STATE OF CALIFORNIA
DECISION OF THE
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 PERB Decision No. 2464-M DECEMBER 29, 2015
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 Anthony Resnick, 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, for City of San Diego; and Lounsbery, Ferguson, Altona & Peak by Kenneth H. Lounsbery and James P. Lough, Attorneys, for Non-Party Petitioners to File Informational Brief in Support of the City's Exceptions Catherine A Boling, T.J. Zane and Stephen B. Williams.

Before Huguenin, Winslow and Banks, Members.

DECISION

BANKS, Member: These cases, which were consolidated for hearing, are before the Public Employment Relations Board (PERB or Board) on exceptions filed by the City of San Diego (City) to the proposed decision (attached) of a PERB administrative law judge (ALJ).[1] The proposed decision concluded that the City violated the Meyers-Milias-Brown Act (MMBA)[2] and PERB regulations[3] by failing and refusing to meet and confer with four recognized employee organizations (Unions) representing City employees over Proposition B, a pension reform measure championed by the City's Mayor Jerry Sanders (Sanders) and other City officials and ultimately approved by voters in a municipal election.[4] The proposed decision also concluded that the City's conduct interfered with the rights of City employees to

[1] The procedural history of these cases before the ALJ appears at pages 2-4 of the proposed decision.

[2] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise noted, all statutory references are to the Government Code.

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

[4] With minor and non-material differences, the complaints alleged violations of MMBA sections 3503, 3505, 3506 and 3509, subdivision (b), and of PERB Regulation 32603, subdivisions (a), (b) and (c).

participate in and be represented by the employee organizations of their choice and with the rights of the Unions to represent the City's employees in their employment relations.

As a remedy, the ALJ ordered the City to cease and desist from refusing to bargain with the Unions, to restore the status quo that existed before the City's unlawful conduct, to make employees whole for any losses suffered as augmented by interest at the rate of seven (7) percent per annum, and to notify employees of the City's willingness to comply with PERB's remedial order. Notably, the proposed decision directed the City to rescind the provisions of Proposition B but included no order for the City to bargain, upon request by the Unions, over an alternative to Proposition B or other proposals affecting employee pension benefits.

The City admits that its designated labor relations representatives, including Sanders, refused the Unions' repeated requests to meet and confer over Proposition B. However, the City denies that it had any legal obligation to meet and confer on this subject because the pension reform ballot initiative that became Proposition B was conceived, sponsored and placed on the ballot by a combination of private citizens' groups and City officials and employees acting not in their official capacities on behalf of the City, but *solely as private* citizens. In addition to asserting various grounds for reversing the proposed decision's finding of liability, the City excepts to the ALJ's proposed remedy as exceeding PERB's jurisdiction. The Unions contend that the City's exceptions are without merit and urge the Board to affirm the proposed decision, albeit with some modifications.[5]

[5] In addition to the parties' exceptions and responses, three proponents of Proposition B, Catherine A. Boling, T.J. Zane and Stephen B. Williams (collectively, Proponents), who are not parties to this case, have petitioned the Board to consider an informational brief in support of the City's exceptions. Pursuant to PERB regulations and decisional law, the Board may consider issues of procedure, fact, law or policy raised in informational briefs submitted by non-parties. (PERB Reg. 32210, subds. (b)(6), (c); *San Diego Community College District* (2003) PERB Decision No. 1467a (*San Diego CCD*), p. 2, fn. 3; *Marin Community College District* (1995) PERB Decision No. 1092, p. 2, fn. 4.) Although the

We have reviewed the entire record in this matter in light of the issues raised by the parties' exceptions and responses and by the non-party informational briefs submitted by Proponents of the disputed ballot measure. Based on our review, we conclude that the ALJ's findings of fact are supported by the record, and we adopt them as the findings of the Board itself, except as noted below. The ALJ's legal conclusions are well-reasoned and in accordance with applicable law and we adopt them as the conclusions of the Board itself, except where noted below. We affirm the proposed decision and the remedy, as modified, subject to the following discussion of the City's exceptions.

FACTUAL SUMMARY

The material facts, as set forth in the proposed decision, are not in dispute.[6] San Diego is a charter city governed by a 9-member City Council. At all times relevant, it has operated

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Proponents have not directed us to newly discovered law or raised any other matter that would affect the outcome of this decision, the Board has nonetheless addressed those issues in the Proponents' informational brief which we believe warrant comment.

[6] The City's Exception No. 6 correctly notes that the ALJ misidentified Catherine A. Boling (Boling), one of the Proponents of Proposition B, as the treasurer of San Diegans for Pension Reform, the committee initially supporting the Mayor's pension reform proposal. In fact, as the City points out, Boling served as the treasurer of a separate committee, known as Comprehensive Pension Reform for San Diego, which nevertheless enjoyed financial support from San Diegans for Pension Reform after April 2011, when the Mayor, Councilmember Carl DeMaio (DeMaio), and various special interest groups agreed on the compromise language that became Proposition B. (Reporter's Transcript (R.T.) Vol. II, p. 185.) Boling had also previously served as the treasurer of an organization known as San Diegans for Accountability at City Hall, Yes on D, which had supported the 2010 ballot measure that institutionalized the City's Strong Mayor form of government. Although this correction to the ALJ's factual findings indicates that the relationship between Boling and the Mayor was less direct than suggested by the proposed decision, it does not affect other factual findings relied on by the ALJ to conclude that Proposition B traced its lineage not only to the proposal put forward by DeMaio but *also* to the pension reform proposal announced by the Mayor at City Hall in November 2010. Nor does this correction alter the proposed decision's conclusion that, in announcing and supporting his pension reform proposal and then the compromise language that became Proposition B, Sanders was acting under color of his authority as Mayor and on behalf of the City.

under a "Strong Mayor" form of government whereby the City's Mayor acts as the City's chief executive officer with no vote on the City Council, but with the power to recommend measures and ordinances to the Council which the Mayor finds "necessary or expedient" or otherwise desirable. (Charging Party Exhibit (CP Ex.) 8; R.T. Vol. II, pp. 37-38.) The Mayor is ultimately responsible for the day-to-day governmental and business operations of the City, including the role of lead negotiator in the City's collective bargaining matters with the various employee organizations representing City employees. (CP Exs. 23, 24.)

Although the Mayor takes direction from the City Council, which must adopt any tentative agreements negotiated with the Unions in order to make them binding (MMBA, § 3505.1), when meeting and conferring with employee representatives, the Mayor makes the initial determination of policy with regard to a position the City will take, including what concessions to make and what reforms or changes in terms and conditions of employment are important for the City to achieve. Since 2009, the City's practice has been that the Mayor briefs the City Council on his proposals and strategy and obtains its agreement to proceed. The Mayor retains outside counsel to serve as the chief negotiator at the bargaining table. Under Council Policy 300-6,[7] the role of the City Council is limited to either ratifying a tentative agreement reached between the Mayor and employee representatives or, following a declaration of impasse, voting on whether to approve and impose the Mayor's last, best and

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Although not mentioned in the City's exceptions, the proposed decision also incorrectly states that the victory celebration following passage of Proposition B was "held at the Lincoln Club," when, in fact, the record indicates that it was held at the US Grant Hotel in space rented by the Lincoln Club. (R.T. Vol. II, pp. 189-190.) Like the incorrect identification of Boling's organizational affiliation, we disregard this inaccuracy as a harmless error and inconsequential to the outcome of this case. (*Regents of the University of California* (1991) PERB Decision No. 891-H, p. 4.)

[7] Council Policy 300-6 concerns the impasse procedures for proposals of the Mayor; it does not apply to situations in which the City Council has proposed its own ballot measure.

final offer (LBFO). (CP Ex. 23, p. 7.) In this context, the Council must either adopt or reject the Mayor's LBFO; it has no authority to add to or change the provisions of the Mayor's proposal, to mediate between the City and the Unions, or to combine a Union proposal with the Mayor's LBFO.

Beginning on or about November 19, 2010, and continuing in the months thereafter, Sanders, acting under the color of his elected office and publicly supported by Council President Pro Tem Kevin Faulconer (Faulconer) and City Attorney Jan Goldsmith (Goldsmith), launched a campaign to alter employee pension benefits. On that date, and as part of the Mayor's agenda for eliminating the City's $73 million structural deficit during the remaining two years of Sanders' term in office, the Mayor's office issued a news release titled "Mayor Jerry Sanders Fact Sheet" which included the Mayor's picture and the City seal, posted information on the Mayor's section of the City's website, and, with Faulconer and Goldsmith in attendance, held a press conference in the Mayor's offices on the 11th Floor of City Hall to announce the pension reform initiative.

The central tenet of the Mayor's pension reform proposal involved phasing out the City's defined benefit plan in favor of a 401(k)-style defined contribution plan for most City employees. Initially the Sanders/Faulconer proposal was opposed by City Councilmember DeMaio, whose own pension reform proposal was generally perceived as "tougher" and enjoyed considerable support from business and other special interest groups. However, by April 2011, DeMaio and Sanders and their respective backers had agreed on compromise language, dubbed the Comprehensive Pension Reform Initiative (CPRI), which became Proposition B.

In the months after announcing his proposal for pension reform, Sanders raised money in support of the campaign, negotiated with other City officials and special interest groups to

craft acceptable compromise language for the initiative, and endorsed efforts to gather enough signatures to place the initiative before voters in the November 2012 election. Although Sanders periodically characterized his efforts on behalf of pension reform as those of a "private citizen," he and his staff testified that these efforts to "permanently fix[]" the City's financial problems through the pension reform initiative would be a major component of the Mayor's agenda for the remainder of his term in office. The Mayor also discussed his plans for the pension reform initiative during his official State of the City address at the January 12, 2011 City Council meeting.

It is undisputed that Sanders, Faulconer and their staff used the City's official website and City e-mail accounts to send mass e-mail communications to publicize and solicit support for the proposed initiative. (CP Ex. 80; R.T. Vol. II, pp. 168-169.) In one e-mail message, Faulconer explained that, while "decisions like these won't always be easy pills for some to swallow, [he] was elected to make these types of decisions, to look out for taxpayers, to ensure we're doing all we can with the tax dollars they send to City Hall."

It is also undisputed that, once passed by the voters, the savings mandated by Proposition B afforded considerable financial benefit to the City. Sanders testified that the 401(k)-style system was, in his estimation, "critically important to the City and its financial stability and to long-term viability for the City." (R.T. Vol. II, p. 44.) In early 2012, Sanders also issued a series of "Fact Sheet[s]" announcing that the various reforms undertaken by his administration in combination with concessions obtained separately from employees through the meet-and-confer process had resulted in eliminating the City's structural budget deficit. (CP Exs. 127, 128, 131; R.T. Vol. II, pp. 166-167.)

With knowledge and acquiescence by the City Council, Sanders also refused repeated requests by the Unions to meet and confer over the pension reform initiative.

The ALJ found that, by the above conduct, Sanders, in his capacity as the City's chief executive officer and labor relations spokesperson, made a firm decision and took concrete steps to implement his decision to alter terms and conditions of employment of employees represented by the Unions. The ALJ also found that Sanders was acting as the City's agent when he announced the decision to pursue a pension reform initiative that eventually resulted in Proposition B, and that the City Council, by its action and inaction, ratified both Sanders' decision and his refusal to meet and confer with the Unions. Because the ALJ found that the impetus for the pension reform measure originated within the offices of City government, he rejected the City's attempts to portray Proposition B as a purely "private" citizens' initiative exempt from the MMBA's meet-and-confer requirements.

DISCUSSION

Summary and Overview of the City's Exceptions

The City's exceptions can be grouped as follows:

1. Agency Issues: Whether the ALJ misapplied Board precedent and/or common law agency principles to determine that, in announcing and supporting his concept for a pension reform ballot initiative, the Mayor was acting as an agent of the City and not as a private citizen and whether the City Council ratified both the Mayor's policy decision and his refusal to meet and confer with the Unions over the pension reform ballot initiative.

2. Constitutional Defenses to MMBA Liability: Whether the ALJ erred in failing to protect citizens' constitutional right to legislate directly by initiative and/or Sanders' First Amendment rights, as a private citizen, to speak, associate, assemble and petition the government for redress.

3. Scope of PERB's Jurisdiction and Remedial Authority: Whether the proposed remedy exceeds PERB's jurisdiction and whether *any* Board-ordered remedy may lawfully overturn the results of the municipal election adopting Proposition B.

4. Miscellaneous Exceptions: The City also challenges several miscellaneous factual and legal points in the proposed decision. These include whether the ALJ erred in giving credence to a 2008 Memorandum of Law (Memo) issued by then City Attorney Michael Aguirre (Aguirre), which the City now claims was repudiated by Aguirre's successor, current City Attorney Goldsmith (Exception No. 4); whether the ALJ erred in finding that Boling, a Proponent of the CPRI which became Proposition B, was the treasurer of the Mayor's Committee of San Diegans for Pension Reform (Exception No. 6); and, whether the ALJ erred by confusing and conflating the Mayor's ideas for pension reform with those supported by DeMaio and various business and other special interest groups.

As explained below, we reject most of the City's exceptions, including its exceptions to the ALJ's application of agency theory, some of its constitutional defenses to PERB's duty to administer the MMBA's provisions, and its miscellaneous exceptions regarding the significance of the Aguirre Memo and the degree of continuity between Sanders' initial proposal for pension reform and the compromise language of Proposition B that Sanders helped broker. Because we have determined that they are not necessary for resolving this case, we have declined to rule on some of the City's exceptions regarding constitutional issues and the proposed remedy.

1. Exceptions to the ALJ's Application of Agency Theory

We address the ALJ's agency analysis first because it is perhaps the most contested issue in this case. Three of the City's exceptions specifically challenge the ALJ's application of agency rules. Exception No. 7 contends that the ALJ erred in concluding that the Mayor

remained within his statutory agency role as the City's chief spokesperson in labor relations, while simultaneously acting as a private citizen to support an initiative brought by non-governmental actors. (Proposed Dec., pp. 36-37, 52.) Exception No. 10 similarly contends that the ALJ erred in using agency theory to impose a meet-and-confer obligation for the Mayor's concept of pension reform, which, according to the City, he pursued as a private citizen (Proposed Dec., pp. 34-45), while Exception No. 5 disputes the ALJ's finding that the City Council ratified the Mayor's acts. Additionally, Exception Nos. 1, 3, 8 and 9 indirectly challenge the proposed decision on much the same point by insisting that Proposition B was a purely private citizens' initiative and contesting the ALJ's findings and conclusions that the impetus for its reforms "originated within the offices of City government" and that, "[d]espite the private citizens' participation in the initiative campaign and their belief that that their activities were constitutionally protected, those efforts contributed to the City's unfair practice and were ratified by the City." (Proposed Dec., pp. 54-55.)

Some of the City's arguments against a finding of agency were already considered and adequately addressed in the proposed decision and their repetition here is therefore unnecessary. (*King City, supra*, PERB Decision No. 1777, p. 10.) To the extent not already addressed in the proposed decision, we turn then to the City's exceptions to the ALJ's findings that Sanders acted as a statutory and common law agent of the City.

Exception to the ALJ's Finding of Statutory Agency

The City's exception to the ALJ's finding that Sanders acted as a statutory agent of the City amounts to little more than an assertion that no violation of the MMBA occurred, because the Mayor and other City officials and employees complied with or were authorized by *other* legal authorities. However, whether the Mayor or other City officials and employees complied

with other laws, regulations or policies does not determine the lawfulness of their conduct under the MMBA.

Otherwise, the gist of this exception, and indeed of most of the City's exceptions to the ALJ's application of common law agency rules (below), is a broad assertion that the Mayor's concept of pension reform and the ballot measure ultimately approved by the voters were *private* citizens' actions and in no way attributable to the City as a public employer. We reject this contention as well.

As was recounted in detail in the proposed decision, the Mayor, his staff, and other City officials, including Faulconer, Goldsmith, Chief Operating Officer Jay Goldstone (Goldstone), City Chief Financial Officer Mary Lewis (Lewis) and City Councilmember DeMaio, appeared at press conferences and other public events, used City staff, e-mail accounts, websites and other City resources, as well as the prestige of their offices, to publicize and solicit support for an initiative aimed at altering the pension benefits of City employees. To cite one of many examples, Sanders testified that he never asked Darren Pudgil, his director of communications, to keep the media informed about Sanders' efforts to publicize his pension reform proposal. But Sanders admitted that he never gave the matter much thought, because "that's what Darren thinks his job is." (R.T. Vol. II, pp. 21, 30-32 [Sanders]; see also CP Exs. 35, 38.] Sanders' admission reflects his expectation that his staff would regard the pension reform measure as City business and within the scope of their official duties, unless specifically instructed otherwise.

Aimee Faucett, the former chief of staff to Faulconer, who became the Mayor's director of policy and deputy chief of staff in January 2011, similarly explained that there was an expectation that the Mayor's staff would support his efforts at pension reform but that no one was ever explicitly advised that doing so was voluntary. These and similar explanations from others belie the notion that any serious effort was made to segregate the official duties of the

Mayor and his staff from their ostensibly *private* activities in support of the pension reform initiative. (R.T. Vol. III, pp. 140-141, 185 [Julie Dubick], Vol. IV, pp. 73-75, 92-95 [Faucett].) We agree with the ALJ that the Mayor acted as the statutory agent of the City in announcing and supporting a ballot measure to change City policy regarding employee pension benefits and in refusing to bargain with the Unions over this change in policy.

We turn then to the City's exceptions to the ALJ's application of common law agency principles.

Exception to the ALJ's Finding of Actual Authority

The City argues there can be no actual authority in this case because the City Council neither expressly or impliedly authorized Sanders to pursue a pension reform ballot measure, nor engaged in conduct that would cause Sanders to believe that he possessed such authority. Although Sanders was the City's chief negotiator in labor relations matters and had previously proposed a pension reform ballot measure to the City Council, according to the City, he did not have authority to act *independently* on such matters and was required by City policy to obtain approval from the City Council for bargaining proposals and ballot measures affecting negotiable subjects. Sanders and his chief of staff also explained that his decision to pursue a pension reform ballot initiative was based on his belief that such a measure was necessary for the City's financial health, but that they did not think a majority of the City Council, as comprised in late 2010, would approve the pension reform or place the issue before the voters. (Proposed Dec., pp. 14-15; R.T. Vol. III, pp. 152, 155 [Dubick]; CP Ex. 182.) According to the City, Sanders thus understood that he did not have and would not obtain authorization from the City Council for pension reform, which was one of the reasons for putting the measure before the voters instead.

The City's arguments are misplaced. "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.) The Civil Code makes a principal responsible to third parties for the wrongful acts of an agent in transacting the principal's business, regardless of whether the acts were authorized or ratified by the principal. (Civ. Code, §§ 2330, 2338.) An agent's authority necessarily includes the degree of discretion authorized or ratified by the principal for the agent to carry out the purposes of the agency in accordance with the interests of the principal. (*Skopp v. Weaver* (1976) 16 Cal.3d 432, 439; *Workman v. City of San Diego* (1968) 267 Cal.App.2d 36, 38.) Where an agent's discretion is broad, so, too, is the principal's liability for the wrongful conduct of its agent. (*Superior Farming Co. v. Agricultural Labor Relations Bd.* (1984) 151 Cal.App.3d 100, 117,[8] cf. *Skopp v. Weaver, supra,* 16 Cal.3d 432, 439.) By contrast, wrongful acts committed by the agent that are unrelated to the purpose of the agency will not result in liability for the principal. (Civ. Code, § 2339.) Thus, contrary to the City's contention, the determining factor here is not whether the City authorized the specific acts undertaken by the Mayor as its bargaining representative, but whether Sanders was acting within the scope of his authority, including the degree of discretion conferred on the Mayor by the City Charter to further the City's interests. (*Johnson v. Monson* (1920) 183 Cal. 149, 150-51; *Vista Verde Farms v. Agricultural Labor Relations Bd., supra,* 29 Cal.3d 307, 312.)

As noted in the proposed decision, the City Charter authorizes the Mayor to recommend legislation to the City Council as he may deem necessary (CP Ex. 8, p. 2), and there is no

[8] When interpreting the MMBA, it is appropriate to take guidance from administrative and judicial authorities interpreting the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 et seq., the California Agricultural Labor Relations Act (ALRB), Labor Code §§ 1148 et seq., and other California labor relations statutes with parallel provisions, policies and/or purposes. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608; *Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617, 623-624.)

dispute that Sanders conceived, announced and pursued the pension reform initiative for the benefit of the City and with the specific goal of improving its finances. As explained in the proposed decision, Sanders publicly announced his decision to seek a change in employee pension benefits at his November 2010 press conference, at his January 2011 State of the City speech, and again at his April 2011 press conference following his compromise with DeMaio and his supporters over the language of the initiative. Although the City insists that Sanders was free to do so as a private citizen, the fact remains that on each of these and other occasions, and in accordance with his duties as set forth in the City Charter, he emphasized that the changes to employee pension benefits were necessary *for the City's* financial well-being.

The Mayor and his policy-making staff also considered and discussed pension reform in their official capacities and on several occasions, including during the Mayor's State of the City address to the City Council, identified it as a principal goal for the remainder of his administration. (Proposed Dec., p. 41.) At the hearing, even those elected City officials who were keen to defend the Mayor's right to act as a private citizen conceded that, by the terms of the City's Charter, it is *only* the Mayor, *in his capacity as the Mayor*, who appears before the City Council to deliver a speech on the state of the City, its financial condition, and what measures are appropriate for improving that condition. (R.T. Vol. II, pp. 39, 41-42 [Sanders], Vol. III, pp. 42-43 [Goldstone].) The City Council was also well aware of the Mayor's policy decision and his efforts to implement it. It also became aware of correspondence between the City Attorney and the Unions, which documented the Mayor's repeated refusal to meet and confer with the Unions regarding Proposition B.

In light of the largely undisputed facts and circumstances of this case, we agree with the ALJ that, by want of ordinary care, the City Council allowed Sanders to believe that he could pursue a citizens' initiative to alter employee pension benefits, and that no conflict existed

between his duties as the City's chief executive officer and spokesperson in collective bargaining and his rights as a private citizen.[9] We likewise agree with the ALJ that Sanders acted with actual authority because proposing necessary legislation and negotiating pension benefits with the Unions were within the scope of the Mayor's authority and because the City acquiesced to his public promotion of the initiative, by placing the measure on the ballot, and by denying the Unions' the opportunity to meet and confer, all while accepting the considerable financial benefits resulting from the passage and implementation of Proposition B. (Civ. Code, § 2307; *Compton, supra,* at p. 5; *Ach v. Finkelstein, supra,* 264 Cal.App.2d 667, 677.)

As was also explained in the proposed decision, agency theory is used to impose liability on a respondent for the acts of its employees or representatives that were within the scope of their authority. (Proposed Dec., p. 39.) Although labor boards adhere to common law principles of agency, they routinely apply these principles with reference to the broad, remedial purposes of the statutes they administer, rather than by strict application of concepts governing an employer's responsibility to third parties for the acts of its employees. (*International Assn. of Machinists, Tool and Die Makers Lodge No. 35 v. NLRB* (1940) 311 U.S. 72, 88; *H. J. Heinz Co. v. NLRB* (1941) 311 U.S. 514, 520-521; *Circuit-Wise, Inc*. (1992) 309 NLRB 905, 908; *Big Three Indus. Gas & Equip. Co*. (1977) 230 NLRB 392, 395, enforced (5th Cir. 1978) 579 F.2d 304; *Vista Verde Farms v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 307, 312.)

Under the circumstances, making liability dependent on whether the City Council *expressly* authorized Sanders, its statutory agent in collective bargaining matters, to pursue a

[9] Actual authority may be established either by precedent authority or by subsequent ratification. (Civ. Code, § 2307; *Compton Unified School District* (2003) PERB Decision No. 1518 (*Compton*), p. 5; *Ach v. Finkelstein* (1968) 264 Cal.App.2d 667, 677.) The ALJ's discussion of agency by ratification and the City's exception thereto are discussed in greater detail below.

pension reform ballot measure would undermine the principle of bilateral negotiations by exploiting the "problematic nature of the relationship between the MMBA and the local [initiative-referendum] power." (*Voters for Responsible Retirement v. Board of Supervisors of Trinity County* (1994) 8 Cal.4th 765, 782 (*Voters for Responsible Retirement*).)[10] As explained in the proposed decision, given the extent to which the Mayor, his staff, and other City officials used the prestige of their offices to promote Proposition B, and given the City's legal responsibility to meet and confer and its supervisory responsibility over its bargaining representatives, the MMBA's meet-and-confer provisions must be construed to require the City to provide notice and opportunity to bargain over the Mayor's pension reform initiative before accepting the benefits of a unilaterally-imposed new policy. (Proposed Dec., p. 38.)

As to the City's argument that Sanders did not believe himself to possess the authority to pursue a ballot measure on behalf of the City, the proposed decision found that, because "[t]he Mayor believed pension reform was needed to eliminate the City's $73 million structural budget 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." (Proposed Dec., p. 14.) The City has not excepted to this or other factual findings that Sanders *believed himself to be acting on behalf of the City, regardless of whether his specific acts in pursuit of pension reform were expressly authorized by the Council*. At the hearing, Sanders testified that his proposed reforms, including phasing out the defined benefit plan in favor of a defined contribution plan for most employees, "were necessary for the financial health of the City." (Proposed Dec., p. 14.) Although purportedly undertaking these actions as a private citizen, as noted in the proposed decision, "[t]he Mayor emphasized that his latest proposal [for pension reform] was a critical

[10] Identified in the proposed decision as "*Trinity County.*"

objective *of his administration* and the focus *of his remaining years in office*." (Proposed Dec., p. 34, emphasis added; see also R.T. Vol. III, p. 30 [Goldstone].)

The record thus supports the ALJ's finding that Sanders acted with actual authority, because his recommendations and policy decisions regarding pension benefits and other negotiable matters were within the scope of his authority as the City's chief negotiator and because, by his own admission and the undisputed testimony of others, his acts were motivated at least in part by a purpose to serve the City.

Exceptions to the ALJ's Finding of Apparent Authority

The City also disputes the ALJ's finding of apparent authority, according to which a principal, either "intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." (Civ. Code, § 2317.) "Apparent 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." (City Exceptions, p. 27, citing *Chula Vista Elementary School District* (2004) PERB Decision No. 1647 (*Chula Vista*).) The City challenges the proposed decision's finding that employees would reasonably believe that the Mayor pursued pension reform both in his capacities as an elected official and as the City's chief executive officer, because, according to the City, the record is devoid of testimony by any City employee that he or she believed Sanders was acting in his capacity as Mayor when he spoke publicly about a pension reform initiative, or that any employee even saw or heard the Mayor's public statements. Rather, the City argues that *Inglewood Unified School District* (1990) PERB Decision No. 792 (*Inglewood*) "requires that the charging party prove by direct evidence that employees believed the purported agent was acting with the employer's authorization." We disagree.

Under *Inglewood*, the party asserting an agency relationship by way of apparent authority has the burden of proving the elements of that theory. While *Inglewood* stated that "[m]ere

surmise" is insufficient to support a theory of apparent authority (*Id*. at pp. 20-21, citing *Harris v. San Diego Flume Co.* (1891) 87 Cal. 526), the *Inglewood* majority said nothing about requiring direct evidence or any other manner for meeting this burden. We understand the rule as an *objective* one whose inquiry is what employees would reasonably believe under the circumstances. (*Chula Vista, supra,* PERB Decision No. 1647, pp. 8-9.) Like PERB's interference test, which employs a similarly objective or *reasonable person* standard, what any particular employee *subjectively* believed is not determinative. (*Clovis Unified School District (*1984) PERB Decision No. 389, p. 14.)

Moreover, the City ignores evidence in the record as to what employees, as part of the general news-consuming public, knew. It is undisputed that the Mayor's actions in support of a pension reform ballot initiative were well-publicized. Gerard Braun, the author of Sanders' January 2011 State of the City address, testified that he was aware of the Mayor's pursuit of pension reform through a ballot initiative not by virtue of anything that occurred within City Hall or the Mayor's office, but "as a consumer of news and a consumer of information." According to the Mayor's speechwriter, "everyone was aware that the Mayor was working on this and it was the subject of conversation and news broadcasts, and you know, I think my neighbors were aware of it." (R.T. Vol. I, p. 169.) Under the circumstances, members of the general public, including City employees, would reasonably conclude that the Mayor was pursuing pension reform in his capacity as an elected official and the City's chief executive officer, based on his statutorily-defined role under the City's Strong Mayor form of government and his contemporaneous and prior dealings with the Unions on pension matters, some in the form of proposed ballot initiatives. (R.T. Vol. II, p. 42 [Sanders]; CP Exs. 77, 81.)

It is likewise undisputed that the general public and the media were aware of the controversy over the Mayor's status as a private citizen when publicly supporting the initiative.

(R.T. Vol. IV, pp. 242-243; CP Exs. 77, 81, 21, 58.) Sanders admitted that he thought the transition to a 401(k)-style pension plan was essential for ensuring *the City's* financial health and that, because he wished to avoid going through the MMBA's meet-and-confer process, he chose to present and support the issue as a private citizen rather than in his official capacities as the City's Mayor. (R.T. Vol. II, pp. 44, 59; see also R.T. Vol. IV, pp. 242-243 [Pudgil].)

Contrary to the City's argument, the fact that the Mayor's speeches, press conferences and media interviews were not directed at employees *per se* does not mean that employees were unaware or that they would not reasonably believe under the circumstances that the Mayor was acting in his capacity as the City's chief executive officer and chief labor relations spokesperson when announcing and supporting the pension reform ballot initiative. Under the circumstances, City employees as part of the news-consuming general public would have also reasonably concluded that the City Council had authorized or permitted the Mayor to pursue his campaign for pension reform to avoid meeting and conferring with employee labor representatives.

Inglewood is Not Controlling for this Case

Much of the parties' briefing concerns the proper application of PERB's agency precedent, most notably *Inglewood*, *supra,* PERB Decision No. 792, in which the Board held that a school principal was not acting as an agent of the school district when he filed a retaliatory lawsuit against employees and union representatives over disputes that arose at work. For example, the City excepts to footnote 18 of the proposed decision in which the ALJ distinguished *Inglewood*'s "cautious" approach for imputing liability to a public employer. The ALJ reasoned that, unlike the Mayor, a school principle is a lower-level administrator who is not generally perceived as speaking for management so as to support a finding of apparent authority. The City argues that the Board's holding in *Inglewood* is not limited to employees who are not generally

perceived as speaking for management, "nor does the decision even suggest that different evidentiary standards might apply based on the employee's position." The Unions also devote extended discussion to PERB's *Inglewood* decision but conclude that a closer reading of it and the Board's earlier decision in *Antelope Valley Community College District* (1979) PERB Decision No. 97 (*Antelope Valley*), support the ALJ's finding of apparent authority in this case.

Initially, PERB's approach to agency issues for employers was not well-defined. In *Antelope Valley*, a two-member panel of the Board concluded that managerial and supervisory employees were acting with apparent authority of a community college district's governing board when they interfered with an organizing drive of an employee organization. Chairperson Harry Gluck argued for following private-sector precedent, according to which an employer may be held responsible for the conduct of its supervisors or managers where, under the circumstances, employees would have just cause to believe that such individuals were acting for and on behalf of management. (*Antelope Valley*, *supra*, PERB Decision No. 97, pp. 9-10, citing *International Association of Machinists v. NLRB, supra,* 311 U. S. 72.) Citing differences in the statutory definitions of "supervisor[]" under the Educational Employment Relations Act (EERA)[11] and the NLRA, Member Raymond Gonzales argued against adopting private-sector standards in favor of what he characterized as a more cautious "case-by-case" approach. (*Id*. at pp. 32-33.)[12] Because *Antelope Valley* was decided by only two Board members who disagreed in their reasoning, it is not regarded as controlling PERB precedent on

[11] EERA is codified at section 3540 et seq.

[12] In some respects, this description is misleading. The existence of agency is a question of fact or ultimate facts and thus, agency issues, regardless of the test or theory used, will generally turn on the facts of the case. (3 Witkin, Summary 10th (2005) Agency, § 93, p. 140.) While PERB's *Inglewood* holding may therefore be described as more "cautious" about assigning liability to the employer, it is no more "case-by-case" than the private-sector approach advocated by Chairman Gluck.

the subject of agency. (*Santa Ana Unified School District* (2013) PERB Decision No. 2332 (*Santa Ana*), pp. 8-10.)

The following year, the Board decided *San Diego Unified School District* (1980) PERB Decision No. 137 (*San Diego USD*). In that case, by a 3-2 vote, a school board approved a strike settlement agreement that would impose no reprisals or sanctions against those teachers who had participated in an allegedly unlawful strike. The two members making up the minority of the school board then prepared a letter of commendation, which was printed on official school stationery and signed by the two school board members with their titles. The letter was placed in the personnel files of approximately 2,500 teachers who had crossed the picket lines and the school district admitted that, like any other letter of commendation from a parent or member of the general public, such letters may be considered as a factor in future promotional opportunities and decisions. (*Id*. at pp. 2-3.) Although the employees' labor representative protested to the school board, the three school board members who had approved the strike settlement agreement did nothing to rescind and remove the letters from the teachers' files. (*Id*. at p. 4.)

In affirming the proposed decision, which concluded that the letters of commendation constituted unlawful reprisals for protected employee conduct, a Board majority in *San Diego USD* endorsed Gluck's formulation from the *Antelope Valley* decision. Although Member Barbara Moore wrote a concurring opinion, she expressed no disagreement with Gluck's discussion of agency and no subsequent PERB decision has overruled *San Diego USD*.[13]

A decade later, in *Inglewood*, *supra,* PERB Decision No. 792, the Board reversed an ALJ who had applied private-sector precedent and decided instead that a school principal was not acting as an agent of the school district when he filed a civil lawsuit against the Association and

[13] *Santa Ana, supra*, PERB Decision No. 2332, pp. 8-10, discussed the divergent paths taken by PERB and the NLRB, but expressed no preference between the two, since, under either approach, the result in that case would have been the same.

several of its members for their EERA-protected conduct. The Board decided not to follow the National Labor Relations Board's (NLRB) broad application of agency principles in this case because EERA does not include language found in the NLRA stating that the statutory definition of "employer" includes any person acting as an agent. The Board also noted that, unlike the NLRA, supervisors may organize and bargain collectively under EERA and, consequently, rank-and-file employees are less likely to believe that a school principal's retaliatory lawsuit against the association and its members was brought on behalf of the school district.[14]

The association sought judicial review of PERB's *Inglewood* decision, arguing among other things that PERB should follow private-sector precedent. (*Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767.) The appellate court noted that it was not deciding whether PERB's decision was correct, but only whether it was not "clearly erroneous." In upholding the Board's decision, the court held that PERB's reasoning and conclusion were not clearly erroneous. It did not say that PERB's interpretation of EERA was the only reasonable one, or even that it was the best interpretation of EERA. It simply said that it was *one* possible interpretation of the statute which was not "clearly erroneous" and that the agency was therefore entitled to deference.

Insofar as it goes, the City is correct that *Inglewood* does not expressly limit its holding to employees who are not generally perceived as speaking for management, nor contain language suggesting that different evidentiary standards might apply based on the employee's position. However, in *Inglewood* the only disputed issue involving agency principles pertained to the school principal. No unfair practice was attributed to the conduct of the employer's chief

[14] Member William Craib wrote an extended and persuasive dissenting opinion in which he argued, among other things, that the agency cases relied on by the majority involved contracts negotiated or entered into by a putative agent, and that such cases are not necessarily appropriate or the best authority for deciding unfair labor practice liability, which are generally more akin to torts committed by an employer's putative agent.

executive officer or to any members of its governing board purportedly acting as "private citizens" or otherwise outside their official capacities. The facts of *Inglewood* thus did not raise the issue and the Board did not deem it necessary to address the appropriate application of agency principles to any employees other than the school principal.

Other PERB decisions, however, both before and since *Inglewood*, have held that an employer's *high-ranking* officials, particularly those whose duties include employee or labor relations or collective bargaining matters, are generally presumed to speak and act on behalf of the employer such that their words and conduct may be imputed to the employer in unfair practice cases. (*San Diego USD, supra*, PERB Decision No. 137 [members of employer's governing board]; *Regents of the University of California* (1998) PERB Decision No. 1263-H, Proposed Dec., p. 45 [director of campus employee and labor relations]; *City of Monterey* (2005) PERB Decision No. 1766-M, proposed decision at p. 21 [city council acting in ostensibly neutral, quasi-judicial function in disciplinary proceedings]; *Trustees of the California State University* (2014) PERB Decision No. 2384-H, p. 41 [assistant vice president of human resources].) Indeed, *San Diego USD* teaches that a public employer may be held responsible for the actions of its highest-ranking representatives or officials, even when they are engaged in ostensibly "private" conduct that *contravenes* the employer's official policy. Although the *San Diego USD* case was not cited or discussed in the proposed decision or the parties' briefs, we agree with the ALJ that *Inglewood* and similar decisions are not controlling here insofar as they were concerned with the conduct of lower-level supervisory employees, not members of the employer's governing board or its highest-ranking executive officials.

Exceptions to the ALJ's Finding that the City Ratified Sanders' Conduct

The City's Exception No. 5 argues that the City Council's failure to disavow the Mayor's conduct does not amount to ratification of his conduct, because Sanders stated publicly that he

was pursuing the pension reform initiative and later supported Proposition B, *as a private citizen*, and because he disclaimed acting on behalf of the City. Further, the City argues that the City Council's placement of Proposition B on the ballot did not ratify the Mayor's conduct because, once a sufficient number of signatures in support of the measure had been certified, its placement on the ballot was a purely ministerial act required by the Elections Code and applicable decisional law. We reject these arguments as well.

An agency relationship may also be established by adoption or subsequent ratification of the acts of another. (Civ. Code, §§ 2307, 2310.) It is well established as a principal of labor law that where a party ratifies the conduct of another, the party adopting such conduct also accepts responsibility for any unfair practices implicated by that conduct. (*Compton, supra*, PERB Decision No. 1518, p. 5, citing *Dowd v. International Longshoremen's Assn., AFL-CIO* (11th Cir. 1992) 975 F.2d 779.) Thus, ratification may impose liability for the acts of employees or representatives, even when the principal is not at fault and takes no active part in those acts. (*Chula Vista, supra* PERB Decision No. 1647, pp. 8-11.) Ratification may be express or implied, and an implied ratification may be found if an employer fails to investigate or respond to allegations of wrongdoing by its employee. (2 Cal. Affirmative Def. § 48:13 (2d ed.).) Although not expressly authorized, acts that are within the scope of an agent's authority are subject to subsequent ratification. (*Sammis v. Stafford* (1996) 48 Cal.App.4th 1935, 1942.)

To find that a principal ratified the acts of another, thereby establishing agency after the fact, it must be shown that the principal knew or was on constructive notice of the agent's conduct and failed to disavow that conduct. (Civ. Code, § 2310; *Chula Vista, supra*, PERB Decision No. 1647, p. 8; *Compton, supra*, PERB Decision No. 1518, p. 5.) There is ample evidence that the City Council knew of Sanders' efforts to alter employee pension benefits through a ballot measure, of his use of the vestments and prestige of his office, including his

State of the City address before the Council, to promote this policy change, and, of his rejection of repeated requests from the Unions to meet and confer regarding this change. It is undisputed that the City Council never repudiated the Mayor's publicly-stated commitment to pursue a pension reform ballot measure, his public actions in support of the change in City policy, or his outright refusal to meet and confer over the decision, when repeatedly requested by the Unions to do so.

The City was also on notice of the potential legal consequences of Sanders' conduct. In response to an earlier dispute between the City and the Unions over a proposed ballot measure aimed at pension reform, in June 2008, then City Attorney Aguirre issued a legal memorandum which concluded, among other things that, because of the Mayor's position and duties, as set forth in the City Charter, a meet-and-confer obligation would attach even to an ostensibly private citizens' initiative. According to the Memo, "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." Because the Mayor would be acting with apparent authority when sponsoring 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]." (Proposed Dec., p. 12, emphasis added.)[15]

As a result of the Aguirre Memo, which remained on the City's website as a statement of City policy throughout the present controversy, the Council was on notice that, even if pursued as a private citizens' initiative, the Mayor's public support for an initiative to alter employee

[15] The City has also challenged the ALJ's reliance on former City Attorney Aguirre's Memorandum of Law, which the City claims to have repudiated by way of separate Memorandum of Law issued by current City Attorney Goldsmith, Aguirre's successor. We address this separate exception below, along with other miscellaneous exceptions.

pension benefits would be attributed to the City for purposes of MMBA liability. Indeed, similar concerns were raised in the media about the Mayor's use of the vestments and prestige of his office, including his State of the City address before the City Council, to support a pension reform ballot initiative *as a private citizen*. Responding to the "most frequently asked questions" from readers, one on-line media report, dated April 9, 2011, discussed whether Proposition B's salary cap on pensionable income complied with the City's meet-and-confer requirements under the MMBA. (CP Ex. 58.)

In addition, the City's "Electronic Mail and Internet Use" policy limits the use of City "computer equipment, electronic systems and electronic data, including Email and the Internet" to "work-related purposes only" and, in the case of e-mail, "for other purposes that benefit the City." (CP Ex. 18.) After the Mayor's November 19, 2010 press conference, his staff and Faulconer used City e-mail accounts to inform thousands of community leaders and others of their plans to alter employee pension benefits through a ballot measure. A message from Faulconer's City e-mail address stated that the Councilmember was "pleased to partner with the Mayor to put this together and take it to [the] voters." It also acknowledged that "decisions like these won't always be easy pills for some to swallow," but that Faulconer "was elected to make these types of decisions, to look out for our taxpayers, to ensure we're doing all we can with [the] tax dollars they send to City Hall." We need not determine whether the Mayor or other City officials and their staff violated the City's policies and procedures or any statutory provisions outside PERB's jurisdiction. What is relevant here is that the City Council was on notice of the Mayor's proposal and, by way of the Aguirre Memo, of the City's obligation to meet and confer over such proposals.

After it became aware of the Unions' requests for bargaining, the City Council, like the Mayor, relied on the advice of Goldsmith that no meet-and-confer obligation arose because

Proposition B was a purely "private" citizens' initiative. The City Council failed to disavow the conduct of its bargaining representative and may therefore be held responsible for the Mayor's conduct. (*Compton, supra*, PERB Decision No. 1518, p. 5.) The City Council also accepted the benefits of Proposition B with prior knowledge of the Mayor's conduct in support of its passage.

We agree with the ALJ's findings that, with knowledge of his conduct and, in large measure, notice of the potential legal consequences, the City Council acquiesced to the Mayor's actions, including his repeated rejection of the Unions' requests for bargaining, and that, by accepting the considerable financial benefits resulting from passage and implementation of Proposition B, the City Council thereby ratified the Mayor's conduct.

In light of the foregoing, we reject each of the City's exceptions to the ALJ's application of statutory and common law agency principles and adopt his findings that: (1) under the City's Strong Mayor form of governance and common law principles of agency, Sanders was a statutory agent of the City with actual authority to speak for and bind the City with respect to initial proposals in collective bargaining with the Unions; (2) under common law principles of agency, the Mayor acted with actual and apparent authority when publicly announcing and supporting a ballot measure to alter employee pension benefits; and (3) the City Council had knowledge of the Mayor's conduct, by its action and inaction, and, by accepting the benefits of Proposition B, thereby ratified his conduct.

2. **Exceptions Concerning the Constitutional Rights of Citizens and the Mayor to Petition the Government and to Legislate Directly on Matters of Local Concern**

The City's Exception Nos. 1, 7 and 8 argue that by imposing a meet-and-confer requirement, the ALJ failed to protect the constitutional right of citizens to legislate directly by initiative and Sanders' First Amendment rights, *as a private citizen*, to petition government for redress and to express his views on matters of public concern. The City does not dispute that the subject of Proposition B, employee retirement benefits, is within the MMBA's scope of

representation or that the Mayor, as the City's chief negotiator in labor relations, rejected the Unions' repeated demands to meet and confer over the pension reform proposal before the measure was placed on the ballot for voter approval. The City argues that this otherwise negotiable matter is exempt from the scope of mandatory bargaining because it was proposed and enacted through the citizens' initiative process rather than by traditional legislative means. According to the City, citizens' constitutional right to legislate through local initiative is "by its very nature and purpose a means to bypass the governing body of a public agency [emphasis omitted]" and the ALJ's attempt to "impose" a meet-and-confer requirement in this case fails to recognize that the MMBA's procedural prerequisites pertain only to actions by a public agency's *governing body* and not to a private citizens' initiative. (City Exceptions, pp. 5, 21-22.)

Like the ALJ, we disagree with the premise of the City's argument. The Mayor and other City officials were not acting solely as *private* citizens when they used City resources and the prestige of their offices to promote the pension reform ballot initiative. While the City raises some significant and difficult questions about the applicability of the MMBA's meet-and-confer requirement to a pure citizens' initiative, those issues are not implicated by the facts of this case and we therefore decline to decide them.

To the extent the City asks PERB to annul or suspend the MMBA's meet-and-confer requirement on constitutional grounds, we must decline that invitation as well. As the expert administrative agency established by the Legislature to administer collective bargaining for covered local agencies and their employees, PERB has the power and the duty to investigate and remedy unfair practices and other alleged violations of the MMBA. (MMBA, §§ 3509, subd. (a), 3511; *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 605-608.) It is now well-settled that PERB is not automatically divested of these powers and duties simply because matters of external law, including constitutional questions,

are implicated in a labor dispute. (*San Diego Mun. Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1458.) The agency may assert jurisdiction to avoid constitutional issues (*Leek v. Washington Unified School Dist.* (1981) 124 Cal.App.3d 43, 51-53) and it may interpret contractual, statutory, constitutional, judicial, regulatory, or other sources of external law when necessary to decide matters that are within the Board's jurisdiction and competence. (*San Diego Mun. Employees Assn. v. Superior Court*, *supra*, 206 Cal.App.4th 1447, 1458.)

In interpreting the MMBA and other PERB-administered statutes, PERB strives, whenever possible, to avoid conflicts with external law, including constitutional provisions. (*Certificated Employees Council v. Monterey Peninsula Unified School Dist.* (1974) 42 Cal.App.3d 328, 333-334 and *Solano County Community College District* (1982) PERB Decision No. 219, pp. 13-14.) The Board is also cautious about deciding matters outside its usual jurisdiction and expertise, particularly where, as here, the issues may be novel or the law unsettled. (*City of San Jose* (2013) PERB Decision No. 2341-M, p. 45, fn. 16; *City of Pinole* (2012) PERB Decision No. 2288-M, pp. 12-13.)

PERB's authority is not unlimited. Where a genuine conflict exists between one of our statutes and a constitutional provision, the California Constitution prohibits PERB from declaring a statute unconstitutional or unenforceable, or from refusing to enforce a statute on the basis of it being unconstitutional, unless an appellate court has determined that the statute is unconstitutional. (Cal. Const., art. III, § 3.5; *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1094-1095; see also *Southern Pac. Transportation Co. v. Public Utilities Com.* (1976) 18 Cal.3d 308, 315, Justice Mosk, concurring and dissenting.) Even if we were to agree with the City and conclude that the MMBA's meet-and-confer requirement is unconstitutional, either as a general matter or as applied by the ALJ in this case, we would lack

authority to overturn or refuse to enforce the statute, absent controlling appellate authority directing that result. (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 31; *San Diego CCD, supra,* PERB Decision No. 1467a, p. 5; *Santa Monica Community College District* (1979) PERB Decision No. 103 (*Santa Monica*), pp. 12-13.) Despite extensive briefing before the ALJ and the Board, including a request for the Board to consider recently-decided California Supreme Court authority,[16] the City has directed us to no statutory, constitutional, or controlling appellate authority that would permit, *much less require*, PERB to ignore its duty to administer the MMBA's meet-and-confer provisions under the circumstances of this case. We are not persuaded by the City's contention that the "home rule"[17] and citizens' initiative provisions of the California Constitution, whether considered separately or in tandem, compel PERB to disregard its own precedent and that of the courts and declare the MMBA's meet-and-confer requirement unenforceable in this case. Consequently, we must follow the statute as directed by the Legislature. (*San Diego CCD, supra,* PERB Decision No. 1467a, p. 5.)

While we do not purport to resolve constitutional issues, we set forth our reasoning insofar as it is necessary to respond to the City's exceptions. Under the California Constitution's home rule provisions, a city may adopt a charter giving it the power to make and enforce all ordinances and regulations in respect to municipal affairs, subject only to the restrictions included in the charter. (Cal. Const., art. XI, §§ 3(a), 5(a); 8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 993, p. 566.) Under the home rule doctrine, a charter is to

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[16] *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029 (*Tuolumne*), and similar cases interpreting the procedural requirements of the California Environmental Quality Act (CEQA), Public Resources Code, § 21000 et seq., in the context of a citizens ballot initiative, are discussed below to the extent they are relevant to the present case.

[17] The term "home rule" refers to the power of charter cities to act as sovereigns with respect to their own municipal affairs. (Cal. Const., art. 11, § 5(a); *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 11-18.)

a city what the California Constitution is to the state. That is, cities operating under home rule charters have supreme authority as to municipal affairs, or matters of strictly local or internal concern, free from any interference by the Legislature. (*State Bldg. and Const. Trades Council of Cal., AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 555-556; *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 282, 284.) However, a charter represents the supreme law of a charter city, but only *as to municipal affairs*. As to matters of statewide concern, it remains subject to preemptive state law. (Cal. Const., art. XI, § 5(a); *Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374, 385; *City of San Jose v. International Assn. of Firefighters, Local 230* (2009) 178 Cal.App.4th 408, 413.)

The courts have not advanced a precise definition of the "cryptic phrase" *municipal affairs* (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 6) and have opted instead for a case-by-case approach whereby the meaning of the term fluctuates according to changes in conditions. (*Ibid*.; *Butterworth v. Boyd* (1938) 12 Cal.2d 140; *Bishop v. City of San Jose* (1969) 1 Cal.3d 56; *Sonoma County Organization of Public Employees v. Sonoma* (1979) 23 Cal.3d 296, 314 (*SCOPE v. Sonoma*).)[18] On one point, however, they have been nearly unanimous: "local legislation may not conflict with statutes such as the Meyers-Milias-Brown Act which are intended to regulate the entire field of labor relations of affected public employees throughout the state." (*San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553, 557; *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 500, citing *Professional Fire Fighters, Inc. v. City*

[18] However, several authorities suggest that, if there is any reasonable doubt as to whether a particular matter is a municipal affair, courts will resolve the matter in favor of the legislative authority of the state and against the charter city. (45 Cal. Jur. 3d Municipalities § 187, citing *People v. Moore* (1964) 229 Cal.App.2d 221; *Dairy Belle Farms v. Brock* (1950) 97 Cal.App.2d 146; *Zack's, Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1183.)

of Los Angeles (1963) 60 Cal.2d 276, 294-295; see also *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 67.)

Even though the California Constitution's home rule provisions grant plenary power to a charter city to determine such matters as the number, compensation, method of appointment, qualifications, tenure of office and removal of deputies, clerks and other employees of the city (Cal. Const., art. XI, § 5, subds. (a), (b); see also *SCOPE v. Sonoma, supra,* 23 Cal.3d 296, 314) in *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*), the California Supreme Court has held that public agencies must nonetheless comply with the MMBA's meet-and-confer requirements *before* submitting to voters a charter amendment affecting employee wages, hours or working conditions. (*Seal Beach, supra*, at pp. 600-601.) The MMBA thus "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." (*Seal Beach, supra,* at p. 600.) Following *Seal Beach*, the law is clear: while the MMBA does not purport to supersede charters, ordinances, and local rules establishing civil service systems or other methods of administering employer-employee relations (MMBA, § 3500, subd. (a)), neither may a charter city rely on its home rule powers to ignore or evade its procedural obligations under the MMBA to meet and confer with recognized employee organizations concerning negotiable subjects. (*Seal Beach, supra,* at pp. 600-601.)

The City apparently concedes this point. As stated in Goldsmith's January 26, 2009 Memorandum of Law, "the duty to bargain in good faith established by the MMBA is a matter of statewide concern and of overriding legislative policy, and *nothing that is or is not in a city's charter can supersede that duty*." (CP Ex. 24, emphasis added, citing *City of Fresno v. People ex rel. Fresno Firefighters, IAFF Local 753* (1999) 71 Cal.App.4th 82, 100, rev. denied

(July 21, 1999).) Nevertheless, the City argues in its exceptions that *Seal Beach* and other cases are distinguishable from the present controversy because they were concerned, not with a *purely* citizen-sponsored initiative, but with ballot measures *sponsored and recommended by* a public agency's legislative body. We are likewise not persuaded by this contention, given the peculiar circumstances of this case and our agreement with the ALJ that, irrespective of the citizens' right to enact Proposition B, the Mayor's *prior* announcement of a policy change affected negotiable matters within the scope of the MMBA's meet-and-confer requirements. We explain.

In addition to the home rule powers of a charter city, the California Constitution also guarantees to the citizens of a charter city the right to legislate directly by initiative or referendum. (Cal. Const., art. II, § 11.) The initiative and referendum rights of citizens are based on "the theory that all power of government ultimately resides in the people." (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591 (*Associated Home Builders*).) The California Supreme Court has referred to the citizens' initiative-referendum right as "one of the most precious rights of our democratic process" and declared it "the duty of the courts to jealously guard [this] right of the people." (*Ibid*.) In order that the right not be improperly annulled, "[i]f doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." (*Ibid*.; see also 7 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 155, p. 281.) Thus, absent a clear showing that the Legislature intended otherwise, the local electorate's right to legislate directly is generally co-extensive with the legislative power of the local governing body. (*Totten v. Board of Supervisors of County of Ventura* (2006) 139 Cal.App.4th 826, 833.)

However, the constitutional right of a local electorate to legislate by initiative, like the home rule authority of the charter city itself, extends only to *municipal affairs.* As such, it is likewise preempted by general laws affecting matters of statewide concern. As we know from

Seal Beach, preventing labor unrest through collective bargaining is a matter of statewide concern. (*Seal Beach, supra,* 36 Cal.3d 591, 600.) Legislation establishing a uniform system of fair labor practices, including the collective bargaining process between local government agencies and employee organizations representing public employees, is "an area of statewide concern that justifies … restriction" on the local electorate's power to legislate through the initiative or referendum process. (*Voters for Responsible Retirement, supra,* 8 Cal.4th 765, 780; *Seal Beach, supra,* 36 Cal.3d 591, 600.) In sum, a charter city does not expand its power to affect statewide matters simply by acting through its electorate rather than through traditional legislative means. (*Ibid.*; *Younger v. Board of Supervisors* (1979) 93 Cal.App.3d 864, 869-870; see also *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 509-510.)

In *Voters for Responsible Retirement,* the Supreme Court recognized an implicit tension between the citizens' right to determine municipal affairs through initiative or referendum and the MMBA's purpose of promoting full communication between public employers and their employees to resolve labor disputes.

> [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.

(*Voters for Responsible Retirement, supra,* 8 Cal.4th 765, 782.)

Because *Voters for Responsible Retirement* involved interpretation of both the MMBA and a separate provision of the Elections Code restricting voters' ability to re-decide matters included in a previously-adopted Memorandum of Understanding (MOU), the Supreme Court determined that it was unnecessary to decide *which* of these two general laws of statewide

concern trumped the rights of the local electorate to legislate directly on matters affecting employee compensation. The Court concluded that, "In either case, the Legislature has made explicit its intent to restrict the referendum right for [such] ordinances, and such restriction is constitutionally justified" by "the Legislature's exercise of its preemptive power to prescribe labor relations procedures in public employment." (*Id.* at pp. 783-784.)

None of the above is to say that the MMBA necessarily preempts all voter initiatives on matters that are within the scope of bargaining. Nor do we attempt to decide that issue, since we agree with the ALJ that it was not presented by the facts of this case. Under San Diego's Strong Mayor form of government, the Mayor is a statutory agent of the City with regard to labor relations and collective bargaining matters. The ALJ reasoned from these statutorily-defined duties and by application of common law agency rules that Sanders was acting on behalf of the City in announcing and promoting a ballot initiative aimed at changing employee pension benefits. We agree with the ALJ that, given the Mayor's authority as the City's bargaining representative, the City cannot evade its meet-and-confer obligations under the circumstances by claiming he acted as a private citizen. (Proposed Dec., pp. 50-51, 53, citing *Voters for Responsible Retirement, supra,* 8 Cal.4th 765, 782-873; see also R.T. Vol. II, pp. 44, 59 [Sanders].)

The City concedes that no California court has yet decided whether the MMBA's meet-and-confer requirement was intended to apply to charter amendments to be adopted *solely* by a citizen's initiative, as opposed to one sponsored by the public agency's governing body, and if so, what is the scope of MMBA preemption. (See *Seal Beach, supra,* 36 Cal.3d 591, 599, fn. 8.) Nevertheless, it argues that *Tuolumne, supra,* 59 Cal.4th 1029 "should be dispositive" of the issues presented in this case, including whether the MMBA's procedural requirements trump the

rights of citizens to legislate directly on municipal affairs through the initiative process. Again, we are not persuaded.

Tuolumne considered the interplay of the Elections Code and the procedural requirements of CEQA when a local legislative body is confronted with a citizens' initiative. The issue presented was whether a local legislative body, when confronted with a citizens' initiative, must comply with the strict time limits set forth in the Elections Code for acting on the initiative or whether it must comply with the more time-consuming process of conducting an environmental impact report (EIR), as is generally required by CEQA.[19] The Supreme Court held that, once presented with the voters' initiative petition, the local legislative body's option of ordering a report, as set forth in the Elections Code, is the exclusive means for assessing the potential environmental impact of an initiative or "[a]ny other matters the legislative body requests" be included in such report. (*Tuolumne, supra,* at p. 1036.) Thus, contrary to the City's characterization, *Tuolumne* considered two potentially conflicting provisions of *statutory* law, the Elections Code and CEQA. Because *Tuolumne* did not directly consider, much less decide, *constitutional* issues, including whether the citizens' initiative process preempts general laws affecting matters of statewide concern, including the MMBA, it did nothing to alter the longstanding position of California courts that a charter city's authority extends only to municipal affairs, regardless of whether its citizens legislate directly by initiative or by traditional legislative means. Where local control implicates matters of statewide concern, it

[19] Under the Elections Code, a local legislative body that receives an initiative petition signed by at least 15 percent of the city's registered voters must either: (1) adopt the initiative, without alteration, within 10 days after the petition is presented; (2) immediately submit the initiative to a vote at a special election; or (3) order a report on "[a]ny … matters the legislative body requests." However, if a report is ordered, then the report must be prepared and presented within 30 days after the petition was certified as satisfying the signature requirement. Within 10 days of receiving such report, the legislative body must then either adopt the ordinance as proposed, or order an election. (Elections Code, § 9214; *Tuolumne, supra,* at p. 1036.)

must either be harmonized with the general laws of the state (*Seal Beach*) or, where a genuine conflict exists, the constitutional right of local initiative is preempted by the general laws affecting statewide concerns. (*Voters for Responsible Retirement, supra,* 8 Cal.4th 765; *Younger v. Board of Supervisors, supra,* 93 Cal.App.3d 864, 869-870.)

Moreover, *Tuolumne* and other CEQA cases offer little, if any, guidance for the issues of the present case. The *Tuolumne* Court held that a validly qualified voter-sponsored initiative is exempt from CEQA requirements and that a local legislative body has a ministerial duty to place the measure before the voters. (*Tuolumne, supra,* 59 Cal.4th at p. 1036; see also *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 785-786, 793-795; *Stein v. City of Santa Monica* (1980) 110 Cal.App.3d 458, 461; *Native American Sacred Site and Environmental Protection Assn. v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961.) By contrast, where a ballot measure is adopted by the legislative body rather than or in addition to private citizens' sponsorship, the measure is *not* exempt from CEQA's procedural requirements. (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 171 (*Friends of Sierra Madre*).) The City is thus correct that *Tuolumne* and other CEQA cases recognize "a clear distinction between voter-sponsored and city-council-generated initiatives," so that, unlike a purely citizen-sponsored initiative, a pre-election EIR, as generally mandated by CEQA, should be prepared and considered by a city council before it places its own initiative on the ballot for the voters to approve. (*Friends of Sierra Madre, supra,* at p. 189.)

However, *Toulumne* and the other CEQA cases turn, in large part, on the availability, under the Elections Code, of a reasonable, albeit abbreviated, alternative to the full EIR typically required by CEQA. That is, even if a report ordered by a local legislative body in response to a citizens' initiative must be prepared on a more expedited basis than the report envisioned by CEQA, nothing precludes it from covering the same subject matter or from making the same

findings and recommendations as might have been included in a CEQA-authorized report. (*Tuolumne, supra,* 59 Cal.4th at pp. 1039, 1041-1042.)

The City contends that the procedural requirements of the MMBA are essentially no different from CEQA's requirement of an EIR and should thus be dispensed with any time a matter is presented to a local legislative body, even if it would otherwise affect negotiable subjects under the MMBA. However, as explained in *Friends of Sierra Madre,* the "clear distinction between voter-sponsored and city-council-generated initiatives," serves a significant governmental policy by alerting voters to the extent to which a matter has been investigated before being placed on the ballot for voters to decide. (*Friends of Sierra Madre, supra,* 25 Cal.4th 165, 189.) Voters who are advised that an initiative has been placed on the ballot by their city council will assume that the city council has done so only after itself making a study and thoroughly considering the potential environmental impact of the measure.

For that reason, the CEQA cases hold that a pre-election EIR should be prepared and considered by the city council before the council decides to place a *council-generated* or *council-sponsored* initiative on the ballot. By contrast, voters have no reason to assume that the impact of a *voter*-sponsored initiative has been subjected to the same scrutiny and, therefore, will investigate and consider the potential environmental impacts more carefully before deciding whether to support or oppose the initiative. (*Friends of Sierra Madre, supra,* 25 Cal.4th 165, 190.) How or whether this particular form of notice to the voters would translate into the MMBA context is unclear, as that was not the issue in *Tuolumne* or other CEQA cases. Also questionable is the City's attempt to equate the qualitatively different procedural requirements of CEQA and the MMBA. The City does not explain how a written report would serve as an effective substitute for the essentially *bilateral* process of meeting and conferring between representatives of the City and employee organizations. (MMBA, § 3505; *Voters for*

Responsible Retirement, supra, 8 Cal.4th at p. 780 [describing the meet-and-confer requirement as "[t]he centerpiece of the MMBA"].)

In the absence of controlling appellate authority directing PERB that the meet-and-confer process is constitutionally infirm or preempted by the citizens' initiative process, we must uphold our duty to administer the MMBA. (Cal. Const., art. III, § 3.5; MMBA, §§ 3509, subd. (b), 3510; *Lockyer v. City and County of San Francisco, supra,* 33 Cal.4th 1055, 1094-1095; *San Diego CCD, supra,* PERB Decision No. 1467a, p. 5; *Santa Monica, supra,* PERB Decision No. 103, pp. 12-13.) As in other cases involving assertions of constitutional rights or defenses as well as conduct that was arguably prohibited or protected under the PERB-administered statutes, we may resolve the issues only to the extent our statutes are implicated. If the parties believe that our decision fails to resolve any underlying constitutional issues, or that our decision intrudes on constitutional rights, they are free to seek redress in the courts, having exhausted their administrative remedies. (*Regents of the University of California* (2012) PERB Decision No. 2300-H, p. 18.)

3. **Exceptions to the Proposed Remedy as *Ultra Vires***

The City's Exception No. 2 and the Proponents' brief in support of the City's exceptions argue that, because a Board-ordered remedy can only be directed against an offending party (EERA, § 3541.5, subd. (c)), the ALJ cannot order the County Registrar of Voters or any entity other than the City to nullify or rescind the election result or any of the terms of Proposition B approved by the voters. The City and the Proponents also argue that, although the private citizens groups supporting Proposition B "were never before PERB and their voice was never heard," the ALJ has nonetheless "fashioned a rescission remedy that deprives them of all their rights." (City Exceptions, p. 7.) Because we modify the proposed remedy in accordance with the discussion below, we find it unnecessary to decide the merits of these arguments.

In addition to a cease-and-desist order and posting requirement, PERB's traditional remedy for an employer's unlawful unilateral change includes restoration of the prior status quo and appropriate make-whole relief, including back pay and benefits with interest thereon, for all employees who have suffered loss as a result of the unlawful conduct. (*Regents of the University of California* (1983) PERB Decision No. 356-H.) These *restorative* and *compensatory* aspects of a Board-ordered remedy are well-established in PERB precedent and both enjoy judicial approval. (*California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 946; *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 190-91; *Oakland Unified School Dist*. v. *Public Employment Relations Bd.* (1981) 120 Cal.App.3d 1007, 1014-1015; see also *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 824 and *International Assn. of Fire Fighters Union v. City of Pleasanton* (1956) 56 Cal.App.3d 959, 979 [approving private-sector precedent requiring reversal of unilateral changes and restoration of prior status quo].)

Both the restorative and compensatory aspects of a remedial order also serve important policy objectives set forth in the MMBA and the other PERB-administered statutes. Restoring the parties and affected employees to their respective positions before the unlawful conduct occurred is critical to remedying unilateral change violations, because it prevents the employer from gaining a one-sided and unfair advantage in negotiations and thereby "forcing employees to talk the employer back to terms previously agreed to." (*County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 22-23, citing *San Mateo County Community College District* (1979) PERB Decision No. 94, pp. 14-17; see also *San Francisco Community College District* (1979) PERB Decision No. 105, p. 17 [requiring the representative to pursue negotiations from a changed position caused by the employer's unilateral action "would be tantamount to requiring it to recoup its losses at the negotiations table"].) When carried out in the context of declining

revenues, a public employer's unilateral actions "may also unfairly shift community and political pressure to employees and their organizations, and at the same time reduce the employer's accountability to the public." (*County of Santa Clara, supra*, at pp. 22-23.) In short, restoration of the prior status quo is necessary to affirm the principle of bilateralism in negotiations, which is the "centerpiece" of the MMBA and other PERB-administered statutes (*Voters for Responsible Retirement, supra,* 8 Cal.4th at p. 780), and to vindicate the authority of the exclusive representative in the eyes of employees. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51, p. 5.)

Indeed, the restorative principle is so central to the agency's remedial authority that, notwithstanding the strong public policy favoring voluntary resolution of labor disputes, PERB has rejected arbitral awards as repugnant to our statutes when they fail to fully restore the status quo and make affected employees whole for an employer's bargaining violations. (*Ramona Unified School District* (1985) PERB Decision No. 517; *Dry Creek Joint Elementary School District* (1980) PERB Order No. Ad-81a.) The Board has also admitted error and granted an injured party's request for reconsideration when the remedial order in a unilateral change case failed to provide for make-whole relief. (*Regents of the University of California (Davis)* (2011) PERB Decision No. 2101a-H, p. 5.)

No less important is the compensatory aspect of the Board's standard remedy for a unilateral change. An award of back pay and other make-whole relief ensures that employees are not effectively punished for exercising their statutorily-protected rights. A back pay or other monetary award also provides a financial disincentive and thus a deterrent against future unlawful conduct. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13, and authorities cited therein.) In light of the above precedent and policy considerations, we therefore start with the presumption that the appropriate remedy in this or any other unilateral change case must

include full restoration of the parties to their previous positions and appropriate make-whole relief for any and all employees affected by the unlawful conduct. We next examine the language of the MMBA and applicable decisional law in light of the City's and Proponents' arguments that the proposed remedy exceeds PERB's authority.

In transferring jurisdiction over most MMBA matters from the superior courts to PERB, the Legislature directed PERB to interpret and apply the MMBA's unfair labor practice provisions "in a manner consistent with and in accordance with judicial interpretations" of the Act. (MMBA, §§ 3509, subd. (b), 3510.) It also granted PERB broad powers to remedy unfair practices or other violations of the MMBA and to take any other action the Board deems necessary to effectuate its purposes. (MMBA, § 3509, subd. (a); EERA, §§ 3541.3, subds. (i), (n), 3541.5, subd. (c); *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd., supra,* 210 Cal.App.3d 178, 189-190.)

While PERB's remedial authority is thus broad, it is limited to what is "reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purposes," and we do not presume that by transferring MMBA jurisdiction to PERB, the Legislature intended to transfer to PERB the full scope of remedial powers exercised by the courts. (*McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 359.) Rather, the Legislature made PERB's authority with respect to the MMBA identical to those powers and duties previously delegated to PERB under EERA and other PERB-administered statutes. (EERA, § 3541.3; *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1087-1091.) Thus, PERB may not itself enjoin a respondent from committing unfair practices or other violations of our statutes, even when PERB is convinced that such acts will result in irreparable harm to the charging party or the public interest. Rather, PERB must file an action with a superior court in order to enjoin the respondent's allegedly

unlawful conduct. (MMBA, § 3509, subd. (a); EERA, §3541.3, subd. (j).) Similarly, in an action to recover damages due to an unlawful strike, PERB lacks the authority of the courts to award strike-preparation expenses as damages or to award damages for costs, expenses, or revenue losses incurred during, or as a consequence of, an unlawful strike. (MMBA, § 3509, subd. (b); see also *United Farm Workers of America v. Agricultural Labor Relations Bd.* (1995) 41 Cal.App.4th 303, 322-326.)

PERB's authority to annul an ordinance or other local rule whose substantive terms are inconsistent with the provisions, policies or purposes of the MMBA is not in question. (MMBA, §§ 3507, subd. (a), 3509, subd. (g); *County of Amador* (2013) PERB Decision No. 2318-M, p. 11; *County of Imperial* (2007) PERB Decision No. 1916-M; *County of Calaveras* (2012) PERB Decision No. 2252-M, pp. 4-5; *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 201-202 and n. 12.) Nor in question is PERB's authority to order an offending public agency to enact or amend an ordinance to remedy a procedural violation of the MMBA. (*San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553, 557-558; see also MMBA, §§ 3509, subd. (b), 3510, subd. (a).) However, we have located no authority holding that PERB's remedial authority includes the power to overturn a municipal election.[20]

The California Supreme Court has declared it "the duty of *the courts*" to "jealously guard" the initiative-referendum right (*Associated Home Builders*, *supra*, 18 Cal.3d 582, 591, emphasis added) and the Attorney General has similarly opined that the judicial writ of *quo warranto* "may be an appropriate process" to challenge the validity of a voter-approved charter amendment allegedly placed on the ballot before exhaustion of the MMBA's meet-and-confer

[20] The issue was arguably raised but not squarely answered by the appellate court in *International Federation of Professional & Technical Engineers, AFL-CIO v. Bunch* (1995) 40 Cal.App.4th 670.

requirements. (*City of Bakersfield* (2012) 95 Ops.Cal.Atty.Gen. 31, at p. 3.) Indeed, there is appellate authority holding that *quo warranto* is *the exclusive* means to nullify a voter-approved charter amendment due to procedural irregularities, including a public employer's failure to satisfy its meet-and-confer obligations under the MMBA. (*International Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 698; see also *City of Coronado v. Sexton* (1964) 227 Cal.App.2d 444, 451-453 [*dicta*].) In *Seal Beach, supra,* 36 Cal.3d at p. 595, the Attorney General granted the representatives of city employees leave to sue the City of Seal Beach in *quo warranto* after the city's voters passed a city council-sponsored ballot measure that amended the city charter to require summary dismissal from employment of any employee who participated in a strike. However, in *Seal Beach*, the appropriateness of *quo warranto* proceedings to test the regularity of a voter-approved initiative was "not questioned" and therefore not determined by the Court. (*Seal Beach, supra,* at p. 595, fn. 3.)

In other cases, the California Supreme Court and the Courts of Appeal have held that an invalid statute or ordinance may also be challenged on constitutional or statutory grounds by a petition for writ of mandamus or an action for declaratory relief resulting in a judicial determination that the measure is invalid. (*Friends of Sierra Madre, supra,* 25 Cal.4th 165, 192, fn. 17 [mandamus]; *Walker v. Los Angeles County* (1961) 55 Cal.2d 626, 637 ["The interpretation of ordinances and statutes are proper matters for declaratory relief."]; *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (2003) 113 Cal.App.4th 465, 482-483 [declaratory relief]; see also *Howard Jarvis Taxpayers Assn. v. City of San Diego* (2004) 120 Cal.App.4th 374, 379; and *Hoyt v. Board of Civil Service Com'rs of City of Los Angeles* (1942) 21 Cal.2d 399, 402 [holding Code of Civ. Proc. § 1060 authorizes declaratory relief to determine validity of city's ordinance].)

Whatever the appropriate civil action for challenging and overturning the results of a municipal election, statutory and decisional law refer only to *the courts* as the source of such relief, either in the form of a writ (Code Civ. Proc., §§ 803 [*quo warranto*], 1085 [mandamus]) or as an action for declaratory relief *resulting in a judicial determination* as to the validity of the challenged statute or ordinance. (Code Civ. Proc., § 1060; *Hoyt v. Board of Civil Service Com'rs, supra,* 21 Cal.2d 399, 405-406.) Given the significance of the citizens' initiative-referendum process as "one of the most precious rights of our democratic process," and the Supreme Court's declaration that it is "*the duty of the courts* to jealously guard this right" (*Associated Home Builders, supra*, 18 Cal.3d 582, 591, emphasis added), we decline to insert ourselves into the municipal electoral process or into disputes that properly belong in the courts. (Cal. Const., art. VI, § 1; *McHugh v. Santa Monica Rent Control Bd., supra,* 49 Cal.3d 348, 374.) We therefore do not adopt that portion of the proposed decision invalidating the results of the June 12, 2012 election in which the City's electorate adopted Proposition B.[21] We emphasize, however, that the agency is not powerless to order an effective make-whole remedy in this case.

To satisfy the compensatory aspect of PERB's traditional remedy for an employer's unilateral change, we will direct the City to pay employees for all lost compensation, including but not limited to the value of lost pension benefits, resulting from the enactment of Proposition B, offset by the value of new benefits required from the City under Proposition B.

[21] We are aware of no impediment to our consideration of a request for injunctive relief prior to a proposed charter amendment is voted upon by the electorate, if a charging party has alleged a prima facie violation of MMBA or another of our statutes and injunctive relief is appropriate to preserve the status quo and PERB's ability to order a remedy upon completion of our administrative process. (*Public Employment Relations Bd. v. Modesto City Schools District* (1982) 136 Cal.App.3d 881, 895-896; see also *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 780 [declaratory relief appropriate remedy before certification of election results].)

Such payments shall continue as long as Proposition B is in effect or until such time as the Unions and the City have *mutually* agreed otherwise. As with other monetary awards of back pay and/or benefits, the dollar amount shall be compounded with interest at the rate of seven (7) percent per annum.

To satisfy the restorative principle of PERB's traditional remedy and to vindicate the authority of the Unions as the exclusive representatives of the City employees, we will direct the City, at the Unions' options, to join in and/or to reimburse the Unions for legal fees and costs for bringing a *quo warranto* or other civil action aimed at overturning the municipal electorate's adoption of Proposition B. In other instances where a remedial measure is subject to the jurisdiction of another tribunal, PERB has ordered the offending party to join, initiate, or prosecute such litigation before that tribunal as may be necessary to restore the parties to their respective positions before the unlawful conduct occurred and make affected employees whole. (*Omnitrans* (2009) PERB Decision No. 2030-M (*Omnitrans*), p. 33; *County of San Joaquin (Health Care Services)* (2003) PERB Decision No. 1524-M (*County of San Joaquin*), pp. 2-3; *California Union of Safety Employees (Coelho)* (1994) PERB Decision No. 1032-S (*Coelho*), p. 18; see also *California Union of Safety Employees (Baima)* (1993) PERB Decision No. 967-S, p. 4.) In *Omnitrans*, the Board ordered the respondent to join an employee in petitioning the appropriate superior court to expunge all records related to the employee's arrest and prosecution for criminal trespass, which had been caused by respondent's unlawful denial of union access rights. (*Id*. at p. 33.) Similarly, in *Coelho*, the Board ordered the respondent to withdraw a citizen's complaint filed with an administrative agency against an employee for an unlawful, retaliatory purpose. (*Id*. at p. 18.)

PERB has also ordered a respondent to reimburse the injured party for attorneys' fees and costs incurred for litigation before other tribunals when such litigation is necessary to fully

remedy an unfair practice. In *County of San Joaquin, supra,* PERB Decision No. 1524-M, PERB ordered a public employer to pay attorneys' fees for an employee who had been forced to defend himself in separate proceedings before a medical evaluation committee. The Board explained that an award of attorneys' fees was appropriate, because the employer had initiated the administrative complaint process against the employee for an unlawful, retaliatory purpose and thus the standard PERB remedy of restoring the parties to their respective positions before the unlawful conduct occurred and making affected employees whole required reimbursement of the employee's losses caused by the employer's unlawful conduct. (*Ibid*.)

As a general rule, a labor board should not place the consequences of its own limitations on injured parties or affected employees who appear before it and thereby allow an offending respondent to benefit from its unlawful conduct. (*Mt. San Antonio Community College Dist. v. Public Employment Relations Bd., supra*, 210 Cal.App.3d 178, 190, citing *NLRB v. J. H. Rutter-Rex Mfg. Co.* (1969) 396 U.S. 258, 265; *Bertuccio v. Agricultural Labor Relations Bd.* (1988) 202 Cal.App.3d 1369, 1390-1391; *International Union of Electrical, Radio & Machine Workers v, NLRB (Tiidee Products)* (D.C. Cir. 1970) 426 F.2d 1243; see also *City of Pasadena, supra,* PERB Order No. Ad-406-M, pp. 13-14.)

As in *Omnitrans* and other cases where the Board lacked jurisdiction to effect a complete make-whole remedy *directly*, ordering the City, at the Unions' option, to join and/or reimburse legal fees and costs for litigation undertaken by the Unions to rescind the election approving Proposition B, is necessary for the Unions to obtain complete relief from the City's refusal to meet and confer. Failure to include such an order would undermine the Unions' authority in the eyes of the employees they represent, reward the City for its unlawful conduct, and subvert the principle of bilateral dispute resolution that is at the core of the MMBA. (*City of Pasadena, supra*, PERB Order No. Ad-406, p. 13.)

The City and the Proponents argue that *any* restorative remedy in this case which would result in overturning Proposition B is improper, because PERB cannot regulate election law or decide "constitutional" questions. However, these arguments miss the point. As the above cases illustrate, the fact that the Board has no authority to regulate matters within the jurisdiction of another tribunal does not prevent it from ordering the offending party in an unfair practice case to initiate, pursue, withdraw and/or pay the costs of separate litigation before such tribunal, whenever necessary to remedy unlawful conduct within PERB's jurisdiction. (*Omnitrans, supra*, PERB Decision No. 2030-M, p. 33; *County of San Joaquin, supra*, PERB Decision No. 1524-M, pp. 2-3.)

We express no opinion on the merits of a petition for writ of mandate, *quo warranto* or any other action or special proceeding the Unions may wish to pursue to obtain a complete restorative and make-whole remedy in this case. We simply order that the City, as the offending party, rather than the Unions and employees, bear the costs of pursuing complete relief in the courts. Nor do we think that the remedial order outlined above would give the Unions *carte blanche* to pursue frivolous litigation at the City's and ultimately the taxpayers' expense as a way to punish the City. Frivolous or vexatious litigation before the courts is within the competence and jurisdiction of the courts to remedy, if necessary. (Code Civ. Proc., §§ 128.5, 425.16, 907, 1038; Cal. Rules of Court, rules 8.276, 8.544.)

Additionally, we do not agree with the City and the Proponents that the ALJ's proposed remedy in this case, or *any* Board-ordered remedy, is necessarily defective because it adversely affects persons who were not parties to these proceedings or over whom PERB has no jurisdiction. It is true, as the City and the Proponents point out, that the statute only explicitly authorizes PERB to order a remedy against an offending party. (MMBA, § 3509, subd. (a) [incorporating by reference EERA, § 3541.5, subd. (c)].) However, the fact that third parties

beyond the Board's jurisdiction have benefitted by the unlawful conduct of a respondent in unfair practice proceedings does not preclude PERB from ordering the offending party to take whatever steps may be necessary to remedy its unlawful conduct and effectuate the statute's policies and purposes, including actions that may indirectly affect third parties.

In *Folsom-Cordova Unified School District* (2004) PERB Decision No. 1712 (*Folsom-Cordova*), PERB determined that a public school employer had entered into a contract with a private bus company to provide transportation services for students without providing the exclusive representative notice and opportunity to bargain. As in other unilateral change cases, the Board ordered its traditional restorative and make-whole remedy, including an order for the school district to rescind its agreements with the private bus company. There was no suggestion in *Folsom-Cordova* that the private bus company had acted unlawfully, that the substantive terms of its agreement with the school district were unlawful, or even that it was subject to PERB's jurisdiction. Not only was the private bus company not a party to PERB's proceedings, but, as far as PERB was concerned, its only action was to exercise its constitutionally-protected freedom to contract. (Cal. Const., art. I, § 1; *Ex parte Drexel* (1905) 147 Cal. 763, 764 [inalienable right to "liberty" includes freedom of contract]; *Ex parte Dickey* (1904) 144 Cal. 234, 235 [inalienable right to "property" includes freedom to contract]; U.S. Const. amend. XIV, § 1; *Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 572 [liberty interest protected by due process clause includes freedom of contract].) Nevertheless, as explained above, PERB's powers and duties extend to administration of the MMBA and California's other public-sector labor relations statutes. Although the Board should strive wherever possible to avoid interpreting those statutes in a manner that conflicts with external law, we are not free to disregard that statutory responsibility, unless directed by the Legislature or appellate authority to do so, even when the rights of third parties outside our

jurisdiction may be affected by a Board-ordered remedy. (Cal. Const., art. III, § 3.5; *Lockyer v. City and County of San Francisco, supra,* 33 Cal.4th 1055, 1094-1095.)

The remedy in *Folsom-Cordova*, including the Board's order to rescind existing agreements with a third party not subject to PERB jurisdiction, is in accord with judicial authority. In *San Diego Adult Educators v. Public Employment Relations Bd.* (1990) 223 Cal.App.3d 1124, the Court of Appeal affirmed PERB's decision that a public school employer had committed an unfair practice by contracting out the instruction of so-called "minor" language courses and terminating the employment of exclusively-represented teachers without first bargaining with their representative. The Court of Appeal affirmed that part of the Board's order which directed the school district to rescind its agreement with the contracting entity and to reinstate the laid-off teachers with back pay and benefits. (*San Diego Adult Educators, supra*, at pp. 1135, 1137-1138.)

In light of PERB and judicial precedent, we must reject the City's and the Proponents' argument that we lack jurisdiction to order our traditional restorative and make-whole remedy for the City's unilateral change in this case, solely because it may adversely affect the rights of persons who were not parties to these proceedings and are outside the Board's jurisdiction.

4. **Miscellaneous Issues in the City's Exceptions and the Proponent's Amicus Brief**

Whether the Mayor's Announcement and Pursuit of a Pension Reform Ballot Initiative Constituted a Firm Decision to Change Policy on Negotiable Subjects

As noted in the proposed decision, the City does not deny that it altered its established policy affecting employee pension benefits[22] without providing the Unions with notice or

[22] The City does not dispute that pension benefits are generally a negotiable subject and, aside from its argument that the Mayor's pension reform proposal was brought as a citizens' initiative, which we reject, it has offered no other reason why PERB should disregard long-standing private and public-sector precedent treating pension benefits as negotiable. (*Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass*

opportunity to meet and confer. In its Exception No. 9, the City argues that the ALJ erred in determining that the Mayor, by merely announcing his desire to pursue pension reform by initiative as a private citizen, had made a "determination of policy" within the meaning of the MMBA and PERB decisional law. (City Exceptions, p. 3.) Elsewhere in this decision we address the City's related argument that Sanders was acting as a "private citizen" rather than an agent of the City when he announced his objective for pension reform. Here, it is sufficient to note that the City misstates PERB precedent regarding unilateral changes, by asserting, among other things, that a change in policy affecting negotiable subjects must have been "*implemented* before the employer notified the union and gave the union the opportunity to request negotiations." (City Exceptions, p. 3, emphasis added.)

An employer commits an unlawful unilateral change when it: (1) takes action to change a policy; (2) affecting a matter within the scope of representation; (3) and having a generalized effect or continuing impact upon terms and conditions of employment; (4) without providing notice or opportunity to meet and confer or completing its duty to bargain with the union through impasse or agreement. (*County of Santa Clara, supra,* PERB Decision No. 2321-M, pp. 21-22; *Pasadena Area Community College District* (2015) PERB Decision No. 2444, pp. 11-12.) As we observed in *City of Sacramento* (2013) PERB Decision No. 2351-M, the alleged violation occurs on the date when the employer made a firm decision to change the policy, even if the change itself is not scheduled to take effect until a later date or never takes effect. (*Id.* at p. 27, citing *Anaheim Union High School District* (1982) PERB Decision No. 201; *Eureka City School*

Co. (1971) 404 U.S. 157; *County of Sacramento* (2009) PERB Decision No. 2045-M, pp. 2-3; *County of Sacramento* (2008) PERB Decision No. 1943-M, pp. 11-12; *Madera Unified School District* (2007) PERB Decision No. 1907, p. 2; *Temple City Unified School District* (1989) PERB Decision No. 782, pp. 11-13; *Temple City Unified School District* (1990) PERB Decision No. 814, p. 10; *Clovis Unified School District* (2002) PERB Decision No. 1504 (*Clovis*), pp. 17-18; *Palo Verde Unified School District* (1983) PERB Decision No. 321, p. 8, fn. 3.)

District (1992) PERB Decision No. 955; *Clovis, supra,* PERB Decision No. 1504.) Thus, "[a]n employer violates its duty to bargain in good faith when it fails to afford the employees' representative reasonable advance notice and an opportunity to bargain *before reaching a firm decision* to establish or change a policy within the scope of representation, or before implementing a new or changed policy not within the scope of representation but having a foreseeable effect on matters within the scope of representation." (*Id*. at p. 28, emphasis added.)

Among the authorities discussed in *City of Sacramento, supra,* PERB Decision No. 2351-M, was *Clovis,* in which an employer sought to avoid paying employer contributions to the federal Social Security program by organizing an election in which employees could determine, by majority vote, whether to opt-out of the program. After convening several meetings with employees to discuss the benefits of opting-out, the employer conducted the election, but then took no further steps to change its own, or the employees' Social Security contributions, pending resolution of an unfair practice charge filed by the employees' representative. Significantly, the *Clovis* Board rejected the employer's defense that, even though a majority of employees had voted to opt-out of Social Security, it had taken no action to implement the proposed changes in employee benefits and had therefore never consummated a unilateral lateral change in policy. (*Clovis, supra,* PERB Decision No. 1504, pp. 19-23.) *Clovis* demonstrates that, even if an employer does not *implement* a change in policy, if its conduct indicates a "clear intent" to pursue a change in negotiable matters without providing the representative with prior notice and opportunity to bargain, it has satisfied the criterion of making a change in policy under PERB's test for a unilateral change. (*Ibid*.)

The City also makes much of the fact that some of the details of the pension reform initiative championed by Sanders changed between the Mayor's November 2010 press conference and the compromise reached in April 2011 with DeMaio and the citizens groups.

It argues that the CPRI unveiled in April 2011 was "markedly different" from the Mayor's initial proposal and that the Mayor's contribution to and support for the compromise language "do[] not make [the initiative] his, or the City's, determination of policy nor the implementation of a policy determination of the Mayor." (City Exceptions, p. 26.) We disagree.

The determinative facts in this case are not how much the Mayor was compelled to compromise to pursue his objective of pension reform or whether the compromise language ultimately agreed upon more closely resembled the Mayor's November 2010 proposal or that initially championed by other City officials or interest groups. Rather, the significant facts in the ALJ's analysis and in our estimation as well are as follows: The Mayor's November 2010 press conference and other conduct indicated a clear intent or firm decision to sponsor and support a voter initiative to "permanently fix" the problem of "unsustainable" pension costs by, among other things, phasing out the City's defined benefit plan with a defined contribution plan for all new hires, except police and firefighters. The Mayor admitted it was *his* decision to purse the pension reform objectives through a citizens' initiative, a decision which Sanders believed absolved the City of any meet-and-confer obligations. (R.T. Vol. II, p. 46.) After several weeks of negotiations, the Mayor reached a compromise proposal with DeMaio and his supporters, which, if approved by voters, would replace the City's defined benefit plan with a defined contribution plan for new hires represented by the Unions. Despite some change, the essence of the Mayor's initial proposal and Proposition B affected negotiable subjects in the same manner and, to the extent the two proposals differed, it was in response to pressures by other City officials and interest groups and not the result of meeting and conferring with the employees' representatives.

Continuity Between the Mayor's Initial Pension Reform Proposal and Proposition B

In the alternative, the City argues in Exception No. 3, that the ALJ erroneously confused and conflated the Mayor's ideas of pension reform with those supported by the citizen groups who sponsored Proposition B. The City thus contends that PERB may not impute liability to the City for the passage of Proposition B because it bears no relationship to the pension reform measure proposed by the Mayor in November 2010. According to this line of argument, even assuming the Mayor announced a change in policy, the policy change that eventually resulted was dramatically different and, moreover, attributable to the efforts of non-governmental actors, such that no liability should exist. We disagree.

The essence of the Mayor's plan to "permanently fix" the problem of "unsustainable" pension costs was to replace the City's defined benefit plan with a 401(k)-style defined contribution plan for all new hires, except safety employees (police, firefighters and lifeguards). His initial plan, like that of Councilmember DeMaio's so-called *roadmap for recovery* plan, included other features as well, but *both* plans would implement a defined contribution plan for new hires. Officials of the Lincoln Club, the San Diego Taxpayers Association, the Chamber of Commerce and other business and special interest groups criticized the Mayor's proposal as insufficiently "tough." These same individuals and groups also informed the Mayor and DeMaio that they would not fund and support two competing measures and that they were prepared to move forward on the DeMaio proposal with or without the Mayor. Nevertheless, no signatures were gathered for several weeks and both campaigns were effectively put on hold while Sanders, DeMaio and others attempted to negotiate a compromise that would result in one measure to be placed before the voters. After weeks of negotiations, the two sides agreed on the language of the CPRI, which Sanders continued to portray as *his* proposal.

These undisputed facts undermine the City's arguments that Proposition B traces its roots only to the DeMaio plan but not to the Mayor's plan. The actual language of Proposition B was not drafted, and consequently no signatures were gathered, until *after* the Mayor and DeMaio camps had reached a compromise. While the resulting language was not identical to either the Mayor's or the DeMaio plan, both sides were sufficiently satisfied with the compromise that they threw their support behind the initiative. Although he described the negotiations as "tough," Sanders admitted that he "got many things [he] wanted" as a result of the compromise language. He was an enthusiastic supporter of the CPRI as the signature-gathering campaign got underway. (R.T. Vol. II, pp. 188-189.) Indeed, Sanders financed and endorsed signature-gathering efforts and he told representatives of the City's firefighters that he had raised approximately $100,000 in support of the initiative. (R.T. Vol. II, p. 189.)

Even at the formative stages, before the language of Proposition B had been hammered out, the Lincoln Club and others considered Sanders' participation in the discussion important enough that meetings were scheduled, cancelled and re-scheduled to accommodate his schedule. (CP Ex. 35; R.T. Vol. II, p. 26.) While the Chamber of Commerce and other special interest groups who initially supported the DeMaio proposal told the Mayor that they would only back one ballot initiative, and that they were prepared to move forward with the DeMaio proposal even without the Mayor, that does not explain why they placed the campaign on hold for several weeks to allow for a compromise between Sanders and DeMaio. The Mayor's participation and support were apparently important enough to the initiative's success that even the advocates of the DeMaio proposals were willing to wait and to accept language deemed less "tough," if it meant having the Mayor's public support for the initiative.

For the purpose of PERB's unilateral change analysis, the relevant inquiry is not whether Sanders achieved all of his political objectives through the compromise language of

Proposition B but whether he, as the City's designated representative in collective bargaining, reached a firm decision to change City policy and whether he and other City officials and employees took concrete steps toward implementing the new policy. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 27, and authorities cited therein.) The record amply supports the ALJ's findings that Sanders and other persons acting on behalf of the City took concrete steps toward implementing the Mayor's policy objective, as announced in Sanders' State of the City speech and elsewhere, of altering employee pension benefits.

Whether the City's Ministerial Duty to Place Proposition B on the Ballot Eviscerates any Duty to Bargain over the Mayor's Policy Decision or Alternative Ballot Measures

The Proponents contend that the proposed decision fails to reveal what options the parties could have discussed in any meet-and-confer process, though they acknowledge in the following sentence the ALJ's observation that the City Council could have placed a competing measure on the ballot.[23] They also argue that the Unions waived any right to meeting and conferring by failing to allege in any of the unfair practice charges that they made any proposal for a competing measure or for any other course of action. We reject this argument.

Following well-settled private-sector precedent, PERB has long held that the employees' representative is not obligated to make proposals or even to request bargaining, when the employer has already reached a firm decision to change policy and does not waver from that decision. (*State of California (Department of Veterans Affairs)* (2010) PERB Decision No. 2110-S, pp. 5-6; see also *S & I Transportation,, Inc.* (1993) 311 NLRB 1388, 1389;

[23] Indeed, the City Council has previously taken this course of action. (See *Howard Jarvis Taxpayers Assn. v. City of San Diego, supra,* 120 Cal.App.4th 374 [where Council disapproved of ballot measure known as Proposition E to require super majority vote to approve tax increases, it placed on the ballot competing measure, Proposition F, which would require a super majority vote to approve Proposition E].)

Ciba-Geigy Pharm. Div. (1982) 264 NRLB 1013, 1017; *Roll & Hold Warehouse & Distribution Corp.* (1997) 325 NLRB 41, affd. (7th Cir. 1998) 162 F.3d 513, 519-520.)

The proposed decision found that the Unions did not demand to bargain over Proposition B per se but over the Mayor's policy decision to alter employee pension benefits, including the contents of his proposed ballot measure to reform employee pensions. (Proposed Dec., pp. 27, 47-48.) As noted in the proposed decision, even accepting the City's characterization of Proposition B as a purely citizens' initiative, the Unions' demands also contemplated the possibility of bargaining over an alternative or competing measure on the subject. (*Id*. at p. 48, fn. 19.) In any event, the City's steadfast refusal to respond to the Unions' requests consummated the Mayor's policy decision to reform pension benefits and thereby alter terms and conditions of employment. As discussed above, in the face of a fait accompli, it would make little sense to require a union to engage in the idle act of making proposals or demanding bargaining over a decision that had already been reached and announced to employees as a *fait accompli*. (*City of Sacramento, supra,* PERB Decision No. 2351-M, p. 33; *County of Santa Clara, supra,* PERB Decision No. 2321-M, pp. 28-29.)

Whether the ALJ Erred in Considering a 2008 City Attorney Opinion Which the City Now Claims to Have Repudiated

The City's Exception No. 4 contends that the ALJ placed great emphasis on a Memorandum of Law authored in 2008 by former City Attorney Aguirre but that the Aguirre Memo had no proper place in the ALJ's analysis because, among other things, the Memo's reasoning and conclusions were wrong, and because the current City Attorney and the Mayor gave no credence to the Aguirre Memo. We disagree.

The Aguirre Memo acknowledged that the Mayor has the same rights as any other citizen with respect to elections and ballot measures, and that he may, as a private citizen, initiate or sponsor a voter petition drive to achieve his aim of retirement reform. However, Aguirre also

noted, that "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." According to Aguirre, because the Mayor would be acting with apparent authority when sponsoring 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]." (Proposed Dec., p. 12, emphasis added.)

A subsequent memorandum of January 26, 2009, authored by Aguirre's successor Goldsmith did not specifically address City-sponsored charter initiatives. (Proposed Dec., p. 13.) Moreover, the Aguirre Memo remained published on the City's website, even after Goldsmith issued his memo. Thus, it is doubtful whether the City *repudiated* the legal analysis set forth in Aguirre's Memo, as it now claims, at least on the issue of the Mayor's status as an agent of the City when supporting a private citizens' initiative for pension reform.

Whether the City has since repudiated the June 19, 2008, legal opinion of its former City Attorney is of no more consequence here than the Mayor's testimony that he did not recall the relevant portion of the memorandum stating that meeting and conferring with the Unions would be required before finalizing language to place on the ballot.[24] The central legal issue before the ALJ was whether the City had unlawfully refused to meet and confer over negotiable matters – whether, under color of his office, the Mayor had made and publicly announced a policy

[24] It is likewise irrelevant whether, as the City argues, the Unions' successful prosecution of a previous unfair practice charge in *City of San Diego (Office of the City Attorney)* (2010) PERB Decision No. 2103-M for Aguirre's unlawful direct communications with exclusively-represented employees demonstrates that they "had nothing but contempt for Aguirre's legal views, especially as to the MMBA." (Emphasis omitted.) What is at issue in this case is whether the City violated the MMBA by making a firm decision to change policy affecting negotiable matters without affording the Unions notice or opportunity to meet and confer, not whether the City did so with malice aforethought or knowledge that it was violating the MMBA.

determination to pursue pension reform without first giving notice and opportunity to the various representatives of City employees to meet and confer over pension reform. Following the U.S. Supreme Court's position in *NLRB v. Katz* (1962) 369 U.S. 736, California courts have adopted the private-sector view that unilateral action affecting mandatory subjects of bargaining constitutes a per se violation of the MMBA for which no showing of bad faith or unlawful intent is necessary. (*Vernon Fire Fighters v. City of Vernon, supra,* 107 Cal.App.3d 802, 824, citing *Katz*; *International Assn. of Fire Fighters Union v. City of Pleasanton, supra,* 56 Cal.App.3d 959, 967-968; see also *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 15.) Because unlawful intent is not a requirement for proving a unilateral change, what is at issue here is not the City's repudiation or the Mayor's inability to recall a legal opinion of its former City Attorney, but the soundness of the legal reasoning included in that opinion.

On that point, we agree with the ALJ's determination that the Aguirre Memo accurately describes the City's duty to bargain under the MMBA by noting that the Mayor "has ostensible or apparent authority to negotiate with the employee labor organizations over any ballot measure he sponsors or initiates, including a voter-initiative," and that the City "would have the same meet-and-confer obligations with its unions over a voter-initiative sponsored by the Mayor as with any City proposal implicating wages, hours, or other terms and conditions of employment." Council Policy 300-06 (the City's local labor relations policy) defines the labor relations authority of the "City" as including "the City Council or any duly authorized City representative," which, as the ALJ noted, includes the Mayor, particularly under the Strong Mayor form of government which recognizes the Mayor's authority as the City's spokesperson in labor negotiations to negotiate on behalf of the City over his ballot proposals to amend the charter. (Proposed Dec., p. 12.) Thus, regardless of whether Aguirre's Memo survives as a

statement of City policy, other City policies as well as the policies and purposes of the MMBA make the City liable for the conduct of the Mayor in labor relations matters, including his announcement that he would pursue a citizens' initiative to achieve pension reform and thereby "permanently fix" the City's problem of "unsustainable" pension costs.

The Aguirre Memo *is relevant* to the extent the City Council was on notice that the Mayor's public support for a pension reform ballot initiative, including one ostensibly brought by private citizens, would implicate a meet-and-confer requirement. Despite this knowledge, the City Council failed to exercise any supervision over the Mayor in this regard and thus it was entirely appropriate for the ALJ to conclude that the City Council at least impliedly ratified the Mayor's conduct.

Whether "Imposing" a Meet-and-Confer Requirement Serves a Legitimate Policy Objective

Proponents also contend that the proposed decision presents no "real" policy argument for why the MMBA should apply to a citizen-sponsored measure pre-election. However, the ALJ did not conclude that the MMBA requires a public agency to meet and confer regarding every citizen's initiative. Rather, he concluded that, under the City's Strong Mayor form of governance, its Mayor acted as an agent of the City when announcing and pursuing the pension reform ballot initiative, and that the City cannot exploit the tension between the MMBA and the initiative process to evade its meet-and-confer obligations. The policy argument underlying the proposed decision is thus the same one set forth in some of the authorities cited by the Proponents, particularly the Supreme Court's *Seal Beach* decision, but also the Supreme Court's *Voters for Responsible Retirement* decision, which is discussed at length by the ALJ.

The Unions were involved in negotiations for successor MOUs and in separate negotiations over retiree health benefits in which they gave up substantial concessions. As pointed out in the proposed decision, for the City's elected officials, and particularly the Mayor

as the chief labor relations official, to use the dual authority of the City Council and the electorate to obtain additional concessions on top of those already surrendered by the Unions on these same subjects raises questions about what incentive the Unions have to agree to anything. Or, in the words of the Supreme Court, "If the bargaining process and ultimate ratification of the fruits of this dispute resolution procedure by the governing agency is to have its purpose fulfilled, then the decision of the governing body to approve the MOU must be binding and not subject to the uncertainty of referendum." (*Voters for Responsible Retirement, supra*, 8 Cal.4th at p. 782, citing *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 336.)

CONCLUSION

For the reasons set forth above, and except as otherwise noted, we affirm the ALJ's findings and conclusions, and we adopt the proposed decision, including the proposed remedy, except as modified.

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) and PERB regulations. 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 (collectively, Unions) 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 Unions 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 Unions before adopting ballot measures affecting employee pension benefits and other negotiable subjects.

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

3. Denying the Unions 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. Upon request, meet and confer with the Unions before adopting ballot measures affecting employee pension benefits and/or other negotiable subjects.

2. Upon request by the Unions, join in and/or reimburse the Unions' reasonable attorneys' fees and costs for litigation undertaken to rescind the provisions of Proposition B adopted by the City, and to restore the prior status quo as it existed before the adoption of Proposition B.

3. Make current and former bargaining-unit employees whole for the value of any and all lost compensation, including but not limited to pension benefits, offset by the value of new benefits required from the City under Proposition B, plus interest at the rate of seven (7) percent per annum until Proposition B is no longer in effect or until the City and the Unions agree otherwise.

4. 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. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with employees represented by the Unions. 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.

5. 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 Unions.

Members Huguenin and Winslow joined in this Decision.

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 that the City of San Diego (City) violated the Meyers-Milias-Brown Act (MMBA) and Public Employment Relations Board (PERB) regulations (Cal. Code of Regs., tit. 8, § 31001 et seq.). 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 (collectively, Unions) in violation of Government Code section 3505 and PERB Regulation 32603(c) 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 Unions 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).

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 Unions before adopting ballot measures affecting employee pension benefits and other negotiable subjects.

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

3. Denying the Unions 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. Upon request, meet and confer with the Unions before adopting ballot measures affecting employee pension benefits and/or other negotiable subjects.

2. Upon request by the Unions, join in and/or reimburse the Unions' reasonable attorneys' fees and costs for litigation undertaken to rescind the provisions of Proposition B adopted by the City, and to restore the prior status quo as it existed before the adoption of Proposition B.

3. Make current and former bargaining-unit employees whole for the value of any and all lost compensation, including but not limited to pension benefits, offset by the value of new benefits required from the City under Proposition B, plus interest at the rate of seven (7) percent per annum until Proposition B is no longer in effect or until the City and the Unions agree otherwise.

Dated: _____ CITY OF SAN DIEGO

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.

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).)