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10 STATE OF CALIFORNIA

11 PUBLIC EMPLOYMENT RELATIONS BOARD

12 DEPUTY CITY ATTORNEYS	)	Case No. LA-E-752-M
ASSOCIATION,	)	
13 Charging Party,	)	<b>RESPONDENT CITY OF SAN DIEGO'S</b>
14 v.	)	<b>MEMORANDUM OF POINTS AND</b>
15 CITY OF SAN DIEGO,	)	<b>AUTHORITIES IN SUPPORT OF ITS</b>
16 Respondent.	)	<b>MOTION TO DISQUALIFY PERB BOARD</b>
	)	<b>AND STAFF OF PERB OFFICE OF</b>
	)	<b>GENERAL COUNSEL</b>

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1 **INTRODUCTION**

2 California Public Employment Relations Board (PERB) Regulation 32155(a)(4) states  
3 that no Board member and no Board agent performing an adjudicatory function shall decide or  
4 otherwise participate in any case or proceeding “[w]hen it is made to appear probable that, by  
5 reason of prejudice of such Board member or Board agents, a fair and impartial consideration of  
6 the case cannot be had before him or her.” Cal. Code Regs., tit. 8, § 32155(a)(4).

7 Before any administrative adjudication of the above-captioned case (Complaint  
8 LA-CE-752-M), the PERB Board and its agents in the Office of General Counsel have taken an  
9 adversarial position to the City of San Diego (City), by filing a Complaint for Injunctive Relief;  
10 Verified Petition for Writ of Mandate, in San Diego Superior Court, *Public Employment*  
11 *Relations Board v. City of San Diego*, San Diego Superior Court Case No. 37-2012-00092205-  
12 CU-MC-CTL (*PERB v. City*). The San Diego Municipal Employees Association (MEA) is  
13 named as Real Party in Interest. *PERB v. City* involves a citizens’ initiative, known as the  
14 Comprehensive Pension Reform (CPR) Initiative, which forms the basis for the allegations of  
15 Charging Party in LA-CE-752-M.

16 While PERB prosecutes identical allegations of violation of the Meyers-Milias-Brown  
17 Act (MMBA) in Superior Court, led by PERB’s Office of General Counsel, the PERB Board  
18 apparently pretends it can be a neutral decision-maker in the Complaint LA-CE-752-M.

19 It cannot.

20 PERB’s actions have resulted in an impermissible confounding of advocacy and  
21 adjudication in the same agency – in the Office of General Counsel and the Board – in violation  
22 of constitutional due process, forever tainting the administrative review before PERB in this  
23 matter.

24 The PERB Board and the members of PERB’s Office of General Counsel cannot provide  
25 the City with a fair and impartial consideration of Complaint LA-CE-752-M, as required by  
26 PERB Regulation 32155, and disqualification is mandated.

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STATEMENT OF FACTS

At the recommendation of PERB’s General Counsel, the PERB Board has initiated litigation against the City, seeking preliminary and permanent injunctive relief and a peremptory writ of mandate, on allegations first made by MEA that the City violated the MMBA by placing a duly qualified citizen initiative to amend the San Diego Charter (Charter) on the ballot. Declaration of Donald R. Worley (Worley Dec.), 2:7-12.<sup>1</sup>

The Complaint for Injunctive Relief; Verified Petition for Writ of Mandate was signed by PERB Deputy General Counsel Wendi L. Ross. Worley Dec., 2:17-22.

Before any administrative hearing before PERB has been held in this case (Worley Dec.,3:8-12; 4:9-13), PERB apparently has made factual findings sufficient to support the filing of a writ of mandate and complaint for injunctive relief, seeking, in part:

a permanent injunction pursuant to Code of Civil Procedure sections 526 and 527, and a peremptory writ of mandate pursuant to Code of Civil Procedure section 1085, be issued and directed to the City of San Diego, its agents, employees, representatives, officers, and officials, and any other person acting in concert or participation with any of them, ordering them and each of them to comply with their clear and present ministerial duties to meet and confer in good faith with the San Diego Municipal Employees Association, pursuant to section 3505 of the MMBA, regarding provisions of the [Comprehensive Pension Reform for San Diego] Initiative or any future initiative with proposed provisions that may affect current and future bargaining unit members’ wages and retirement benefits, before placing any such initiative on the ballot for any subsequent election.

Complaint, 9:24-28, 10:1-4, at Exh. B to Worley Dec.

In its Complaint, signed by PERB Deputy General Counsel Ross, PERB alleges there is a “Dispute [b]etween PERB and the City.”

PERB also alleges, in part:

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

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<sup>1</sup> Citations to Mr. Worley’s declaration and PERB’s Complaint are by page number, followed by a colon and the pertinent line number(s).

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24. Relief is sought here under Code of Civil Procedure sections 526, 527, and 1085 against the City based on its failure to comply with its ministerial duties under the MMBA.

....

28. PERB brings this action pursuant to Code of Civil Procedure 1085 to enforce the City’s clear, present, and ministerial duties under the MMBA, including the duty to negotiate in good faith with the MEA before placing on the ballot an initiative that adversely impacts current and future City employees’ wages and retirement benefits.

29. To obtain writ relief under Code of Civil Procedure section 1085, the petitioner must show there is no other plain, speedy, and adequate remedy; the respondent has a clear, present, and ministerial duty to act in a particular way; and the petitioner has a clear, present and benefit right to performance of that duty. (citation omitted)

30. Respondent has a clear, present, and ministerial duty to negotiate in good faith with the MEA about the Initiative pursuant to section 3505 of the MMBA. . . . The City placed the Initiative on the ballot without first fulfilling its obligation to bargain with MEA.

31. Under applicable legal standards and binding case precedent, and based on the facts as stated under penalty of perjury by MEA in its UPC, the City was required to meet and confer in good faith with MEA before placing the initiative on the June 5, 2012 ballot.

Complaint, 5:26-27, 6:1-2, 7:4-21, at Exh. B to Worley Dec.

PERB has represented to the San Diego Superior Court that it has determined, based on “applicable legal standards and binding case precedent,” that “the City was required to meet and confer in good faith with MEA before placing the Initiative on the June 5, 2012 ballot.” Complaint, 7:19-21, at Exh. B to Worley Dec. In its pleadings, PERB has informed the San Diego Superior Court that MEA is entitled to relief under the allegations that MEA asserted in its Unfair Practice Charge. PERB should not now pretend it can be fair, neutral, and impartial.

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1 **DISCUSSION**

2 **I. PROCEDURAL DUE PROCESS MANDATES THAT THE PROSECUTORIAL**  
3 **AND ADJUDICATIVE FUNCTIONS MUST BE SEPARATED TO ENSURE A**  
4 **FAIR HEARING BEFORE A NEUTRAL OR UNBIASED DECISION-MAKER.**

5 The role of partisan advocate for a particular position or point of view “is inconsistent  
6 with the objectivity expected of administrative decision-makers.” *Nightlife Partners, Ltd. v. City*  
7 *of Beverly Hills*, 108 Cal. App. 4th 81, 93 (2003).

8 It is a fundamental principle that the protections of procedural due process apply to  
9 administrative proceedings. *Nightlife Partners, Ltd.*, 108 Cal. App. 4th at 90 (2003) (citing  
10 *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

11 In *Nightlife Partners, Ltd.*, the City of Beverly Hills denied a cabaret owner’s request to  
12 renew its adult entertainment regulatory permit. *Id.* at 84. The cabaret owner requested an  
13 administrative hearing. *Id.* at 85. After taking evidence, the hearing officer upheld the denial of  
14 the permit. *Id.* The hearing officer was represented and assisted by an advisory attorney, who  
15 was, at the same time, litigating a case on behalf of the city against the cabaret owner in federal  
16 court. *Id.* at 84-85.

17 The cabaret owner filed a petition for a writ of administrative mandate in superior court,  
18 directing the city to set aside the denial of the permit, on the basis that the hearing was unfair, the  
19 hearing officer made improper evidentiary rulings, and the procedures followed violated the  
20 cabaret owner’s rights to procedural due process. *Id.* at 85. The trial court granted the petition,  
21 concluding that the cabaret owner’s due process rights had been violated, in large part because of  
22 the involvement of the attorney, advising the allegedly neutral hearing officer and taking an  
23 adversarial position to the cabaret owner in federal litigation. *Id.* at 86. The trial court “concluded  
24 that [the attorney’s] participation as the hearing officer’s advisor during the administrative  
25 review process constituted ‘actual bias.’” *Id.* at 86. The trial court ordered the city to provide the  
26 cabaret owner with a new hearing. *Id.* at 86.

27 On appeal, the Court of Appeal agreed, affirming the order for a new hearing and  
28 modifying the order to provide that the attorney and decision-maker involved in the first hearing  
must not be involved again. *Id.* at 98. The Court of Appeal wrote:

1 The hearing here, at which [attorney] Boga, City’s advocate for the  
2 initial denial of the renewal application, acted as legal advisor to  
3 the hearing officer reviewing that denial, violated Petitioner’s  
4 rights to due process. Accordingly the trial court did not err by  
5 ordering that City grant petitioners a new hearing.  
6 However, to adequately protect Petitioners’ due process rights, the  
7 trial court’s order for a new trial should be modified to direct that  
8 the new hearing must be conducted by someone other than  
9 [hearing officer] Holmquist, given that his role as a neutral  
10 arbitrator has been compromised in a manner which, practically  
11 speaking, cannot be undone. In addition, the order should also  
12 provide that the new hearing must be conducted in a manner  
13 consistent with the views expressed in this opinion – for example,  
14 the hearing officer should not be, nor be advised by, anyone who  
15 has served as City’s advocate in this or any related case.

9 *Id.* at 98.

10 The court examined the requirements to provide a fair, neutral, unbiased, and impartial  
11 hearing, which are the minimum constitutional standards of due process. The court explained  
12 that the combination of prosecutorial and adjudicative functions in one individual or one  
13 decision-making body is “the most problematic combination for procedural due process  
14 purposes.” *Id.* at 93. The court stated:

15 Due process . . . *always* requires a relatively level playing field, the  
16 ‘constitutional floor’ of a “fair trial in a fair tribunal,” in other  
17 words a fair hearing before a neutral or unbiased decision-maker.

17 *Id.* at 90 (italics in original) (citing *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997); *Withrow v.*  
18 *Larkin*, 421 U.S. 35, 46 (1975)).

19 The court further explained:

20 Just as in a judicial proceeding, due process in an administrative  
21 hearing also demands an appearance of fairness and the absence of  
22 even a probability of outside influence on the adjudication.

22 *Id.* at 90.

23 PERB must provide this due process to the City. But that is now impossible given the  
24 actions of the PERB Board and its General Counsel.

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1 Further, PERB is subject to the California Administrative Procedures Act, specifically  
2 California Government Code (Government Code) section 11425.10(a)(4),<sup>2</sup> which provides that  
3 the adjudicative function must be separated from the investigative, prosecutorial and advocacy

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12 <sup>2</sup> California Government Code section 11425.10 provides:

13 (a) The governing procedure by which an agency conducts an adjudicative  
14 proceeding is subject to all of the following requirements:

15 (1) The agency shall give the person to which the agency action is directed  
16 notice and an opportunity to be heard, including the opportunity to present and  
17 rebut evidence.

18 (2) The agency shall make available to the person to which the agency action is  
19 directed a copy of the governing procedure, including a statement whether  
20 Chapter 5 (commencing with Section 11500) is applicable to the proceeding.

21 (3) The hearing shall be open to public observation as provided in Section  
22 11425.20.

23 (4) The adjudicative function shall be separated from the investigative,  
24 prosecutorial, and advocacy functions within the agency as provided in Section  
25 11425.30.

26 (5) The presiding officer is subject to disqualification for bias, prejudice, or  
27 interest as provided in Section 11425.40.

28 (6) The decision shall be in writing, be based on the record, and include a  
statement of the factual and legal basis of the decision as provided in Section  
11425.50.

(7) A decision may not be relied on as precedent unless the agency designates  
and indexes the decision as precedent as provided in Section 11425.60.

(8) Ex parte communications shall be restricted as provided in Article 7  
(commencing with Section 11430.10).

(9) Language assistance shall be made available as provided in Article 8  
(commencing with Section 11435.05) by an agency described in Section 11018 or  
11435.15.

(b) The requirements of this section apply to the governing procedure by which  
an agency conducts an adjudicative proceeding without further action by the  
agency, and prevail over a conflicting or inconsistent provision of the governing  
procedure, subject to Section 11415.20. The governing procedure by which an  
agency conducts an adjudicative proceeding may include provisions equivalent to,  
or more protective of the rights of the person to which the agency action is  
directed than, the requirements of this section.

1 functions within the agency. Section 11425.30(a)(2) prohibits an adjudicatory hearing officer  
2 from being “subject to the authority, direction, or discretion of a person who has served as  
3 investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage.”<sup>3</sup>

4 Here, PERB’s actions have impermissibly blurred adversarial and adjudicative functions.

5 **II. PERB WENT BEYOND SEEKING TEMPORARY RELIEF, BY AUTHORIZING**  
6 **A WRIT OF MANDATE AND COMPLAINT FOR PERMANENT INJUNCTION.**

7 PERB’s authority is derived from the Government Code, which provides in pertinent  
8 part:

9 The board shall have all of the following powers and  
10 duties:

11 . . . .

12 (b) To determine in disputed cases whether a particular item is  
13 within or without the scope of representation.

14 . . . .

15 (h) To hold hearings, subpoena witnesses, administer oaths, take  
16 the testimony or deposition of any person, and, in connection  
17 therewith, to issue subpoenas duces tecum to require the  
18 production and examination of any employer's or employee  
19 organization's records, books, or papers relating to any matter  
20 within its jurisdiction.

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22 <sup>3</sup> California Government Code section 11425.30 provides:

23 (a) A person may not serve as presiding officer in an adjudicative proceeding in  
24 any of the following circumstances:

25 (1) The person has served as investigator, prosecutor, or advocate in the  
26 proceeding or its preadjudicative stage.

27 (2) The person is subject to the authority, direction, or discretion of a person  
28 who has served as investigator, prosecutor, or advocate in the proceeding or its  
preadjudicative stage.

(b) Notwithstanding subdivision (a):

(1) A person may serve as presiding officer at successive stages of an  
adjudicative proceeding.

(2) A person who has participated only as a decisionmaker or as an advisor to a  
decisionmaker in a determination of probable cause or other equivalent  
preliminary determination in an adjudicative proceeding or its preadjudicative  
stage may serve as presiding officer in the proceeding.

(c) The provisions of this section governing separation of functions as to the  
presiding officer also govern separation of functions as to the agency head or  
other person or body to which the power to hear or decide in the proceeding is  
delegated.

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Notwithstanding Section 11425.10, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 does not apply to a hearing by the board under this chapter, except a hearing to determine an unfair practice charge.

(i) To investigate unfair practice charges or alleged violations of this chapter, and 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, . . . .

(j) To bring an action in a court of competent jurisdiction to enforce any of its orders, decisions, or rulings, or to enforce the refusal to obey a subpoena. Upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, the board may petition the court for appropriate temporary relief or restraining order.

Cal. Gov't Code § 3541.3 (emphasis added).

Government Code section 3541.3 authorizes PERB to bring an action in a court of competent jurisdiction to enforce any of its orders, decisions, or rulings. If PERB is relying on this language to support the filing of *PERB v. City*, then apparently PERB has already decided, without the benefit of an administrative hearing before an impartial decision-maker, that the City has violated the MMBA.

Further, PERB may not rely on the provision in section 3541.3(j) authorizing the filing of a petition for “temporary relief or restraining order,” to support the litigation it has filed in San Diego Superior Court because PERB seeks a writ of mandate and permanent injunction against the City. The prayer for relief is much broader than temporary relief, and is intended to cover all future conduct.

PERB Regulations set forth that the PERB Board is the final decision-maker in the prosecution of an unfair practice charge. PERB Regulation 32325 describes the remedial power of the Board, as follows:

The Board shall have the power to issue a decision and order in an unfair practice case directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of the applicable statute.

8 Cal. Code Reg. 32325.

1 The PERB Board cannot be a final, impartial decision-maker when it has already made  
2 factual determinations and authorized litigation against the City.

3 **III. DISQUALIFICATION OF THE PERB BOARD IS MANDATED.**

4 PERB Regulation 32155 mandates the disqualification of the PERB Board Members,  
5 who participated in the decision to seek a writ of mandate against the City, before any  
6 administrative process was conducted. The regulation, in pertinent part, states:

7 (a) No Board member, and no Board agent performing an  
8 adjudicatory function, shall decide or otherwise participate in any  
9 case or proceeding:

9 . . . .

10 (4) When it is made to appear probable that, by reason of  
11 prejudice of such Board member or Board agent, a fair and  
12 impartial consideration of the case cannot be had before him or  
13 her.

13 8 Cal. Code Regs. 32155.

14 PERB Regulation 32155 authorizes a motion for any party to disqualify PERB Members:

15 (f) Any party to a case before the Board may file directly with  
16 the Board member a motion for his or her recusal from the case  
17 when exceptions are filed with the Board or within ten days of  
18 discovering a disqualifying interest provided that such facts were  
19 not available at the time exceptions were filed. The motion shall be  
20 supported by sworn affidavits stating the facts constituting the  
21 ground for disqualification of the Board member. Copies of the  
22 motion and supporting affidavits shall be served on all parties to  
23 the case.

20 (g) Within ten days after the filing of a motion for recusal, the  
21 Board member alleged to be disqualified shall render a decision  
22 stating the reasons therefore. If the Board member is not on the  
23 panel assigned to hear the case, he or she shall so inform the  
24 parties and indicate that he or she does not intend to participate in  
25 the case. In the event that the Board member decides to participate,  
26 he or she shall render a decision on the motion for recusal before  
27 doing so.

25 Cal. Code Regs. tit. 8, § 32155

26 Given the partisan role that PERB has taken, by filing a writ of mandate in San Diego  
27 Superior Court, the PERB Board and all PERB staff must disqualify themselves from  
28 adjudicating this matter.

1 PERB will no doubt contend that it is authorized to seek temporary injunctive relief  
2 (PERB Regulations 32450 and 32465), and it has not overstepped its authority here. In *City of*  
3 *San Jose v. Operating Engineers Local Union No. 3*, 49 Cal. 4th 597 (2010), the California  
4 Supreme Court stated that when remedies before an administrative forum are available, a party  
5 must in general exhaust them before seeking judicial relief. *Id.* at 609.

6 However, the exhaustion doctrine does not apply when the administrative remedy is  
7 inadequate (*Glendale City Employees' Ass'n v. City of Glendale*, 15 Cal. 3d 328, 342 (1975)), as  
8 it is here, because the City cannot get a fair and impartial hearing. *See also Coachella Valley*  
9 *Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.*, 35 Cal. 4th  
10 1072, 1080 (2005) (exhaustion doctrine not applicable when seeking administrative remedies  
11 would be futile). Here, the City cannot get a fair hearing; further, PERB is seeking more than  
12 temporary relief, even before any administrative process. By its allegations, PERB has found the  
13 City in violation of the MMBA before any due process.

14 California courts have emphasized that the standard for temporary injunctive relief does  
15 not require proving an unfair practice charge has been committed. *Public Employment Relations*  
16 *Bd. v. Modesto City Schools Dist.*, 136 Cal. App. 3d 881, 896-897 (1982) (stating that for  
17 injunctive relief to be granted on a request of PERB, the trial court must determine that there  
18 exists reasonable cause to believe an unfair labor practice has been committed and that the relief  
19 sought is just and proper; reasonable cause is met if the theory is neither insubstantial nor  
20 frivolous).

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1           However, a writ of mandate, with allegations that the City violated the MMBA, requires  
2 a greater burden of proof. Cal. Civil Proc. Code § 1085.<sup>4</sup> Further, upon the filing of a verified  
3 petition for writ of mandate (*see* Cal. Civ. Proc. Code § 1086), a trial court has jurisdiction to  
4 resolve any legal or factual issues, via an evidentiary hearing if need be (Cal. Rules of Court,  
5 Rules 3.1103, 3.1306). *People v. Picklesimer*, 48 Cal. 4th 330, 340 (2010). By filing a petition  
6 for writ of mandate, the PERB Board and Office of General Counsel have relinquished the  
7 ability to be fair and impartial. Factual issues must be decided by the Superior Court.

### 8           **CONCLUSION**

9           As a result of the litigation filed by PERB, the City is deprived of its procedural due  
10 process rights before PERB. The City cannot get a fair and impartial consideration of Complaint  
11 LA-CE-752-M by the PERB Board who approved the filing of the litigation or the Office of the  
12 General Counsel, who recommended the litigation and now prosecute the City, in the Superior  
13 Court.

14           PERB, as a decision-maker, cannot provide the City a fair and impartial consideration of  
15 the unfair practice charge case filed by Charging Party, in which the City has been named as  
16 Respondent, because PERB has already made a decision that the City violated the MMBA  
17 related to the CPR Initiative.

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19           Dated: March 22, 2012

JANI I. GOLDSMITH, City Attorney

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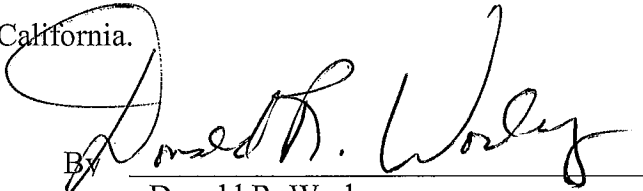
Donald R. Worley  
Assistant City Attorney

23           Attorneys for Respondent  
24           CITY OF SAN DIEGO

25           <sup>4</sup> California Code of Civil Procedure section 1085(a) provides:

26           A writ of mandate may be issued by any court to any inferior tribunal,  
27           corporation, board, or person, to compel the performance of an act which the law  
28           specially enjoins, as a duty resulting from an office, trust, or station, or to compel  
                the admission of a party to the use and enjoyment of a right or office to which the  
                party is entitled, and from which the party is unlawfully precluded by that inferior  
                tribunal, corporation, board, or person.

1 I, as agent and attorney for Respondent City of San Diego, declare under penalty of  
2 perjury that this Respondent City of San Diego's Memorandum of Points and Authorities in  
3 Support of its Motion to Disqualify PERB Board and Staff of PERB Office of General Counsel  
4 is true and complete to the best of my knowledge and belief, and this declaration was executed  
5 on March 22, 2012, at San Diego, California.

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7 BY \_\_\_\_\_  
8 Donald R. Worley  
9 Assistant City Attorney

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