *before* the vote and implementation of a charter amendment. (*Id.* at p. 602.) *Seal Beach* noted prior cases of city charter preemption by the MMBA in cases of direct conflict between the substance of local legislation and the requirements of the statute. (*Id.* at pp. 598-599.) *Seal Beach* describes its application of MMBA preemption as an "a fortiori" case because imposition of the meet-and-confer requirement on a city council proposing a charter amendment is only a procedural overlay on the local legislative activity. (*Id.* at p. 599; see *Baggett v. Gates* (1982) 32 Cal.3d 128, 139.) "Cities function both as employers and as democratic organs of government. The meet-and-confer requirement is an essential component

[13] Section 3505 provides in pertinent part:

> The 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 representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

of the state's legislative scheme for regulating the city's employment practices. By contrast, the burden on the city's democratic functions is minimal." (*Seal Beach, supra*, 36 Cal.3d at p. 599.) The city's constitutional right to propose charter amendments was not absolute.

Legislation changing negotiable terms and conditions of employment can occur by action of the public agency's governing body alone or by its proposal for legislation submitted to the electorate. (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802 (*City of Vernon*); *Seal Beach, supra*, 36 Cal.3d 591.) The fact that the electorate must vote to adopt a proposed ballot measure in order to complete the unilateral change does not alter the consequence in terms of implementation; the vote merely consummates the governing board's proposal for a change of policy. According to the unions, the City achieved its implementation of a policy change as a result of the Mayor exercising his policymaking authority to propose the legislation and launching the citizens' campaign, and the City allowing the Mayor's proposal in the form of Proposition B to be placed on the ballot without providing the unions an opportunity to meet and confer.

PERB has held that a unilateral change occurs when the employer demonstrates a clear intent to change a policy affecting terms and conditions of employment with no subsequent wavering of that intent, and the employer has taken concrete steps to effectuate the change even if its action falls short of actual implementation. (*Folsom-Cordova Unified School District* (2004) PERB Decision No. 1712; *City of San Juan Capistrano* (2012) PERB Decision No. 2238-M; *City of Vernon, supra,* 107 Cal.App.3d 802, 822-824 [entire policy ordered rescinded, not just portion enforced].) The record establishes that the Mayor announced his intention to seek implementation of a new policy regarding pensions. He did so at the November 2010 press conference, his State of the City speech, and again at the April 2011

press conference. The Mayor emphasized that his latest proposal was a critical objective of his administration and the focus of his remaining years in office.

The City contends that the Mayor and Councilmember Faulconer only had a "concept" for pension reform, and even that concept did not become Proposition B because it was altered in negotiations. But the Mayor accepted the compromise of his proposal in order to obtain the support of the Lincoln Club and San Diego Taxpayers Association, and officially announced at the April 2011 press conference that his reform initiative was proceeding to the ballot, consistent with his previously stated goal. The Mayor acted on his intention to pursue pension reform, satisfying the requirement for taking concrete steps toward implementation of a new policy.

The City does not dispute that the Mayor's proposal contained matters within the scope of representation and that the City rejected the unions' demands to meet and confer over that proposal prior to the reforms being enacted through the passage of Proposition B. As in *Seal Beach, supra,* 36 Cal.3d 591, the critical question is whether the Mayor's announced commitment to pursue a citizens' initiative triggered a duty to meet and confer on the part of the City. The unions argue the City had such a duty based on the principles of agency. The Mayor is an agent of the City by virtue of the statute—which compels a duty to meet and confer on the City and its designated representatives— and by virtue of common law agency principles—which prevent the City from arguing that the Mayor's pursuit of the initiative as a private citizen relieves the City of its statutory obligations.

Statutory Agency

The MMBA has two stated purposes: "(1) to promote full communication between public employers and employees; and (2) to improve personnel management and employer-employee relations within the various public agencies." (*Seal Beach, supra*, 36 Cal.3d at

p. 597.) "These purposes are to be accomplished by establishing methods for resolving disputes over employment conditions and by recognizing the right of public employees to organize and be represented by employee organizations." (*Ibid.*) The principal method for resolution of disputes over employment conditions is the meet-and-confer process.

Section 3505 speaks to the obligation to meet and confer, the core, reciprocal duty imposed on the public agency and its employee organizations. It also contains language referencing the prohibition against unilateral changes in terms and conditions of employment that is applicable to all the statutes administered by PERB. (See *Berkeley Unified School District* (2012) PERB Decision No. 2268, p. 12.) The second clause of the first sentence sets forth the general duty to meet and confer, requiring that the governing board and its designated representatives "consider fully such presentations as are made by the employee organization on behalf of its members *prior* to arriving at a determination of policy or course of action." (Emphasis added.) *Seal Beach* illustrates, unremarkably, that a city council's decision to propose an alteration of terms and conditions of employment by way of a charter initiative is a determination of policy or course of action that triggers a duty to meet and confer.

The City maintains that only the City Council can make a determination of policy by virtue of section 3505 and the Mayor lawfully chose to avoid such a determination by undertaking an initiative campaign as a private citizen. The City argues that the MMBA "assumes that the *governing body* is making the ultimate determination of policy or course of action. *If there is no council involvement in any determination of policy or course of action, there is no duty to meet and confer.*" (Original emphasis.)[14]

Section 3505's command is not limited to the governing body. Although the governing body is legally responsible for enacting legislation on terms and conditions of employment

[14] Hereafter all emphasis in quoted material from the parties' briefing is in the original.

(e.g., most often by adopting a tentative agreement), the duty defined by section 3505 is also imposed on "other representatives as may be properly designated by law or by such governing body." The Mayor is unquestionably such an "other representative." Nor can section 3505 be read as confining itself to policy determinations or intended courses of actions of the governing body. PERB has construed all of the statutes under its jurisdictions as requiring negotiations on proposals to change negotiable subjects regardless of whether accomplished through legislative action by the governing body. (See *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492 [chief of police]; *Omnitrans* (2009) PERB Decision No. 2030-M [supervisor]; *Los Angeles Unified School District* (2002) PERB Decision No. 1501 [district superintendent acting on recommendation of chief of police].) Therefore as the City's chief negotiator, the Mayor has a duty by the terms of the statute to provide advance notice and opportunity to meet and confer over proposed changes.

The City's claim that the Mayor lacks authority to make a policy decision in terms of a ballot measure (only the City Council has that right), and any attempt to do so would amount to an unlawful delegation of legislative power, is misdirected. 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. In the *Seal Beach* situation, the city council is not legislating per se, but offering a proposal to be adopted by legislative action on the part of the electorate. By the same reasoning invoked by the Mayor, a majority of the City Council's members could propose an initiative measure as private citizens for the express purpose of circumventing the duty to meet and confer, thereby rendering the requirement of *Seal Beach* ineffectual. The City, as the public agency, has a duty to refrain from unilateral action undertaken by the Mayor, not simply because he is a City official with policymaking discretion, but because he is a statutory agent for purposes of meeting and conferring.

The City also contends that the Mayor has no authority to make a bargaining proposal to the unions without the City Council's prior approval, and therefore he could not present his initiative proposal directly to the unions. The unions do not dispute that currently the Mayor must obtain prior approval of all initial bargaining proposals including ballot proposals.[15] But they rely on the City Charter, which establishes a "shared duty" between the Mayor and the City Council for discharging the City's duties under the MMBA and City policy which requires that the Mayor present any proposal for an initiative measure to the City Council. The City Charter does afford the Mayor authority to recommend "measures and ordinances" he finds "necessary and expedient" to the City Council, and the Mayor decided to pursue a legislative "measure" here. He communicated his policy decision to the City Council in his State of the City speech, which, according to the City Charter, is to include recommendations to the Council on the affairs of the City. By seeking the City Council's approval for initiative proposals and complying with City policy in the past, the Mayor has treated the City Council as his supervising authority in labor relations terms. In terms of his statutory duties, the Mayor has gone outside the chain of command. The Mayor cannot have it both ways; he cannot be lacking in authority to make decisions on labor relations matters, yet also have the ability to take actions that have the effect of changing terms and conditions of employment. The Mayor's failure to consult the City Council demonstrates a breach of the shared statutory responsibility, which the Council could reasonably have rebuked if it had so chosen. It is true then that by allowing the Mayor to bypass the City Council in the manner that he did, the City Council abdicated its supervisory responsibility under the MMBA. (*Voters for Responsible*

[15] According to Chadwick, this policy took effect after City Attorney Goldsmith's 2009 memorandum. Nothing in the 2009 memorandum suggests the intent to supersede the Aguirre opinion or diminish the Mayor's ability to propose an initiative measure directly to the unions—or at least the substance of such a proposed measure.

Retirement v. Board of Supervisors of Trinity County (1994) 8 Cal.4th 765, 783 (*Trinity County*) [legislative body has a supervisory role].)

The Mayor's decision not to request approval of his initiative measure was based on a presumption that the City Council would reject it. But it was also based on the Mayor's desire to avoid the negotiations process and any compromise in the material terms of his proposal—the essence of unlawful employer unilateral action. After choosing not to request the Council's approval of his ballot initiative, the Mayor used the advantages of his office, including alliances with Councilmembers Faulconer and DeMaio, and the City Attorney, to promote his pension reform concepts as a citizens' initiative. (See *City of San Diego, supra*, PERB Decision No. 2103-M, pp. 13-14 [City charter's definition of the city attorney's duties does not justify disregard of the MMBA, and the city attorney had a choice whether to comply with the preemptive duty to meet and confer].)

In light of *Seal Beach*, and given the City's legal responsibility to meet and confer and supervisory responsibility over its bargaining representatives, section 3505 must be construed to require that the City provide its unions the opportunity to meet and confer over the Mayor's proposal for pension reform before accepting the benefits of a unilaterally imposed new policy, when the Mayor, invoking the weight of his office, has taken concrete steps toward qualifying his policy determination as a ballot measure.

The Agency Theory of Liability

Agents are classified according to the origin of their authority (actual or apparent) or the scope of their authority (general or special). (Civ. Code, §§ 2297, 2298, 2299, 2300.) An actual agent is one really employed by the principal. (Civ. Code, § 2299.) "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." (Civ. Code, § 2316.) Apparent

authority (i.e., ostensible authority) is "such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." (Civ. Code, § 2317.) Ratification allows for a third method of establishing an agency relationship. It occurs through the voluntary election by a person to adopt as his own an act of another, the effect of which is to treat the act as if originally authorized by him. (Civ. Code, § 2307; 2B Cal.Jur.3d (2007) Agency, § 67, p. 261, § 85, p. 289.)

PERB and National Labor Relations Board (NLRB) have adopted the principles of agency. Agency is employed to impose liability on the charged party for the unlawful acts of its employees or representatives even when the principal is not at fault and takes no active part in the action. (*Chula Vista Elementary School District* (2004) PERB Decision No. 1647 (*Chula Vista*); *Inglewood Unified School District* (1990) PERB Decision No. 792 (*Inglewood*); *D & F Industries, Inc.* (2003) 339 NLRB 618, 619-620; see *Vista Verde Farms v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 307; see also Civ. Code, § 2338.) Agency principles are also employed to determine the existence of an agency relationship for purposes of ascertaining authority and imputing notice to the principal. (*Mount Diablo Unified School District, et al.* (1977) EERB[16] Decision No. 44 [whether a grievance representative is an agent of an employee organization]; *Safway Steel Products, Inc.* (2001) 333 NLRB 394, 400 [authority to bind principal in negotiations]; *Marin Community College District* (1995) PERB Decision No. 1092, adopting administrative law judge's decision at p. 78 [notice imputed]; *Repco Distributing, Inc.* (1984) 273 NLRB 158, 163 [same].) Both PERB and the NLRB rely on common law principles of agency. (*Inglewood, supra*, PERB Decision No. 792, pp. 19-20; *Allegany Aggregates, Inc.* (1993) 311 NLRB 1165, 1165.)

[16] Prior to 1978, PERB was known as the Educational Employment Relations Board (EERB).

NLRB precedent is applicable except to the extent limited by the *Inglewood* decision. (See *Compton Unified School District* (2003) PERB Decision No. 1518, p. 5 (*Compton*); *Chula Vista, supra,* PERB Decision No. 1647, p. 9.) In *Inglewood*, PERB adopted the view that the Legislature did not intend for it to find vicarious liability in cases of apparent authority regardless of whether the employer authorized or ratified the purported agent's unlawful conduct. (*Id.* at pp. 17-18; *Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 780; *Compton*, at p. 5; but see *Chula Vista*, at p. 9 [actual authority suffices under the NLRB test, distinguishing *Inglewood*].)

Actual Authority

In the more general framework of transactional liability, the acts of an agent are binding on the principal when the agent acts within the scope of his actual (or ostensible) authority. (Civ. Code, § 2330; 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency, § 75, p. 79 ["qui facit per alium facit per se" ("he who acts through another does the act himself")]; see *Monteleone v. Southern California Vending Corp.* (1968) 264 Cal.App.2d 798, 806.) The unions contend that the Mayor spoke for the City when he stated his intention to place his pension reform proposal on the ballot. Actual authority may be conferred by precedent authorization or subsequent ratification. (Civ. Code, §§ 2307, 2310.)

Similarly, under the application of agency principles for purposes of vicarious liability, a principal is responsible for the unlawful acts of his agent when he acts within the scope of his employment. (See Rest.2d Agency, §§ 216, 219, subd. (a); see also Civ. Code, § 2338.) In this case, the action alleged to be unlawful is the Mayor's pursuit of a unilateral change.[17]

[17] The Restatement Second of Agency, section 12, comment (a), explains that actual and apparent agents have the "power" to affect the legal relations of the principal in matters connected to the agency that is broader than their "authority" as agents (e.g., to bind the principal to a contract or subject him to an action in tort despite a lack of authority). (See 2 Witkin, Summary of Cal. Law, Agency, § 76, pp. 79-80.)

An agent/servant is acting within the scope of his agency authority/employment when he is "actuated, at least in part, by a purpose to serve the master." (Rest.2d Agency, *supra*, § 228, subd. (1)(c).) There can be no question that the Mayor pursued the initiative measure for the benefit of the City with the goal of improving its financial health. He has done so in the past at the bargaining table as the City's chief negotiator. The City Charter authorizes the Mayor to recommend legislation to the City Council. The Mayor and his policy-making staff considered and discussed pension reform in their official capacities and identified the Mayor's new reform concepts as a principal goal of his last term. The Mayor's chief of policy and chief executive officer believed consideration of the merits of the proposal was legitimate City business. The Mayor never asserted that he pursued pension reform for personal interests, and he dismissed the suggestion that he pursued it as a means to burnish his legacy as an elected official. (Cf. *Inglewood, supra*, PERB Decision No. 792 [school principal's motivation to vindicate his personal reputation]; Rest.2d Agency, § 228, subd. (2).)

The City does not dispute that the Mayor has responsibility for negotiating with the unions, but contends he may only be liable for conduct "*when he is engaged in the meet and confer process*, which is when he is formulating [the] City's positions for presentation to, and ultimate approval by the City Council." This argument is unpersuasive. Pursuit of the pension reform concepts was within the Mayor's general scope of authority in terms of the subject matter. (Rest.2d Agency, § 228, com. (a).) Agents are afforded discretion by which to achieve their principal's objectives. "Agency is the relation that results from the act of one person, called the principal, who authorizes another, called the agent, to conduct one or more transactions with one or more third persons and to exercise a degree of discretion *in effecting the purpose of the principal.*" (*Workman v. City of San Diego* (1968) 267 Cal.App.2d 36, 38, quoting *Wallace v. Sinclair* (1952) 114 Cal.App.2d 220, 229, original emphasis; Civ. Code,

§ 2319.) The Mayor exercised his discretion in a manner he believed would permanently fix the problem with pensions. The City is responsible for the Mayor's pursuit of the citizens' initiative because a principal is responsible for its agent's conduct, so long as that conduct is within the general scope of the agent's authority, even though the principal may not have authorized the specific acts in question or ratified them. (*Contemporary Guidance Service, Inc.* (1988) 291 NLRB 50, 64; *Bio-Medical Applications of Puerto Rico, Inc.* (1984) 269 NLRB 827, 828; *Compton, supra*, PERB Decision No. 1518, p. 5; *Monteleone v. Southern California Vending Corp., supra*, 264 Cal.App.2d 798, 806; 2B Cal.Jur.3d, Agency, § 467, pp. 227-228.)

The City Council was well aware of the Mayor's policy decision and his efforts to implement it. The City Council also became aware through the City Attorney's correspondence with the unions' attorneys that the City would refuse to meet and confer over the Mayor's proposal. And it was on notice of City Attorney Aguirre's opinion that the Mayor's pursuit of a citizens' initiative carried potential liability in terms of the duty to meet and confer. The City Council took no action as a body in spite of these events. By want of ordinary care, the City Council allowed the Mayor to believe he could pursue his citizens' initiative and that no conflict existed between his roles as elected official and private citizen. (*Inglewood Teachers Assn. v. Public Employment Relations Bd., supra,* 227 Cal.App.3d at p. 781.)

Furthermore, agency need not be based on precedent actual authority. The City ratified the Mayor's action by acquiescing in the Mayor's promotion of the initiative, placing the initiative he endorsed on the ballot, and denying the unions the opportunity to meet and confer, while accepting the benefits of Proposition B. (Civ. Code, § 2307.)

Apparent Authority

PERB has held that "[a]pparent authority may be found where an employer reasonably allows employees to perceive that it has authorized the agent to engage in the conduct in

question." (*Chula Vista, supra,* PERB Decision No. 1647, at p. 8, citing *Compton, supra,* PERB Decision No. 1518.) This leads to the conclusion that the employees or third parties may reasonably believe the alleged agent "was reflecting company policy and speaking and acting for management." (*Compton,* at p. 5, fn. 3; cf. *Shipbuilders (Bethlehem Steel)* (1986) 277 NLRB 1548, 1566 [outrageous unauthorized acts not imputed because they would have disabused the third party of any notion of authority].) Acceptance of the benefits of the purported agent's acts with prior knowledge of those acts will be significant in finding agency. (*Compton,* at p. 5.)

The evidence supports the unions' claim of apparent authority. Bargaining unit employees and the public were reasonable in concluding that the Mayor was pursuing pension reform in his capacity as both elected official and the City's chief executive officer based on his public statements, news coverage of those statements, and his history of dealing with unions on pension matters, some in the form of proposed ballot initiatives. Most telling was the April 2011 news conference, which aired after the culmination of a four-month effort to coalesce support around a single initiative measure in concert with organized private interests. The press conference took place at City Hall. The 10:00 p.m. local television news report described the Mayor's plan to proceed with the compromise initiative as the joint effort of the Mayor and Councilmember DeMaio. The Lincoln Club and San Diego Taxpayers Association were only mentioned as having brought the two City officials together. In the cases of vicarious liability, lower ranking management representatives are less likely to be viewed as speaking for management. The Mayor operates as a strong mayor and is the highest ranking

elected official whom the public could reasonably believe spoke for the City and reflected its policy.[18]

The Mayor did not act alone in pursuit of the City's interests. Councilmember Faulconer, Councilmember DeMaio, and City Attorney Goldsmith were known endorsers of the Mayor's proposal. Quantifiable time and resources derived from the City as described in the record were devoted to the Mayor's promotion of his initiative, notwithstanding the views of some or all of the City's witnesses that their activities were on personal time. (Cf. *Inglewood, supra*, PERB Decision No. 792.) Even if done on non-work time, their defense that these activities were done for private purposes is no stronger than the Mayor's, because the evidence establishes they were motivated to act in the interests of the Mayor, who was their supervisor.

In addition, in light of the Mayor's record of negotiating over pension matters, bargaining unit employees especially could have reasonably concluded that the City was permitting the Mayor to pursue his campaign in order to avoid meeting and conferring. The November 19, 2010 Fact Sheet noted a distinction between the Mayor's pension plan and retiree health benefits by stating that the latter were currently in negotiations, a statement carrying the implication that the pension proposal had been deemed non-negotiable.

The City contends that evidence is lacking that the City authorized the Mayor to embark on his plan for a citizens' initiative; that is, there is no evidence "the City Council represented that Jerry Sanders was acting as the City's agent when proposing his pension reform concepts or supporting what became [Proposition B]." Affirmative representations vouching for the conduct

[18] *Inglewood, supra*, PERB Decision No. 792 is distinguishable because there the school principal had no prior responsibility for representing his employer in labor relations matters. The "cautious" approach adopted by PERB in the case arises in the context of vicarious liability for employees not generally perceived as speaking for management. (*Id.* at p. 18.)

of the purported agent have been absent in PERB's vicarious liability cases, and so the inquiry is whether the perception of authority is warranted by other circumstances. Ratification, through failure to repudiate once the agent's conduct has been made known to the principal, is generally the manner in which apparent authority is established in PERB cases. (*Inglewood, supra*, PERB Decision No. 792; *Chula Vista, supra*, PERB Decision No. 1647; Civ. Code, § 2310.) The City Council never repudiated the Mayor's publicly stated commitment to pursue a citizens' initiative, or claimed that the Mayor acted outside the scope of his authority. (*State of California (Departments of Veterans Affairs & Personnel Administration)* (2008) PERB Decision No. 1997-S, p. 21.) The fact that the Mayor may have believed the City Council as a whole did not support his pension reform concepts does not undermine the reasonableness of the perception of his authority to speak on behalf of the City. His was a private opinion he shared with no one outside his office.

The Mayor's statements to the press that he was pursuing pension reform as a private citizen are insufficient to overcome the reasonable conclusion of apparent authority drawn from his actions undertaken for the benefit of the City. Apparent authority is not determined by the representations or conduct of the purported agent alone. (2B Cal.Jur.3d, *supra*, Agency, § 58, pp. 244-245; *Taylor v. Roseville Toyota, Inc.* (2006) 138 Cal.App.4th 994, 1005; *Bio-Medical Applications of Puerto Rico, Inc., supra*, 269 NLRB 827, 828 [agent's denials do not refute apparent authority].)

The Citizen Proponents as Special Agents

The unions contend that the named sponsors of the initiative, Boling, Zane, and Williams, were special agents of the Mayor and Councilmember Faulconer in their pursuit of the pension reform proposal. A special agent represents the principal for a particular act or transaction. (Civ. Code, § 2297; see *Alliance Rubber Co.* (1987) 286 NLRB 645, 645.) Actual

authority is normally established by a manifestation of consent on the part of the principal for the agent to act on his behalf *and* consent on the part of the agent to act on the principal's behalf *subject to his control.* (2B Cal.Jur.3d, *supra*, Agency, § 2, pp. 157-158; see *van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 572.) Here the element of control is lacking. After the negotiations with representatives from the Lincoln Club and the San Diego Taxpayers Association, the Mayor was asked and did agree that Zane could run the initiative campaign from the Lincoln Club. There is no evidence the Mayor retained authority to run the campaign.

However, ratification and apparent authority apply in this case so as not to excuse the City's failure to meet and confer based on the actions of private citizens involved in the passage of Proposition B. (Civ. Code, § 2307; *Dean Industries, Inc.* (1967) 162 NLRB 1078, 1092-1093 [agency of townspeople and business leaders].) The Mayor may not have believed the private initiative proponents were his agents, but he actively sought their support, and his alliance with them was no secret. The relationship was widely broadcast through the KUSI account of the April 2011 press conference. The Mayor spoke at the victory celebration of the Lincoln Club, where he was afforded credit, and accepted credit, for the passage of Proposition B. Furthermore, the City Council, through the involvement of Councilmembers DeMaio and Faulconer, the City Attorney, and the Mayor's staff, had notice of the Mayor's alliance with the citizens' groups and his efforts to forge a unified front. (*Marin Community College District*, *supra*, PERB Decision No. 1092.)

Agency principles are appropriately applied to find that the City was responsible for the Mayor's policy determination and his activities undertaken toward its implementation. The Mayor's attempt to act as a private citizen—a simultaneous denial he acted on behalf of the City—signaled his intent to shed himself of his role as statutory agent for the City. The success

of this strategy was dependent in large measure on the Mayor's representation in his capacity as an elected official that Proposition B was a credible and lawful policy decision, necessary to address the City's unfunded pension liability and deserving of the voters' support.

The City's Defenses Arising from the Citizens' Initiative Process

The City begins from the premise that Proposition B was independently presented to the City Clerk by citizens groups, coupled with the claim that the unions' attempt to prove the Mayor controlled the CPR Committee and the campaign has failed, as demonstrated in particular by the fact that his proposal was significantly altered through negotiations. As to the Mayor's initial policy statements, the City argues that the Mayor did nothing more than seize on an idea for budget reform, promote that idea, and wait for citizens groups to come forward to carry it toward a successful conclusion at the ballot box. The City relies on statutory provisions, case law, and the First Amendment, which protect the Mayor's right as a private citizen to support the Proposition B campaign.

The City's defense was established early in the dispute when the City Attorney read the unions' demands as seeking to negotiate over the ballot initiative presented by the citizen proponents. The City believed its refusal to meet and confer was justified based on the absence of legal precedent requiring negotiations over a citizens' ballot initiative. At the same time, the City ignored the unions' demand to meet and confer over the Mayor's policy decision. Whether this was intentional on the City's part is unimportant. The City's denial that the Mayor made a policy determination for which the City is responsible has been rejected for the reasons explained above. By not seeking to bargain over Proposition B per se, the

unions avoid the question left open in *Seal Beach, supra,* 36 Cal.3d 591.[19] The unions' case does not require demonstration that *Seal Beach* should be extended to citizens' initiatives.

Nevertheless, the City asserts that the citizens' right to directly legislate "is by its very nature and purpose a means to bypass the governing body of a public agency;" that the Mayor "obviously chose the initiative to bypass the City Council;" and that the consequence of such a "political decision" is lawful avoidance of the meet-and-confer requirement. Even the Aguirre opinion, upon which the unions rely, suggested this circumvention based on the view that (1) the City has no duty to meet and confer over a citizens' initiative, and (2) the Mayor has a right as a private citizen to participate in such a campaign. However, the former issue is simply unsettled. (*Seal Beach, supra*, 36 Cal.3d at p. 599, fn. 8.) Aguirre qualified the second proposition with the principles of agency. As to that proposition, the question is not whether the Mayor has a constitutional right as a private citizen to support an initiative campaign (he does) but whether he can initiate one when the City he officially represents has failed to provide the unions with an opportunity to meet and confer. In other words, the proper question for this case is whether the Mayor is privileged to bypass the City Council and its *Seal Beach* obligation, and thereby bypass the unions.

The City's argument engenders conflict with the principle of bilateralism that is fundamental to collective bargaining statutes. *Seal Beach, supra*, 36 Cal.3d at p. 597 stated: "The simple question posed . . . is whether the unchallenged constitutional power of a charter city's governing body to propose charter amendments may be used to circumvent the

[19] The unions' interest in bargaining with the Mayor without implicating the rights of the citizen proponents is not difficult to ascertain. They could have hoped for a compromise proposal with the Mayor, possibly through intervention of the City Council. Even assuming the CPR Committee's measure would have succeeded on its own, a compromise solution of any derivation would have resulted in the presentation of a competing initiative measure, possibly giving the electorate a more moderate option for addressing pension costs.

legislatively designed methods of accomplishing the goals of the MMBA." The same question is posed here as to the Mayor's attempt, together with two Councilmembers and the City Attorney, to propose a charter amendment and seek private support to carry it forward. Bilateralism in the bargaining relationship is predicated on face-to-face, give-and-take at the bargaining table. PERB has explained that the duty to bargain includes the "concomitant obligation to meet and negotiate *with no others*, including the employees themselves [and] actions of a[n] employer which are in *derogation of the authority* of the exclusive representative are evidence of a refusal to negotiate in good faith." (*Muroc Unified School District* (1978) PERB Decision No. 80, p. 19, emphasis added, fns. omitted; see also § 3543.3; *California State University* (1989) PERB Decision No. 777-H; *Newark Unified School District* (2007) PERB Decision No. 1895.) "Derogation" is defined as "a lessening or weakening (of power, authority, position, etc.)." (Webster's New Twentieth Century Dict.) The principle of bilateralism prohibits the employer from engaging in practices that reward it for bypassing the exclusive representative. Such practices constitute direct interference with the employees' right to be represented by their chosen representative. (*California State University*, citing *Medo Photo Supply Corp. v. NLRB* (1944) 321 U.S. 678, 684-687; see also *Safeway Trails, Inc.* (1977) 233 NLRB 1078, 1082, affd. (D.C. Cir. 1979) 641 F.2d 930, cert. den. (1980) 444 U.S. 1072.)

Bypassing occurs when the offending party's intent is to achieve bargaining objectives while circumventing the negotiations process. It takes the form of conduct seeking to influence a party not involved in the negotiations, typically either the governing board of the employer or rank-and-file employees in the exclusive representative's bargaining unit. (*California State University* (1987) PERB Decision No. 621-H [union president offered two proposals to the board of trustees never offered at the bargaining table]; *County of Inyo* (2005) PERB Decision No. 1783-M [union representative communicated with the In-Home

Supportive Services Advisory Board]; *Muroc Unified School District, supra*, PERB Decision No. 80 [management's campaign to sway employees].)

This case reveals the anomaly in MMBA jurisdictions presented by the existence of two legislative bodies—the governing body and the electorate—each having the power to legislate terms and conditions of employment but only one, the governing body, having the statutory obligation, at least textually, to meet and confer. The court in *Trinity County, supra*, 8 Cal.4th 765, described this situation as the "problematic nature of the relationship between the MMBA and the [initiative-]referendum power." (*Id.* at p. 782.) *Trinity County* vindicated the principle of bilateralism in the face of an assertion of the citizens' right to legislate. There the county refused to place a referendum on the ballot that would have rescinded an MOU agreed upon between a union and the county's governing board. Two statutes presented potential preemptive effect: Government Code section 25123, subdivision (e), which affords immediate (unconditional) effect to a ratified agreement, and the MMBA, which addresses the authority of the governing body to legislate over terms and conditions of employment. The court concluded that both statutes signaled sufficient legislative authority to uphold the governing body's rejection of the citizens' petition. In so finding, the court concluded that the purposes of the MMBA to promote "definitive resolution of labor-management disputes through the collective bargaining process" preempted exercise of the local referendum power. The court explained:

> [T]he effectiveness of the collective bargaining process under the MMBA rests in large part upon the fact that the public body that approves the MOU under section 3505.1—i.e., the governing body—is the same entity that, under section 3505, is mandated to conduct or supervise the negotiations from which the MOU emerges. If the referendum were interjected into this process, then the power to negotiate an agreement and the ultimate power to approve an agreement would be wholly divorced from each other, with the result that the bargaining process established by the MMBA could be undermined. This kind of bifurcation of

> authority between negotiators and decisionmakers would not be considered lawful were it to occur in the realm of private sector labor relations.

(*Trinity County*, at pp. 782-783, citing *NLRB v. Alterman Transort Lines, Inc.* (5th Cir. 1979) 587 F.2d 212, 226-227.) The requirement for such a referendum sanctions a "kind of bad faith bargaining process in which those who possess the ultimate reservation of rights to approve the collective bargaining agreement—i.e., the electorate—are completely absent from the negotiating table." (*Id.* at p. 783; see also *United Paperworkers International Union* (1992) 309 NLRB 44, 52-53 [statutory representative may not unilaterally extend the scope of its agency authority for the purpose of interjecting extraneous influences into the bargaining relationship].)

The Mayor's choice of a citizens' initiative as a vehicle to implement his policy determination is not privileged because it amounts to bypassing of the unions. The absence of case precedent holding that a duty to meet and confer attaches to a citizens' initiative does not constitute an affirmative license for the Mayor to deprive a union of its right to meet and confer. Though he characterized his initiative campaign as the activity of a private citizen, the Mayor pursued pension reform in his capacity as an elected official, and could not disown his statutory obligation to comply with the MMBA. (*City of San Diego, supra*, PERB Decision No. 2103-M, pp. 13-14.)

The City cites *League of Women Voters of California v. Countywide Criminal Justice Coordination Com.* (1988) 203 Cal.App.3d 529 for the proposition that if the legislative body has proven disinterested, public officials may draft and propose a citizens' initiative "in the hope a sympathetic private supporter will forward the cause and the public will prove more receptive." That case dealt with the question of whether the use of public funds by governmental staff in developing initiative proposals in the public interest violated the

prohibition against use of such funds for partisan political activities. (See *Stanson v. Mott* (1976) 17 Cal.3d 206 [public expenditures supporting or opposing an initiative measure are unlawful, but some expenditures for such measures not in the nature of lobbying or partisan campaigning may be proper].) The determination of a policy to change terms and conditions of employment may in some instances be a matter of "legislative discretion" but it is not simply a determination of "what constitutes a public purpose," like the proposal for an initiative on criminal justice matters in the cited case. (*League of Women Voters of California v. Countywide Criminal Justice Coordination Com.*, *supra*, 203 Cal.App.3d 529, 548.) A determination of policy within the meaning of section 3505 is constrained by the duty to meet and confer. *Seal Beach*, *supra*, 36 cal.3d 591, which embodies that very principle, is not a prohibition on legislative activity.

Neither do sections 3203 and 3209 barring governmental restrictions on political activity by public officials, including promotion of ballot measures affecting terms and conditions of employment, and other cases cited to the same effect by the City, establish any privilege to violate the MMBA. (See *Kinnear v. City and County of San Francisco* (1964) 61 Cal.2d 341; *Pickering v. Board of Ed. of Tp. High School Dist.* (1968) 391 U.S. 563.) Following NLRB precedent, PERB has held that the First Amendment free speech right cannot be exercised for the purpose of violating the statute. (*Antelope Valley Community College District* (1979) PERB Decision No. 97, citing *NLRB v. Virginia Electric & Power Co.* (1941) 314 U.S. 469 [labor act does not enjoin free speech, and sanction of the statute is not for the punishment of the employer but the protection of the employees].) Consistent with the Mayor's view, if the City Council had proposed the same initiative *and* fulfilled its *Seal Beach* obligation, it would be presumed its members could engage in activities as private citizens to promote their proposed legislation. Here, the Mayor proposed a ballot initiative in his capacity

as an elected official, but he, the City Council, and therefore the City, refused to meet and confer over it.

Conclusion

The Mayor under the color of his elected office, supported by two City Councilmembers and the City Attorney, undertook to launch a pension reform initiative campaign, raised money in support of the campaign, helped craft the language and content of the initiative, and gave his weighty endorsement to it, all while denying the unions an opportunity to meet and confer over his policy determination in the form of a ballot proposal. By this conduct the Mayor took concrete actions toward implementation of the reform initiative, the consequence of which was a unilateral change in terms and conditions of employment for represented employees to the City's considerable financial benefit. *Seal Beach* requires negotiations when a public agency, acting through its governing body, makes a policy determination that it proposes for adoption by the electorate. By virtue of the Mayor's status as a statutorily defined agent of the public agency and common law principles of agency, the same obligation to meet and confer applies to the City because it has ratified the policy decision resulting in the unilateral change, and because the Mayor was not legally privileged to pursue implementation of that change as a private citizen. These conclusions make it unnecessary to address any other contentions urged by the unions.

REMEDY

Pursuant to section 3509(a), the PERB under section 3541.3(i) is empowered to

> take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

The City has violated section 3505 of the MMBA and PERB Regulation 32603(c) by failing and refusing to meet and confer over the Mayor's 2010-2011 proposal to reform the

City's defined benefit pension plan prior to placing Proposition B on the ballot. Because the Mayor's policy determination was successfully adopted through the passage of Proposition B, this amounted to a unilateral change. Therefore, the traditional remedy in a unilateral change case is appropriate. (*County of Sacramento* (2009) PERB Decision No. 2044-M; *County of Sacramento* (2008) PERB Decision No. 1943-M.) The City will be ordered to cease and desist from its unilateral action, restore the status quo that existed at the time of the unlawful conduct, and make employees whole for any losses suffered as a result of the unlawful conduct. In *City of Vernon, supra*, 107 Cal.App.3d 802, the court held that an ordinance adopted by the city council without meeting and conferring was void in its entirety. (*Id.* at p. 822.) It is appropriate to order that the City rescind the provisions of Proposition B now adopted. (*Los Angeles County Federation of Labor v. County of Los Angeles* (1984) 160 Cal.App.3d 905; § 3510(a).)

The City argues that such a traditional remedy, or any remedy which bars the implementation of Proposition B, cannot be imposed because the efforts of the innocent third parties who assisted in the passage of the initiative would be nullified. As found above, the characterization that private citizens merely carried forward an idea for legislation proposed by the Mayor as a citizens' initiative is inaccurate. The impetus for the reforms originated within the offices of City government. Consistent with the apparent authority analysis, the electorate would have reasonably interpreted Proposition B to be a proposal developed by City officials in their elected capacities.[20] Despite the private citizens' participation in the initiative campaign and their belief that their activities were constitutionally protected, those efforts

[20] By their statements prior to the filing of the initiative, even San Diego Taxpayer Association Vice-Chair Hawkins and Councilmember DeMaio recognized that the unions had a stake in the matter by acknowledging that the solutions they sought could potentially be achieved through the meet-and-confer process.

contributed to the City's unfair practice and were ratified by the City. (See *Dean Industries, Inc.*, *supra*, 162 NLRB 1078, 1092-1093; *San Mateo County Community College District* (1979) PERB Decision No. 94, pp. 16-17 [unilateral changes in the public sector are an invitation to shift community pressure onto unions and their employees].) Labor law recognizes that a policy change implemented is a fait accompli; it cannot be left in place during the remedial period because vindication of the union's right to negotiate cannot occur when it has to "bargain back" to the status quo. (*City of Vernon*, *supra*, 107 Cal.App.3d 802, 823; *Desert Sands Unified School District* (2004) PERB Decision No. 1682a, p. 5; *San Mateo County Community College District, supra,* PERB Decision No. 94, p. 15.)

As a result of the above-described violation, the City has also interfered with the right of employees to participate in an employee organization of their own choosing, in violation of section 3506 and PERB Regulation 32603(a), and has denied the Charging Parties their right to represent employees in their employment relations with a public agency, in violation of section 3503 and PERB Regulation 32603(b). The appropriate remedy is to cease and desist from such unlawful conduct. (*Rio Hondo Community College District* (1983) PERB Decision No. 292.)

Finally, it is the ordinary remedy in PERB cases that the party found to have committed an unfair practice is ordered to post a notice incorporating the terms of the order. Such an order is granted to provide employees with a notice, signed by an authorized agent that the offending party has acted unlawfully, is being required to cease and desist from its unlawful activity, and will comply with the order. Thus, it is appropriate to order the City to post a notice incorporating the terms of the order herein at its buildings, offices, and other facilities where notices to bargaining unit employees are customarily posted. Posting of such notice

effectuates the purposes of the MMBA that employees are informed of the resolution of this matter and the City's readiness to comply with the ordered remedy.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that the City of San Diego (City) violated the Meyers-Milias-Brown Act (MMBA). The City breached its duty to meet and confer in good faith with the San Diego Municipal Employees Association, the Deputy City Attorneys Association of San Diego, the American Federation of State, County and Municipal Employees, AFL-CIO, Local 127, and the San Diego City Firefighters Association, Local 145 (Charging Parties) in violation of Government Code section 3505 and Public Employment Relations Board (PERB or Board) Regulation 32603(c) (Cal. Code of Regs., tit. 8, § 31001 et seq.) when it failed and refused to meet and confer over the Mayor's proposal for pension reform. By this conduct, the City also interfered with the right of City employees to participate in the activities of an employee organization of their own choosing, in violation of Government Code section 3506 and PERB Regulation 32603(a), and denied the Charging Parties their right to represent employees in their employment relations with a public agency, in violation of Government Code section 3503 and PERB Regulation 32603(b).

Pursuant to section 3509, subdivision (a) of the Government Code, it hereby is ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to meet and confer with the Charging Parties prior to placing the Mayor's 2010-2011 proposals for pension reform on the ballot.

2. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

3. Denying Charging Parties their right to represent employees in their employment relations with the City.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Rescind the provisions of Proposition B adopted by the City and return to the status quo that existed at the time the City refused to meet and confer, including restoration of the pension benefits policy as it existed prior to the adoption of Proposition B.

2. Make affected bargaining unit employees whole for lost pension benefits, plus interest at the rate of 7 percent per annum.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations in the City, where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City, indicating that the City will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Within thirty (30) workdays of service of a final decision in this matter, notify the General Counsel of PERB, or his or her designee, in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or his or her designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on the Charging Parties.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within twenty (20) days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code of Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code of Regs., tit. 8, §§ 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code of Regs., tit. 8, § 32135(b), (c) and (d); see also Cal. Code of Regs., tit. 8, §§ 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, §§ 32300, 32305, 32140, and 32135(c).)

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case Nos. LA-CE-746-M, *San Diego Municipal Employees Organization v. City of San Diego*; LA-CE-752-M, *Deputy City Attorneys Association of San Diego v. City of San Diego*; LA-CE-755-M, *American Federation of State, County and Municipal Employees, AFL-CIO, Local 127 v. City of San Diego*; and LA-CE-758-M, *San Diego City Firefighters Association, Local 145 v. City of San Diego*, in which the parties had the right to participate, it has been found that the City of San Diego (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3505, and Public Employment Relations Board (PERB) Regulation 32603(c) (Cal. Code of Regs., tit. 8, § 31001, et seq.), when it failed and refused to meet and confer with the San Diego Municipal Employees Association, the Deputy City Attorneys Association of San Diego, the American Federation of State, County and Municipal Employees, AFL-CIO, Local 127, and the San Diego City Firefighters Association, Local 145 (Charging Parties) over the Mayor's proposal to amend the City Charter in regard to employee pensions, as set forth in Proposition B. This conduct also violated Government Code section 3506 and PERB Regulation 32603(a) by interfering with the right of bargaining unit members to participate in an employee organization of their own choosing, and Government Code section 3503 and PERB Regulation 32603(b) by denying the Charging Parties their right to represent employees in their employment relations with the City.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Refusing to meet and confer with the Charging Parties prior to placing the Mayor's 2010-2011 proposals for pension reform on the ballot.

2. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

3. Denying Charging Parties their right to represent employees in their employment relations with the City.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Rescind the provisions of Proposition B adopted by the City and return to the status quo that existed at the time the City refused to meet and confer, including restoration of the pension benefits policy as it existed prior to the adoption of Proposition B.

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

2. Make affected bargaining unit employees whole for lost pension benefits, plus interest at the rate of 7 percent per annum.

Dated: _____ CITY OF SAN DIEGO

By: _____
Authorized Agent