Case No. _____

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

CITY OF SAN DIEGO,
Petitioner,

v.

PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondent,

SAN DIEGO MUNICIPAL EMPLOYEES ASSOCIATION, DEPUTY CITY ATTORNEYS ASSOCIATION, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 127, SAN DIEGO CITY FIREFIGHTERS, LOCAL 145, IAFF, AFL-CIO, CATHERINE A. BOLING, T.J. ZANE, STEPHEN B. WILLIAMS, and 115,991 SAN DIEGO REGISTERED VOTERS WHO EXERCISED THEIR RIGHT TO PLACE A CITIZENS' INITIATIVE ON THE BALLOT
Real Parties in Interest.

Appeal of Public Employment Relations Board
Decision No. 2464-M
(Case Nos. LA-CE-746-M; LA-CE-752-M; LA-CE-755-M;
and LA-CE-758-M)

CITY OF SAN DIEGO'S PETITION FOR WRIT OF EXTRAORDINARY RELIEF

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ATTORNEYS FOR PETITIONER, **CITY OF SAN DIEGO**

CERTIFICATE OF INTERESTED PARTIES

(California Rules of Court, Rule 8.208)

The following entities and persons have a financial or other interest in the outcome of the proceeding that justices should consider in determining whether to disqualify themselves:

1. City of San Diego, California;
2. San Diego Municipal Employees Association;
3. Deputy City Attorneys Association;
4. American Federation of State, County and Municipal Employees, AFL-CIO, Local 127;
5. San Diego City Firefighters, Local 145, IAFF, AFL-CIO;
6. Catherine A. Boling;
7. T.J. Zane;
8. Stephen B. Williams; and
9. 115,991 San Diego registered voters who exercised their right to place a citizens' initiative (Proposition B) on the ballot.

Dated: January 25, 2016

JAN I. GOLDSMITH, City Attorney

By _____
M. Travis Phelps
Deputy City Attorney

Attorneys for Petitioner
CITY OF SAN DIEGO

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Pursuant to Government Code section 3509.5, and California Rules of Court, rule 8.498, Petitioner City of San Diego (City) respectfully petitions this Court for a writ of extraordinary relief and requests this Court vacate Decision No. 2464-M issued by Respondent Public Employment Relations Board (PERB) on December 29, 2015. Petitioner City further requests that the Court direct PERB to dismiss in their entirety the Unfair Practice Charges in PERB Case Nos. LA-CE-746-M, LA-CE-752-M, LA-CE-755-M, and LA-CE-758-M.

I.

INTRODUCTION

On December 29, 2015, PERB issued its long awaited decision on the validity of a citizens' initiative concluding that, due to the support of the City's Mayor, a duly certified citizens' initiative is not a "pure citizens' initiative" and therefore must comply with the Meyers-Milias-Brown Act (MMBA) meet-and-confer requirements before being placed on the ballot. The validity of a citizens' initiative has never before depended upon who supported it, or where the impetus for the initiative originated. PERB's decision is unprecedented and clearly erroneous.

Under the Constitution, there are *only* two ways to propose amendments to the City's Charter: (1) by a citizens' initiative or (2) by a vote of the City's "governing body." Cal. Const., art. XI, § 3(b). If a sufficient number of registered voters sign a petition to place an initiative

on the ballot, a city council *must* perform its ministerial duty which the California Constitution and Elections Code mandate, to place it on the ballot without change and without compliance with procedural prerequisites usually attached to city council sponsored measures, such as the California Environmental Quality Act (CEQA), or in this case, the meet-and-confer requirements of the MMBA. *See, e.g., Save Stanislaus Area Farm Economy v. Board of Supervisors*, 13 Cal. App. 4th 141, 149 (1993) ("A local government is not empowered to refuse to place a duly certified initiative on the ballot.")

Here, the key facts demonstrating the error of the PERB Decision are undisputed: Three private citizens, Catherine A. Boling, T.J. Zane, and Stephen B. Williams (the "Citizen Proponents") gave notice to the City that they intended to circulate a petition to have the Comprehensive Pension Reform Initiative (CPRI) placed on the ballot. The elections official, the San Diego County Registrar of Voters, certified that approximately 116,000 registered San Diego voters (approximately 20 percent of the electorate) signed the Citizen Proponents' petition to place the Proposition B on the ballot. Thereafter, the City's "governing body," the City Council, exercised its ministerial duty to place the CPRI on the ballot as Proposition B without change as required by law. On June 5, 2012, Proposition B was overwhelmingly approved by nearly two-thirds of the voters. The "governing body" of the City, the City Council, did *not* propose, or in any

way vote to support Proposition B. In fact, a majority of the City Council opposed Proposition B.

The Constitution does not distinguish between a "pure" and "impure" citizens' initiative. A citizens' initiative that has obtained the required verified signatures and been duly certified as a citizens' initiative by the elections official for qualification on the ballot *is* a citizens' initiative and is constitutionally protected as a right reserved to the people. ***It is not a right for which the people must bargain.***

After voters adopted the CPRI in June 2012, the City sought to stay administrative proceedings commenced by PERB requesting that this Court take direct jurisdiction to bypass PERB. The City argued that years of administrative hearings at PERB would be wasted as PERB already took a strong legal position and clearly wanted to test the boundaries of constitutional law.

This Court refused the City's request and sent the City to administrative hearings at PERB to defend the Unions'[1] unfair practice charges. *San Diego Municipal Employees' Ass'n v. Superior Court (MEA)*, 206 Cal. App. 4th 1447 (2012). In rejecting the City's request, this Court

[1] "Unions" refers collectively to Real Parties in Interest, San Diego Municipal Employees Association, Deputy City Attorneys Association, American Federation of State, County and Municipal Employees, AFL-CIO, Local 127, and San Diego City Firefighters, Local 145, IAFF, AFL-CIO.

found that allegations were sufficient to support an "arguable" violation of the MMBA that: the CPRI was a "sham device" (*Id.* at 1452); "officials of the City had placed the CPRI on the ballot by manipulating the citizen-initiative process. . . ." (*Id.* at 1453); and "the CPRI (while nominally a citizens' initiative) was actually placed on the ballot by City using strawmen to avoid its MMBA obligations. . . ." (*Id.* at 1460.)

Three years later, there is a record of proceedings and PERB findings. Even PERB could not find evidence of "strawmen." In fact, PERB found that the three Citizen Proponents of the CPRI were independent and not controlled by the Mayor or City. There was no finding that the CPRI was a "sham device" or that "officials of the City had placed the CPRI on the ballot by manipulating the citizen-initiative process."

Three years ago, this Court was convinced to deny the City's request because it was told there would be findings of "sham" and "strawmen." No such findings were made and no such evidence was presented.

Instead, in a 65 page opinion, PERB barely mentioned the three Citizen Proponents (only to state they were not controlled by the Mayor). Not once does PERB mention the nearly 116,000 petition signers and the voters who adopted the CPRI. The main groups who funded the signature gathering and election campaign – the Lincoln Club, San Diego Taxpayers Association and Chamber of Commerce – were mentioned, among other

"special interests" in a few paragraphs, primarily to point out that these groups believed that the Mayor's support for the CPRI was important.

Instead of "strawmen" and "sham," PERB simply concluded that Proposition B was not a "pure" citizens' initiative because the Mayor was the impetus and supported it. In a confusing and far reaching opinion, PERB decided that the Mayor was acting as an agent for the City Council or City (it is confusing which of the two PERB thinks is the principal), despite the City Council never having voted for or supported the CPRI; a majority opposing the CPRI; and, the Mayor having no vote on the City Council and no say – by vote or veto – on what propositions the City Council votes to place on the ballot.

Mayors and governors regularly advocate for or against initiatives without their advocacy being attributed to their city or state. The United States Supreme Court has long recognized and even encouraged elected leaders to advocate in the public arena as an exercise of their First Amendment rights. *See Bond v. Floyd*, 385 U.S. 116, 136-37 (1966) (holding "Legislators have an obligation to take positions on controversial political questions"). The right is reinforced by statute in California. *See* Gov't Code § 3203 ("no restriction shall be placed on the political activities of any officer or employee of a state or local agency").

In fact, California's political leaders for decades have openly led initiative movements to bypass legislatures and other obstacles to reform.

Indeed, the citizens' initiative is a power reserved to the people for just that purpose.

A government official does not lose his or her First Amendment rights due to his or her elected position. However, that is exactly what the PERB Decision concludes.

Under the PERB Decision, government officials who want to lead or support a citizens' initiative movement run the risk that an otherwise qualified citizens' initiative will somehow be deemed an "impure" citizens' initiative. Thus, if government officials wish to support a citizens' initiative, they do so at the risk of disenfranchising hundreds of thousands of individuals who signed a petition to place it on the ballot and voted for its implementation.

One only has to look at the 2012 California Sales and Tax Increase Initiative, an initiative placed on the ballot through the filing of over 800,000 signatures, to see how absurd PERB's ruling is. Governor Brown was the impetus for the initiative and aggressively campaigned for it as a way to bypass the state legislature because he could not get the two-thirds vote approval required by the Constitution for legislative tax increases. Under PERB's newly created constitutional law, the tax increase should be overturned because it resulted from an "impure" citizen's initiative (due to the Governor being the impetus), making the initiative really an act of the State. Accordingly, the measure should go to the state legislature for a

vote. Moreover, the same analysis could be applied to nearly all state and local citizens' initiatives having support from elected officeholders.

In the course of amending the California Constitution, PERB does give a nod to the judiciary, acknowledging that the courts must resolve the significant constitutional issues raised by this case. (PERB Dec., pp. 28, 39.) No case could be a clearer example of an inappropriate evisceration of the citizens' right to bring an initiative. This Court must enforce the Peoples' right to initiative and reverse PERB Decision No. 2464-M.

II.

THE PARTIES

1. Petitioner City of San Diego (City) is a "charter city" under Article XI of the California Constitution and is a municipal corporation with all municipal powers, functions, rights, privileges, and immunities authorized by the Constitution and laws of the State of California. The City is a "public agency" as defined in Government Code section 3501(c). The City has an interest that is directly affected by this proceeding in that it was the Respondent in the challenged PERB Decision and has been ordered to, among other things, join in and/or expend public funds to reimburse the Unions' litigation costs 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.

2. Respondent California Public Employment Relations Board (PERB) is the state agency charged with administering the Meyers-Milias-Brown Act (MMBA), which governs employer-employee relations between (most) local public agencies and their employees. On December 29, 2015, PERB issued its decision in Unfair Practice Case Nos. LA-CE-746-M, LA-CE-752-M, LA-CE-755-M, and LA-CE-758-M (PERB Decision No. 2464-M) which is the subject of this Petition for Writ of Extraordinary Relief.

3. Real Party in Interest, San Diego Municipal Employees Association (MEA), is an "employee organization" within the meaning of Government Code section 3501(a). MEA is the recognized exclusive representative of employees in the City's Administrative and Field Support, Technical, Professional and Supervisory Units. MEA was the Charging Party in Unfair Practice Case No. LA-CE-746-M, which is the subject of this Petition.

4. Real Party in Interest, Deputy City Attorneys Association (DCAA), is an "employee organization" within the meaning of Government Code section 3501(a). The DCAA is the recognized exclusive representative of the City's Deputy City Attorneys. DCAA was the Charging Party in Unfair Practice Case No. LA-CE-752-M, which is the subject of this Petition.

5. Real Party in Interest, American Federation of State, County and Municipal Employees, AFL-CIO, Local 127 (AFSCME Local 127), is

an "employee organization" within the meaning of Government Code section 3501(a). AFSCME Local 127 is the recognized exclusive representative of the City's blue collar employees, representing employees in the City's Maintenance, Labor, Skilled Trades and Equipment Operator Units. AFSCME Local 127 was the Charging Party in Unfair Practice Case No. LA-CE-755-M, which is the subject of this Petition.

6. Real Party in Interest, San Diego City Firefighters, Local 145 (Firefighters Local 145), is an "employee organization" within the meaning of Government Code section 3501(a). Firefighters Local 145 is the recognized exclusive representative of the City's employees in the City's Fire Fighter Unit. Firefighters Local 145 was the Charging Party in Unfair Practice Case No. LA-CE-758-M, which is the subject of this Petition.

7. Real Party in Interest, Catherine A. Boling, is a citizen, taxpayer, and voter residing in the City of San Diego and an official proponent of the CPRI, which went to the ballot as Proposition B.

8. Real Party in Interest, T.J. Zane, is a citizen, taxpayer, and voter residing in the City of San Diego and an official proponent of the CPRI, which went to the ballot as Proposition B.

9. Real Party in Interest, Stephen B. Williams, is a citizen, taxpayer, and voter residing in the City of San Diego and an official proponent of the CPRI, which went to the ballot as Proposition B.

10. Real Party in Interest, 115,991 San Diego registered voters who exercised their right to place a citizens' initiative (Proposition B) on the ballot, but who were completely ignored by PERB.

III.

JURISDICTION

1. This Court has jurisdiction over this Petition pursuant to Government Code section 3509.5 and California Rules of Court, rule 8.498.

2. Government Code section 3509.5 provides in part: "Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case . . . may petition for a writ of extraordinary relief from that decision or order. . . . A petition for a writ of extraordinary relief shall be filed in the district court of appeal having jurisdiction over the county where the events giving rise to the decision or order occurred. The petition shall be filed within 30 days from the date of the issuance of the board's final decision or order, or order denying reconsideration, as applicable."

3. The "board" mentioned in Government Code section 3509.5 is PERB. Gov't Code § 3501(f). This Court is the "district court of appeal having jurisdiction over" the County of San Diego.

4. PERB Decision No. 2464-M, issued on December 29, 2015, pertains to four unfair practice cases (which were consolidated for hearing) in which the City was the respondent, and therefore the City is a respondent

aggrieved by the decision and order. The City has filed its petition within 30 days from the date of the issuance of the decision.

5. California Rules of Court, rule 8.498(a)(1), provides in relevant part: "A petition to review an order or decision of the . . . Public Employment Relations Board must be filed in the Court of Appeal. . . ."

IV.

FACTS AND PROCEDURAL HISTORY

1. On April 4, 2011, three private citizens, Catherine A. Boling, T.J. Zane, and Stephen B. Williams (hereinafter referred to as the "Citizen Proponents") filed with the City Clerk a notice of intent to circulate a petition within the City for the purpose of amending the City's Charter, pursuant to Section 3 of Article XI of the California Constitution.

2. The Citizen Proponents' notice identified the CPRI as the proposition they intended to circulate a petition for in an effort to qualify the measure for presentation to the electorate, and requested the total number of signatures that will be required to be submitted by their coalition to ensure its placement on the June 2012 ballot.

3. The CPRI proposed to make changes to the City's retirement benefits for certain and future City employees, as well as define the terms the City must use when it begins labor negotiations with the City's recognized employee organizations. To accomplish such changes, the CPRI proposed to amend certain provisions of the City's Charter.

4. In order for the CPRI to qualify for the ballot, the Citizen Proponents needed to obtain verified signatures from at least 15 percent (94,346) of the City's registered voters.

5. On September 30, 2011, one of the Citizen Proponents, T.J. Zane, delivered the petition sections and signatures to the City Clerk and attested that the submitted petition contained at least 94,346 signatures. The City Clerk forwarded the petition to the San Diego County Registrar of Voters (SDROV) to officially verify the signatures.

6. The SDROV, using a random sample method in accordance with Elections Code section 9115, determined that the initiative petition contained 115,991 projected valid signatures. Accordingly, on November 8, 2011, the SDROV issued a Certification that the CPRI petition had received a "SUFFICIENT" number of valid signatures requiring it to be presented to the voters as a citizens' initiative.

7. The City Clerk submitted the SDROV's Certification to the City Council on December 5, 2011, and that same day the City Council passed Resolution R-307155, a resolution of intention to place the CPRI on the June 5, 2012 Presidential primary election ballot, as required by law.

8. On January 19, 2012, MEA filed an Unfair Practice Charge (UPC) with PERB over the City's refusal to bargain over the CPRI, which was then headed for the ballot on June 5, 2012, as Proposition B, because

the City claimed it was a "citizens' initiative" and not the "City's initiative."

9. Three other City employee unions, the DCAA, Firefighters Local 145, and AFSCME Local 12, also filed UPCs with PERB, and embraced the allegations of the MEA UPC.

10. Among the allegations in the various UPCs, were claims that the "so-called 'citizen initiative' is merely a sham device," that "Mayor Sanders hired the attorneys who wrote the proposition for pension reform to his specifications," and that "[t]he three initiative proponents, April Boling, T.J. Zane and Steve Williams 'filed the Mayor's initiative for him.'"

11. On January 30, 2012, fulfilling its ministerial duty under then Election Code section 9255(b)(2), the City Council enacted Ordinance O-20127 which placed the CPRI on the June 5, 2012 Presidential primary election ballot as Proposition B.

12. On February 10, 2012, PERB's Office of General Counsel issued a PERB complaint against the City based on MEA's UPC alleging the City had violated Government Code sections 3503, 3505, 3506 and California Code of Regulations section 32603. That same day, PERB's General Counsel notified the City that its Board had authorized the initiation of an action in San Diego Superior Court seeking injunctive and writ relief against the City.

13. PERB filed its verified complaint against the City on February 14, 2012, [San Diego Superior Court Case No. 37-2012-00092205-CU-MC-CTL] seeking temporary and permanent injunctive relief prohibiting the CPRI from being presented to the City voters and a permanent injunction and peremptory writ of mandate ordering the City to comply with the City's alleged meet and confer obligations relating to the CPRI and any future citizens' initiatives before placing them on the ballot for any subsequent election.

14. On February 21, 2012, the Superior Court denied PERB's request for a temporary restraining order, ruling that court proceedings should await the outcome of the June 5, 2012 election.

15. PERB, however, continued with its administrative hearings scheduled for April 2-5, 2012, on MEA's UPC against the City. On March 12, 2012, PERB issued subpoenas to multiple elected City officials as well as numerous unelected City employees and private citizens, requiring them to testify and turn over documents concerning their decision of whether or not to support the CPRI.

16. On March 27, 2012, following a March 23 hearing on the City's motion to stay PERB's administrative hearings and after having taken the matter under submission, the Superior Court issued a Minute Order staying PERB's administrative hearing, quashing the subpoenas

issued by PERB, and setting a status conference concerning the stay of administrative proceedings for June 22, 2012.

17. On April 11, 2012, MEA filed a petition for writ of mandate with this Court seeking immediate relief from the Superior Court's stay of the PERB administrative hearings.

18. On June 19, 2012, this Court issued a peremptory writ of mandate directing the Superior Court to vacate its stay order, and permit the PERB administrative hearings proceed. *San Diego Municipal Employees Ass'n v. Superior Court*, 206 Cal. App. 4th 1447 (2012).

19. On June 28, 2012, the City filed a petition requesting a rehearing. The City's rehearing request was denied on July 3, 2012.

20. PERB Administrative Law Judge Donn Ginoza (ALJ Ginoza) conducted the administrative hearing on July 17, 18, 20 and 23, 2012, after which the parties filed opening and closing briefs.

21. On February 11, 2013, ALJ Ginoza issued his Proposed Decision that the City had violated the MMBA by failing to meet and confer with the Unions over the CPRI.

22. On March 4, 2013, City filed with PERB its Statement of Exceptions to the Proposed Decision and Brief in Support. On April 15, 2013, the Unions filed their Consolidated Response to the City's Exceptions.

23. On December 29, 2015, the PERB Board issued its Decision, affirming the Proposed Decision and Remedy by ALJ Ginoza with minor modifications. (PERB Decision No. 2464-M is attached hereto as **EXHIBIT 1**.)

24. The PERB Decision held, that the City violated the MMBA and PERB regulations by failing and refusing to meet-and-confer with four recognized employee organizations representing employees over Proposition B, which was "championed" by the City's Mayor and other City officials and ultimately approved by voters in a municipal election.

a. Specifically, PERB found that: (1) under the City's Strong Mayor form of governance and common law principles of agency, Mayor 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 Proposition B; 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. (PERB Dec., p. 27.)

b. Addressing the Constitutional issues raised by the City, PERB noted that "the City raises some significant and difficult questions about the applicability of the MMBA's meet-and-confer requirement to a pure citizens' initiative," and concluded that "those issues

are not implicated by the facts of this case" and, therefore, chose not to address them. (PERB Dec., p. 28.) PERB held that "[i]n the absence of controlling appellate authority directing PERB that the meet-and-confer process is constitutionally inform or preempted by the citizens' initiative process, we must uphold our duty to administer the MMBA." (*Id.* at 39.) ***PERB then invited the parties to address the constitutional issues in the courts***, stating "[i]f 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." (*Id.*)

25. PERB Ordered the City to 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; and (3) Denying the Unions their right to represent employees in their employment relations with the City. (PERB Dec., p. 62.)

26. PERB also ordered the City to take the following, among other, affirmative actions: (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 the restore the prior status quo as it existed before the adoption of Proposition B; and (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 Unions agree otherwise. (PERB Dec., pp. 62-63.)

V.

GROUNDS FOR REVIEW

Decision No. 2464-M by Respondent PERB was in error for the following reasons:

1. PERB exceeded its jurisdiction and scope of expertise in finding that Proposition B, a duly certified citizens' initiative, is anything other than a citizens' initiative, entitled to protection under the California Constitution. Permitting PERB to subject government officials and employees to subpoenas and questioning regarding their political support and contacts with initiative supporters violates the officials/employees' constitutional rights of association and privacy.

2. PERB erred as a matter of law and fact in its conclusion that Proposition B, a duly certified citizens' initiative, is not a "pure citizens' initiative."

3. PERB erred as a matter of law and fact in concluding that once a sufficient number of signatures in support of the CPRI had been certified, the City Council's placement of the CPRI (Proposition B) on the ballot was not a purely ministerial act required by the Election Code and applicable decisional law.

4. PERB erred as a matter of law in concluding that the MMBA meet-and-confer process applies to a citizens' initiative and the CPRI. PERB's decision fails to protect the citizens' Constitutional right to legislate by initiative.

5. PERB's decision is clearly erroneous as it violates Mayor Sanders', and other government officials', First Amendment rights. PERB erred as a matter of law by failing to determine that the MMBA meet-and-confer process is preempted by government officials' First Amendment rights. PERB fails to recognize that any and all government officials have a First Amendment right to engage in direct democracy, like any other citizen, and imposing a meet-and-confer requirement on such activity impermissibly impinges upon such right.

6. PERB's decision is clearly erroneous as it violates the rights of government officials recognized and protected by California Government Code sections 3203 and 3209.

7. PERB erred as a matter of law and fact as it violated PERB Regulation 32178 by abandoning the original basis of challenging

Proposition B contained in the Unions' UPCs. There was no evidence or finding that Proposition B was a "sham device," a "nominal" citizens' initiative, or resulted from manipulation of the citizen initiative process, or that it was placed on the ballot by "strawmen."

8. PERB erred as a matter of law and fact in concluding that Mayor Sanders acted as an "agent" of the City or the City Council to impose a meet-and-confer obligation upon the City with regards to Proposition B.

9. PERB erred as a matter of law and fact in finding that the City Council ratified Mayor Sanders' actions as being on behalf of the City.

10. PERB erred as a matter of law and fact in concluding that Mayor Sanders, by announcing his desire to pursue pension reform by initiative as a private citizen, had made a "Determination of Policy."

11. PERB erred as a matter of fact in confusing and conflating Mayor Sanders' ideas of pension reform with those supported by the citizen groups who were proceeding with their own initiative.

12. PERB erred as a matter of law in giving credence and precedential value to a 2008 City Attorney Opinion which the City had repudiated.

13. PERB's order is illegal and unenforceable in that it would require the City to violate its Charter, including sections of Proposition B,

even though PERB acknowledges that it does not have the authority to, and cannot, overturn Proposition B.

14. PERB exceeded its remedial authority in ordering the City to join in and/or reimburse the Unions' reasonable attorneys' fees and costs for litigation undertaken to rescind the provisions of Proposition B.

15. PERB's order (B.2) that the City reimburse the Unions' attorneys' fees and costs in seeking to overturn Proposition B violates the separation of powers doctrine, as an award of attorneys' fees and costs is a determination to be made by the court in favor of a prevailing party, not by PERB in advance of litigation.

16. PERB's order (A.1) that the City cease and desist from "[r]efusing to meet and confer with the Unions before adopting ballot measures affecting employee pension benefits and other negotiable subjects" and (B.1) are illegal infringements on the right of citizens' initiatives. If a citizens' initiative qualifies and is passed by the voters, the City must adopt such measure.

17. PERB's order is vague, ambiguous, unintelligible and, therefore, unenforceable, in that it requires the City to make "current and former" bargaining-unit employees "whole for the value of any and all lost compensation, including but not limited to pension benefits." Defined contribution and defined benefit pension plans are completely different and each has value over the other depending upon the unique circumstances of

each individual employee. Furthermore, Proposition B set up a procedure for freezing "pensionable pay" for five years, and it is entirely speculative as to what would have been negotiated with the Unions had such provision not been in the law.

18. PERB's order is illegal and unenforceable to the extent it purports to give the Unions the power to negotiate and change City employees' vested pension rights.

19. If the PERB Decision and Order stands Petitioner will be irreparably harmed. Petitioner will, among other things, be forced to join in and/or expend public funds to reimburse the Unions' litigation costs 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. Further, PERB's order requires the City to meet-and-confer with the Unions over any and all future citizens' initiatives affecting employee pension benefits and other negotiable subjects, thereby forcing the City to violate its citizens' initiative and free speech rights.

20. Petitioner has no right of appeal from Respondent PERB's decision and does not have a plain, speedy, and adequate remedy at law other than the relief sought in this Petition. Extraordinary relief is explicitly authorized by Government Code section 3509.5. There is no method for compelling proper action in this matter other than this writ for extraordinary relief.

21. Petitioner City has exhausted all available administrative remedies required to be pursued before filing this petition.

VI.

PRAYER

Wherefore, Petitioner City of San Diego prays that, after PERB certifies and files the record of the challenged proceedings pursuant to Government Code section 3509.5(b), and after the briefing and argument contemplated by California Rules of Court, rule 8.498, this Court:

1. Issue a preemptory writ directing PERB to set aside and vacate Decision No. 2464-M and direct PERB to enter a new and different order dismissing its complaints and the Unions' underlying unfair practice charges in their entirety.

2. Award the City its costs and attorneys' fees in this matter; and

3. Grant such other relief as may be just and proper.

Dated: January 25 2016

JAN I. GOLDSMITH, City Attorney

By _____
M. Travis Phelps
Deputy City Attorney

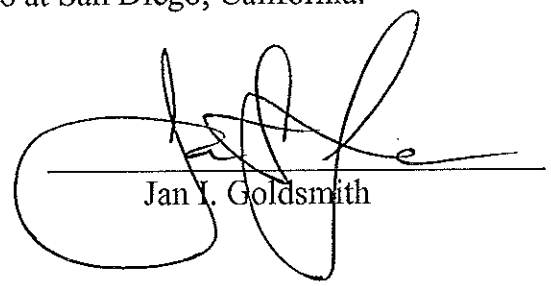
Attorneys for Petitioner
CITY OF SAN DIEGO

VERIFICATION

I, Jan I. Goldsmith, hereby declare as follows:

I am the City Attorney of the City of San Diego, Petition herein. I have read the foregoing Petition for Writ of Extraordinary Relief and know its contents. The facts alleged in the Petition are within my own knowledge and I know these facts to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and this verification was executed on January 25, 2016 at San Diego, California.



Jan I. Goldsmith

CERTIFICATE OF WORD COUNT

The text of this Petition, excluding title page, table of contents, table of authorities, and this certificate of word count consists of 5,079 words as counted by the Word 2013 word-processing program used to generate this Petition.

Dated: January 25 2016

JAN I. GOLDSMITH, City Attorney

By _____
M. Travis Phelps
Deputy City Attorney

Attorneys for Petitioner
CITY OF SAN DIEGO

EXHIBIT 1

PERB Decision No. 2464-M

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-Millas-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

[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 (Tildee 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.