STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN DIEGO FIREFIGHTERS, LOCAL 145, I.A.F.F.,	
Charging Party,	Case No. LA-CE-294-M
v.	PERB Decision No. 2103-M
CITY OF SAN DIEGO (OFFICE OF THE CITY ATTORNEY),	March 26, 2010
Respondent.	

Appearances: Glaser, Weil, Fink, Jacobs & Shapiro by Joel N. Klevens, Attorney, for San Diego Firefighters, Local 145, I.A.F.F.; Michael J. Aguirre, City Attorney, for City of San Diego (Office of the City Attorney).

Before Dowdin Calvillo, Acting Chair; McKeag and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the City of San Diego (Office of the City Attorney) (City) to the proposed decision of an administrative law judge (ALJ). The San Diego Firefighters, Local 145, I.A.F.F. (Local 145) alleged that the City violated the Meyers-Milias-Brown Act (MMBA)[1] and PERB regulations[2] when it: (1) requested that Local 145's international affiliate suspend the Local 145 president because he had been indicted on criminal charges; (2) requested that the Local 145 bargaining team negotiator step down as he

[1] MMBA is codified at Government Code section 3500 et seq. The complaint alleged a violation of Sections 3502, 3503, 3505, 3506 and 3509(b).

[2] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The complaint alleged a violation of PERB Regulation 32603(a), (b), (c) and (d).

formerly served as the City's negotiator; (3) bypassed Local 145 by seeking employees' rescission of their retirement service credit purchases; and (4) unilaterally changed the retirement service credit policy. The ALJ dismissed the first two allegations that the City violated the MMBA by its: (1) request to suspend the Local 145 president; and (2) request that the Local 145 negotiator step down.[3] The ALJ found, however, the City unlawfully bypassed Local 145 and unilaterally changed the retirement service credit policy.

The Board reviewed the proposed decision and the record in light of the City's exceptions, Local 145's response and the relevant law.[4] Based on this review, the Board affirms the ALJ's bypass violation, but reverses the unilateral change violation.

SUMMARY OF FACTS

This case arises during the severe funding crisis affecting the San Diego City Employees' Retirement System (SDCERS). The crisis resulted from a series of poor decisions by City officials and SDCERS trustees beginning in the late 1990's. The decisions included twice delaying the City's contributions to the retirement system, increasing future benefits for City employees, and underpricing employee purchases of retirement service credits. The net effect of these decisions was to grossly underfund the retirement system.

As a result of the pension funding crisis, state and federal officials initiated civil and criminal investigations into the actions of public officials and others. In the midst of the public

[3] Local 145 did not file exceptions to these determinations. Therefore, these allegations are dismissed and will not be addressed herein. (PERB Reg. 32300(c).)

[4] The City's request for oral argument is denied. The Board historically denies requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Monterey County Office of Education* (1991) PERB Decision No. 913.)

upheaval, Michael Aguirre (Aguirre) campaigned for the Office of the City Attorney, vowing to clean up the financial mess facing the City. After his election, Aguirre initiated a number of civil actions attempting to undo some of the decisions affecting the City and the retirement system. State and federal prosecutors ultimately filed criminal charges against some of the SDCERS trustees, including the Local 145 president. It is in this context that the city attorney took the actions at issue in this case.

Effective January 1, 1997, the City implemented a program, pursuant to memorandum of understandings (MOU) the City negotiated with Local 145 and other City unions, that allowed employees to purchase up to five years of service credit in the retirement system. The benefit was to be revenue neutral for the City. Employees who opted for this benefit were required to pay both the employer and employee contributions for the additional service credit. The MOU provided that employees were to pay the contributions "in an amount and manner determined by the San Diego City Employees Retirement System Board to make the System whole for such time."

Retirement system staff calculated the service credit "price" for participating employees, but grossly underestimated the cost of the benefit to the retirement system. As a result, employees were allowed to purchase service credit at a price much lower than would "make the System whole for such time." Several years passed before the retirement system staff realized the extent of the underfunding. The SDCERS trustees then delayed several more years before they acted to correct the problem. In 2003, the trustees adjusted the service credit purchase price, but gave employees three months to complete purchases under the discounted pricing arrangement.

The city attorney estimated the service credit pricing error cost City taxpayers $147 million. After he took office in 2004, Aguirre filed a civil action in an attempt to reverse

the effects of the underpricing of the service credits. In addition, some of the criminal conflict of interest cases pending at the time included civil provisions that could require the reversal of the challenged transactions.

On March 7, 2006, the city attorney issued a press release that stated the purchase of the underpriced service credits was legally unauthorized and violated the City Charter. The press release announced the City would allow any employee to rescind their purchase of service credits.[5] Aguirre's press release directed employees to the city attorney's website where the employees could access a form created by the City Attorney's Office to initiate service credit rescission requests. The *Request to Rescind Purchase of Prospective Service Credit Agreement* form was posted with instructions that stated:

> INFORMATIONAL STATEMENT REGARDING
> RESCISSION OF PURCHASE OF PROSPECTIVE
> SERVICE CREDIT AGREEMENT
>
> As you know, the City Attorney has concluded that the purchase of prospective service credit, or airtime, from the San Diego City Employees' Retirement System ('SDCERS') below full cost was not authorized under the law. If you would like to rescind this legally unauthorized purchase, the information below is provided for your benefit. *You should, however, consult with an attorney and a tax and/or other professional of your choosing regarding the actual tax treatment that will apply in your situation. This information is not intended to be and should not be taken to be individual tax advice.*
>
> - If you purchased service credit using amounts transferred from a City-sponsored defined contribution plan (i.e., the 401(k) plan or the SPSP), the funds paid to SDCERS could be transferred directly back to the applicable plan. Because the funds would be transferred directly from SDCERS to the other plan, and would not be made available directly to you, the transaction should not result in any tax to you. These amounts would be taxable when

[5] Although Local 145 was the only union to file an unfair practice charge challenging the city attorney's actions, the press release and website posting were directed toward all City employees.

eventually distributed from the defined contribution plan in accordance with the plan's rules.

- If you purchased service credit using after-tax cash payments, those payments would he refunded to you. The refund will be treated as a distribution from a retirement plan and you will likely be subject to tax on a portion of the refund. The calculation of the taxable portion involves the ratio of after-tax contributions you made to your overall SDCERS benefit. It will be necessary to obtain additional information from SDCERS to determine your specific tax consequences.

- If you purchased service credit using pre-tax installment payments via payroll deduction, you may be able to transfer those amounts to a City-sponsored defined contribution plan, but you will not be permitted to have the money refunded to you. The direct plan-to-plan transfer should not result in any tax to you. Amounts transferred to a defined contribution plan would be subject to that plan's rules regarding distributions and legal contribution limits and will be taxable when eventually distributed to you.

A transfer back to a qualified plan will result in a small transactional fee charged by the qualified plan administrator. This fee would be borne by the requesting employee.

Accompanying this statement is a written agreement for download and execution to commence the PSC reversal request process. Employees are encouraged to review it, obtain professional advice as needed and desired, execute the document if desired, and submit same to SDCERS for implementation.

Please be aware that SDCERS may deny your request for a transfer of your service credit payment to another plan or as a refund to you. SDCERS has taken the position that transfers back to the defined contribution plans such as SPSP and 401(k) cannot be permitted without jeopardizing the tax-qualified status of those plans. SDCERS has also stated that refunds of your payroll deposits are permitted only if you selected the installment purchase method and have not made all payments. We are attempting to resolve these matters with SDCERS. (Emphasis in original.)

Neither the city attorney nor any other City official gave advance notice to Local 145 about the press release or posting of the rescission documents, or offered to meet and confer

regarding the issue. No City employee actually filled out the service credit rescission form or otherwise sought to rescind the purchase of service credits as a result of the city attorney's press release or website posting.

ALJ'S PROPOSED DECISION

The ALJ concluded that the city attorney had a right to communicate his views regarding the legality of the employees' service credit purchases. The ALJ determined, however, the city attorney went too far and bypassed Local 145 by dealing directly with the employees to get them to relinquish a negotiated benefit. The ALJ rejected the City's claim that the city attorney's status as an elected official under the City Charter, or any referenced general immunity statutes, authorized the City to ignore bargaining obligations under the MMBA. Finally, the ALJ found that by "attempting to change" the service credit purchase policy, the City unilaterally changed the policy without offering to meet and confer with Local 145.

In its exceptions to the proposed decision, the City argues that the press release and website posting were intended to reach all City employees for the purpose of enforcing the MOU, and asking for compliance with it. The City further asserts that as an elected official, and chief legal advisor and attorney to the City, the city attorney has almost unfettered authority to enforce the laws of the City of San Diego, including the MOUs with the respective employee organizations. Concomitantly, the City argues that the communication was merely an informational statement that expressed the city attorney's views and opinions for the purpose of enabling informed judgments by all City employees, and was thus protected employer speech.

DISCUSSION

Bypassing the Union

MMBA section 3505 provides that local government agencies "shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations." Additionally, MMBA section 3503 provides that "recognized employee organizations shall have the right to represent their members in their employment relations with public agencies."

An employer may not communicate proposals to employees before first submitting them to the exclusive representative, seek to bargain directly with employees, or invite them to abandon their representative to achieve better terms directly from the employer. (*Trustees of the California State University* (2006) PERB Decision No. 1871-H.) An employer violates the duty to bargain in good faith when it bypasses the exclusive representative to negotiate directly with employees over matters within the scope of representation. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160 (*Walnut Valley*).)

To establish that an employer has unlawfully bypassed the exclusive representative, a charging party must demonstrate that the employer dealt directly with its employees: (1) to create a new policy of general application, or (2) to obtain a waiver or modification of existing policies applicable to those employees. (*Walnut Valley.*) The Board agrees with the ALJ's finding that the city attorney's actions in this matter fall within the second test, thus bypassing Local 145 in derogation of Local 145's right to represent bargaining unit employees.

The City contends that the press release and website posting were merely asking for compliance with the MOU, not asking employees to relinquish a negotiated right. The City asserts such action was necessary to bring the purchases into compliance with the MOU, which required that the City's share of the cost of the additional service credit be borne by the

employees. However, the City focuses on that part of the MOU that provides that the pricing was to "make the System whole," a provision wholly outside of the control of the employees themselves. To make the City "whole," the city attorney sought the employees' complete rescission of their purchase of service credits.[6] This action goes beyond correcting the price shortfall and disregards the MOU language that expressly authorizes employee purchases of service credit at a price set by the retirement system.

By soliciting employees to rescind their purchase of service credits, made in accordance with the MOU, the City has gone directly to the employees to obtain their waiver of a benefit negotiated by Local 145, based on the City's subsequent determination that the credits were underpriced to the detriment of the City. Consequently, the city attorney's direct request to employees to rescind service credit purchases, constituted bypass of the exclusive representative in violation of the MMBA.

The City's argument that the ALJ failed to properly recognize and apply employer speech protections to the city attorney's communications is unpersuasive. The Board has held that an employer has the right to "express its views on employment related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate" (*Rio Hondo Community College District* (1980) PERB Decision No. 128 (*Rio Hondo*).) However, employer speech that goes beyond mere expression of opinion or communication of existing facts, but instead advocates or solicits a course of action, is not subject to employer speech protections. (*State of California (Department of Transportation)* (1996) PERB Decision No. 1176-S (*CalTrans*).) Furthermore, the Board in *Rio Hondo* specifically held that

[6] Notably, the posted informational statement does not appear to distinguish between purchases made before the underpricing was adjusted in 2003, and purchases made ostensibly at the appropriate pricing. Rather, the posting solicits City employees to rescind all service credit purchases.

protection is afforded to employer speech "provided the communication is not used as a means of violating the Act." (*Id.*) Thus, the Board specifically exempts from protection speech that is used as a means to commit an unfair labor practice, such as bypassing the exclusive representative.

The City argues that pursuant to National Labor Relations Board (NLRB) standards adopted by PERB, the ALJ should have examined only whether the city attorney's communication contained a threat of reprisal or force, or promise of benefit.[7] The City attempted to substantiate its position by comparing excerpts from the city attorney's website posting with excerpts from PERB and NLRB case law. The City calls attention to those parts of the website posting that read, "If you would like to rescind this legally unauthorized purchase" and "[e]mployees are encouraged to review [the rescission form], obtain

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[7] In *Rio Hondo*, a case arising under the Educational Employment Relations Act (EERA) (Gov. Code § 3540 et seq.), the Board considered employer speech provisions in the National Labor Relations Act (NLRA) (29 U.S.C. § 151 et seq.). NLRA section 158(c) states:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

The Board held that although such a provision is absent from EERA, there is a benefit from facilitating the free flow of opinions and views. Therefore, the Board determined that certain types of employer speech is protected. The Board set forth a standard to determine when employer speech loses its protection:

> [A]n employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by section 3543.5 of the EERA.

(*Rio Hondo*; fn. omitted.)

professional advice as needed and desired, execute the document if desired."[8] The City claims these statements are not distinguishable from employer statements found acceptable in cases such as *CalTrans*, *Perkins Machine Company* (1963) 141 NLRB 697 (*Perkins Machine Co.*), and *Rio Hondo*. However, the City mischaracterizes or overlooks pertinent findings from each of these cases.

In *CalTrans*, the employer distributed a memo to all employees informing them that the parties were engaged in negotiations for a new contract. The memo notified employees that upon expiration of the contract, agency fee payers were no longer subject to fair share fee deductions and union members were not prohibited from withdrawing from the union. The memo also referenced procedures for withdrawing from the union, including notification to the union, and noted that questions about canceling union membership should be directed to the union. The Board found the memo protected employer speech, stating:

> [W]here employer speech accurately describes an event, and does not on its face carry the threat of reprisal or force, or promise of benefit, the Board will not find the speech unlawful.

(*Id.*, citing *Chula Vista City School District* (1990) PERB Decision No. 834.)

The City in the instant case argues that the city attorney's press release and website statements did not on their face contain a threat of reprisal or force, or promise of benefit. Thus, they are no different from the explanation of procedures to withdraw from the union in *CalTrans*, and the City should be entitled to protection. However, the City disregards that part of the decision where the Board states:

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[8] The City also argues that admonishments to obtain professional advice contained in both the informational statement and the request form establish the nature of the documents as merely informative. This argument is wholly without merit. A routine referral to consult with legal or tax professionals as to the potential tax or other consequences for any individual employee does not serve to absolve the City from responsibility for directly soliciting action by the employees.

> First, the memos conveying information concerning the right to resign from Union membership *simply communicate that the right exists and do not advocate a course of action*. . . . The facts alleged do not establish that the CalTrans solicited employees to withdraw from membership, only that the CalTrans informed employees of their right to do so.

(*Id.*; emphasis added.)

Similarly, in *Perkins Machine Co.*, the employer sent a letter to each employee informing them of the 15-day window set forth in the collective bargaining agreement, during which they had the right to withdraw from the union, along with the procedures for withdrawal. The employer letter in *Perkins Machine Co.* also advised that:

> Whether you resign from the union, or whether you remain a member will not make any difference in your wages, benefits, position or treatment by the Company.
>
> . . .
>
> We repeat -- the Company is not urging you either to remain a member of the union or to resign from the union. As far as the Company is concerned, that is a matter for each man to decide for himself without pressure from either the Company or the union.

(*Perkins Machine Co.* at p. 699.)

Here, the NLRB also held the letter was acceptable, noting that it was free from any threat of reprisal or promise of benefit. The NLRB found it significant that the letter "ends with a clear statement of Respondent's neutral position." (*Id.* at p. 700)

Finally, the City relies heavily on selective findings in *Rio Hondo*. The City cites language from a memorandum written by the community college superintendent to the president of the faculty association, and argues that the superintendent directly asked union members to take action in a manner indistinguishable from the city attorney's plea to City employees. The City again focuses on the Board's finding that the superintendent's memos contained no "threat of reprisal or force or promise of benefit." (*Rio Hondo.*) However, the crux of the Board's analysis in *Rio Hondo,* that protected employer communications are

founded upon the expression of views, arguments, or opinions, but are not unlimited. The Board stated, "the employer's right to freely express its views, arguments or opinions is impliedly established by the fact that the employer is prohibited only from engaging in negotiations with persons or groups other than the exclusive representative." (*Id.*; emphasis in original.) Further, as stated previously herein, protected speech is afforded the employer "provided the communication is not used as a means of violating the Act." (*Id.*) Moreover, the Board in *Rio Hondo*, specifically noted that the union in that matter did not have exclusive representative status, so the Board did not engage in a bypass analysis. The Board held that "an employer's direct communication with employees may escape protection if it evidences an employer's attempt to bypass the exclusive representative." (*Id.*)

In each of the above cases, the employer communicated existing facts, views, arguments, or opinions, but did not advocate a course of action in circumvention of the exclusive representative, or otherwise use the communication to commit an unfair labor practice.

The same cannot be said about the city attorney's actions in this case. At hearing, City Attorney Aguirre testified that:

> SDCERS had taken the position that they were not going to permit anyone to unwind the transactions, that it couldn't be done for tax reasons. We retained counsel to help us figure out how it could be done, and we wanted and were hoping that people would be motivated by a sense of duty to the city to come forward and take advantage of this and, . . . actually unwind the transactions.

The press release and website posting themselves stated that "SDCERS may deny requests for refunds" for some types of transactions, and assured employees that "the City Attorney's Office is attempting to resolve these matters with SDCERS officials." Therefore,

the City was not merely reporting existing procedures but was actively involved in developing the procedures and was taking specific action to advocate for their success.

Furthermore, when asked at hearing about the intent and purpose of the rescission agreement the city attorney testified:

> Q So the intent of this agreement, as drafted by your office, if it were agreed to by the employee, was that the employee would rescind his purchase, give us up [sic] years of credit, and get his money back without interest, correct?
>
> A That's what this, in this form, yes.

Therefore, by his own statements, the city attorney was soliciting employees to entirely rescind a benefit for the good of the City's finances, not merely describing existing rescission procedures. Giving the document the title "*Informational Statement…*," does not change the nature of the communication. The press release and website posting were not merely informational, but were designed to solicit employees to take action to give up a negotiated benefit, and are therefore not subject to employer speech protections.[9]

The City's argument that the ALJ "failed to give due weight to the San Diego City Charter provisions regarding the city attorney's obligation to enforce the laws of the City and provide legal advice to the City" is similarly unpersuasive. The City cites Section 40 of the San Diego City Charter, that states the city attorney is the "chief legal advisor of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties," as mandating both the duty and the obligation of the city attorney to enforce the

[9] Furthermore, the city attorney's solicitation to rescind employee purchases was accompanied by statements that the purchases were illegal and violated the City Charter. It was also widely known that the city attorney was pursuing litigation to reverse the effect of the employees' underpayment for service credits. Such statements could create undue concern on the part of employees over the consequences of failing to rescind their service credit purchases. (*Rio Hondo*.)

laws of the City, including MOUs between the City and its unions. Based on this argument, the City claims the city attorney had a duty to seek rescission of the employees' service credit purchases in order to protect the City in a financial crisis. However, the City fails to explain or provide any evidence as to how such duties authorize the city attorney to disregard the state collective bargaining statute.[10] As the ALJ concluded, the city attorney could have exercised his duty on behalf of the City by seeking modification or rescission of the benefit through negotiations with Local 145.

Unilateral Change

In determining whether a party has committed a unilateral change in policy in violation of MMBA section 3505 and PERB Regulation 32603(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria 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 other party 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

[10] The City attempts to liken the city attorney's powers to that of the State Attorney General. The City notes the California Constitution, article V, section 13, grants power to the Attorney General as the "chief law officer of the State," subject to the "powers and duties of the Governor." The City argues, "[W]hereas the Constitution and Government Code limit the Attorney General's powers somewhat, the Charter provides almost no limit to the City attorney's legal powers." In this assertion, the City disregards case law that holds "that general law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern." (*Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 292 [creation of uniform fair labor practices throughout the state is a matter of state concern and general law is paramount]; see also, *San Francisco Unified School District* (2008) PERB Decision No. 1948 and cases cited therein.)

impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Walnut Valley, supra,* PERB Decision No. 160; *San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

The ALJ found that "by attempting to change the policy concerning purchase of such service credits without offering to meet and confer with Local 145," the City violated MMBA section 3505. However, in order to establish a prima facie case, the charging party must first demonstrate that the employer changed a written agreement or past practice. An "attempt" to change a policy is insufficient. Although the city attorney solicited employees to rescind service credit purchases, the record does not contain evidence the City actually altered or terminated the policy with respect to the purchase of service credits. In fact, the SDCERS trustees adjusted the cost to purchase service credits, suggesting that the benefit continues and is now revenue neutral to the City. Therefore, the ALJ's finding that the City committed a unilateral change violation is reversed.

Request for Judicial Notice

The City asks the Board to take judicial notice of the San Diego City Charter, San Diego Municipal Code, section 24132, and San Diego Ordinance O-18383, section 24.1312. These three documents were submitted for the first time with the City's exceptions.[11]

California Evidence Code section 451(a), provides that "Judicial notice *shall* be taken of . . . [the] decisional, constitutional, and public statutory law of this state . . . and the provisions

[11] Article V, section 40 of the City Charter was admitted into evidence at the hearing and was considered by the ALJ.

of any charter described in Section 3, 4, or 5 of Article XI of the California Constitution."[12] (Emphasis added.) City charters are considered to "have all the dignity of ordinary statutes," and are subject to judicial notice although not set forth in the record. (*Tilden v. Blood* (1936) 14 Cal.App.2d 407, 413; *Clark v. Patterson* (1977) 68 Cal.App.3d 329.) Therefore, we grant the request to take judicial notice of the City Charter.

However, as discussed herein, the City fails to demonstrate how the provisions in the City Charter defining the city attorney as the chief legal advisor to the City, gives him the authority to bypass the exclusive representative and directly solicit the employees to rescind benefits obtained pursuant to the MOU negotiated by Local 145.

California Evidence Code section 452(b) provides that, "Judicial notice *may* be taken of . . . [r]egulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States." (Emphasis added.) As such, the granting of judicial notice by PERB is discretionary. Municipal codes and city ordinances fall under this statute.

Both the Municipal Code and the City Ordinance were readily available prior to the filing of the charge, and the City failed to offer any evidence of good cause for failure to obtain and provide this evidence at the hearing for the ALJ to consider. Therefore, the Board denies the City's request for judicial notice of the City Municipal Code and Ordinance.

Remedy

Pursuant to Government Code section 3509(a), PERB, under Section 3541.3(i), is empowered to:

[12] Section 3, Article XI of the California Constitution provides that, "For its own government, a county or city may adopt a charter by majority vote of its electors . . . ."

> [T]ake 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 ALJ ordered the City to remove the informational statement and request for rescission agreement from the city attorney's website. However, the Board agrees with the City that this remedy is overbroad, as the issue before the Board at this time pertains only to claims by Local 145. Therefore, the Board finds an appropriate remedy is to order the City to include with any posting on the city attorney's website regarding rescission of retirement service credit purchases, a prominent notation that the procedure does not apply to employees represented by Local 145.

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the City of San Diego (Office of the City Attorney) (City) violated the Meyers-Milias-Brown Act (MMBA) when it bypassed the San Diego Firefighters, Local 145, I.A.F.F. (Local 145), by soliciting employees to rescind a benefit, the purchase of retirement service credit, negotiated by Local 145. All other allegations are DISMISSED.

Pursuant to Government Code section 3509, it is hereby ORDERED that the City and its representatives shall:

A. CEASE AND DESIST FROM:

1. Bypassing Local 145 by directly soliciting bargaining unit employees to rescind retirement service credit purchases.

2. Interfering with employee rights by directly soliciting bargaining unit employees to rescind retirement service credit purchases.

3. Interfering with Local 145's right to represent employees by directly soliciting bargaining unit employees to rescind retirement service credit purchases.

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

1. Notify any bargaining unit employee represented by Local 145 who submitted a *Request to Rescind Purchase of Prospective Service Credit Agreement*, that they may withdraw the rescission and have their retirement service credits restored.

2. Include with any posting on the city attorney's website, regarding rescission of retirement service credit purchases, a prominent notation that the procedure does not apply to bargaining unit employees represented by Local 145.

3. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the City 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 it will comply with the terms of this Order. Such posting shall be maintained for a period of 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. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board or the General Counsel's designee. The City shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Local 145.

Member McKeag joined in this Decision.

Acting Chair Dowdin Calvillo's concurrence and dissent begins on page 19.

DOWDIN CALVILLO, Acting Chair, concurring and dissenting: I concur in the majority's conclusion that the City of San Diego (Office of the City Attorney) (City) did not make an unlawful unilateral change in violation of section 3505 of the Meyers-Milias-Brown Act and Public Employment Relations Board (PERB) Regulation 32603(c) when it posted on its website an informational statement regarding rescission of certain purchases of retirement service credit along with a form a City employee could use to initiate such a rescission. However, for the following reasons, I disagree with the majority's conclusion that the website postings constituted a bypass of San Diego Firefighters, Local 145, I.A.F.F. (Local 145).

Local 145 alleged that the City bypassed the union by directly soliciting employees to rescind purchases of retirement service credit. Article 23(6)(B) of the MOU between the City and Local 145 in effect at the time of the alleged violation stated, in relevant part:

> A five-year purchase of service credit provision is established effective January 1, 1997. Under this provision, the Member may purchase up to five years of service credit by paying both employee and employer contributions in an amount and manner determined by the San Diego City Employees Retirement System Board to make the System whole for such time.

The informational statement posted on the City's website began:

> As you know, the City Attorney has concluded that the purchase of prospective service credit, or airtime, from the San Diego City Employees' Retirement System ('SDCERS') below full cost was not authorized under the law. *If you would like to rescind this legally unauthorized purchase, the information below is provided for your benefit.*

(Italics added.)

The letter introduced the rescission request form as follows:

> Accompanying this statement is a written agreement for download and execution to commence the PSC reversal request process. Employees are encouraged to review it, obtain professional advice as needed and desired, *execute the document if desired*, and submit same to SDCERS for implementation.

(Italics added.)

The remainder of the informational statement addressed various tax issues that might arise from rescission of a purchase. The rescission request form stated the reason for the rescission, i.e., that the purchase price of the service credits was calculated in error, and the method by which the purchase funds were to be returned to the employee.

To establish that an employer has unlawfully bypassed the union, the charging party must demonstrate that the employer dealt directly with its employees: (1) to create a new policy of general application, or (2) to obtain a waiver or modification of existing policies applicable to those employees. (*County of Fresno* (2004) PERB Decision No. 1731-M; *Walnut Valley Unified School District* (1981) PERB Decision No. 160.) An employer does not bypass the exclusive representative by communicating directly with employees regarding implementation of an existing policy or matters that are related, but not contrary, to the policy. (See *County of Fresno*, *supra* [employer's solicitation of employees to be part of "jail working group" not bypass when the memorandum of understanding (MOU) explicitly acknowledged working group's existence]; *Walnut Valley Unified School District*, *supra* [requiring employee to sign document confirming employee volunteered to work overtime was not an attempt to obtain a waiver of overtime policy]; *East Tennessee Baptist Hospital* (1991) 304 NLRB 872, 873 [because collective bargaining agreement allowed employer to make shift changes as necessary for adequate patient care, employer could lawfully survey employees about shift preferences].)

Here, the City's website postings merely informed City employees that the City had created a procedure for rescinding a purchase of improperly priced service credits and provided a form to undo such a transaction if the employee chose to do so. The permissive language of the postings shows rescission was an optional action on the part of City employees. Nowhere in the postings did the City ask or encourage employees to waive or modify their ability to

purchase service credits pursuant to Article 23(6)(B) of the MOU. Thus, the website postings on their face did not constitute a bypass of Local 145.

Further, while the record establishes that the city attorney intended for his March 7, 2006 news release to encourage City employees to rescind service credit purchases made below full cost, I disagree that this encouragement transformed the informational website postings into a bypass of Local 145. The majority cites *State of California (Department of Transportation)* (1996) PERB Decision No. 1176-S, *Rio Hondo Community College District* (1980) PERB Decision No. 128, and *Perkins Machine Company* (1963) 141 NLRB 697, none of which involved a bypass allegation, for the proposition that an employer's speech is unlawful if it encourages employees to engage in conduct that undermines the exclusive representative. In both *State of California (Department of Transportation)*, *supra*, and *Perkins Machine Company*, *supra*, the employer notified employees of their right to withdraw from the union during the "window period" set forth in the collective bargaining agreement and provided a pre-existing withdrawal form to employees. The respective boards found the employer's conduct lawful because it did not encourage withdrawal from the union but merely informed employees of an existing right. Relying on these cases, the majority finds the City's communications unlawful because they encouraged employees to take action using a new procedure created by the City.

It is undisputed that the City created a new procedure for rescinding a purchase of improperly priced service credits and encouraged employees to use the procedure. However, unlike encouraging employees to withdraw from the union, this conduct does not have a detrimental effect on Local 145. As noted above, the rescission procedure is not necessarily contrary to the negotiated benefit provided in MOU Article 23(6)(B). Moreover, none of the City's additional communications about the rescission procedure indicated a desire for employees to waive or modify their ability to purchase retirement service credits. Thus, unlike

the majority, I would find that the City did not "advocate a course of action in circumvention of the exclusive representative" by encouraging employees to rescind their purchases of improperly priced service credits.[1] Accordingly, I conclude the City did not bypass Local 145 by posting the informational statement regarding retirement service credit and the rescission request form on its website, or by encouraging employees to rescind purchases of improperly priced service credits. I would therefore dismiss the complaint and underlying unfair practice charge in their entirety.

[1] To the extent the majority's conclusion is based on the possible coercive effect of the city attorney's communications in light of ongoing well-publicized litigation, including criminal charges, over the improperly priced service credits, I disagree that this context is sufficient to establish interference with employee rights, particularly as the record indicates no City employee actually rescinded his or her purchase of retirement service credits as a result of the communications.

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 No. LA-CE-294-M, *San Diego Firefighters, Local 145, I.A.F.F. v. City of San Diego (Office of the City Attorney)*, in which all parties had the right to participate, it has been found that the City of San Diego (Office of the City Attorney) (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq.

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

A. CEASE AND DESIST FROM:

1. Bypassing the San Diego Firefighters, Local 145, I.A.F.F. (Local 145), by directly soliciting bargaining unit employees to rescind retirement service credit purchases.

2. Interfering with employee rights by directly soliciting bargaining unit employees to rescind retirement service credit purchases.

3. Interfering with Local 145's right to represent employees by directly soliciting bargaining unit employees to rescind retirement service credit purchases.

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

1. Notify any bargaining unit employee represented by Local 145 who submitted a *Request to Rescind Purchase of Prospective Service Credit Agreement*, that they may withdraw the rescission and have their retirement service credits restored.

2. Include with any posting on the city attorney's website, regarding rescission of retirement service credit purchases, a prominent notation that the procedure does not apply to bargaining unit employees represented by Local 145.

Dated: _____

CITY OF SAN DIEGO (OFFICE OF THE CITY ATTORNEY)

By: _____
Authorized Agent

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.